

CIRCULAR FASHION AND LEGAL DESIGN: WEAVING CIRCULAR ECONOMY THREADS INTO INTERNATIONAL CONTRACTS

Working Paper IE Law School

AJ8-288-I

07-11-2024

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Abstract: Many current practises in the global fashion industry are highly unsustainable, creating obscene amounts of waste and overuse of natural resources. Recent trends towards fast- and ultra-fast fashion significantly exacerbate these problems. Transformation is urgently needed and circular economy (CE) models appear to have potential for the sector to foster sustainability whilst harnessing economic gains. This study explores the effects of legal design for CE in international contracts from the perspective of private international law (PIL). The paper identifies regulatory and enabling possibilities that can be used to exit the legal ‘lock-in’ of the linear economy in this context. It lays out some of the challenges and outlines how, through circular rethinking, they could be overcome. The paper suggests possible ways PIL methodologies and techniques could be used to contribute to the transition to CE.

Keywords: Circular Economy, Fashion Law, Private International Law, Conflict of Laws, Sustainability, Global Supply Chains, Supply Chain Regulation, International Contracts, Cross-border contracts, Consumer Law, Commercial Contracts, Consumer Contracts, Private Law, Circular Business Models, Circular Reversed Retailing, Fast Fashion, Ultra-Fast Fashion, Reverse loop, Recycling, Upcycling.

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Editado por el IE Law School, Madrid, España

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By Verónica Ruiz Abou-Nigm* & Antonia Sommerfeld**

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I. Introduction

The unsustainability of many mainstream practices of the fashion industry are well documented.¹ They create obscene amounts of waste and overuse of natural resources during the production, transportation and disposal processes involved. It is estimated that for every five garments produced, the equivalent of three end up in a landfill or incinerated each year² and less than one per cent of material used to produce clothing is recycled into new clothing.³ In addition to the ecological impact, industry practices are known to include harmful effects for many of the workers involved.⁴ The trend towards fast fashion and ultra-fast fashion⁵ through companies such as *Shein* and *Temu* upscale these problems tremendously.⁶

Reactions, social, behavioural, and regulatory, are on the rise. At the global level, UNEP has launched its ‘One UNEP Textile Initiative’ to tackle the sustainability crisis of the textile industry, outlining ‘the imperative for the fashion sector to become radically and rapidly transformed to become circular’.⁷ Regionally, the EU commission has shown political will to tackle problematic practices.⁸ At the national level, France seems to be pioneering in regulatory terms.⁹ Related normative frameworks are rapidly evolving worldwide, including the EU’s Corporate Sustainability Reporting Directive (CSRD)¹⁰, the Corporate Sustainability Due Diligence Directive (CSDDD),¹¹ the requirements of the European Sustainability Reporting

¹ See further ‘EU Strategy for Sustainable and Circular Textiles’ (P9_TA (2023)0215) of 1 June 2023, sec. A.–E.; EU Environment Agency, textiles, 22 May 2024, <https://tinyurl.com/45xw4vsn>; ‘The One UNEP Textile Initiative’ ascribes to the textile industry 2–8 % of global greenhouse gas emissions, 215 trillion litres of water use per year and 9 % of annual microfibre pollution to oceans, <https://tinyurl.com/4xvkhtx5>.

² McKinsey & Company, ‘Style that’s sustainable: A new fast-fashion formula’ (2016), <https://tinyurl.com/4vd9vydh>; more generally Ellen MacArthur Foundation, ‘A new textiles economy: Redesigning fashion’s future’ (2017), p. 19, <https://tinyurl.com/mrxvr7xm>.

³ Ellen MacArthur Foundation, ‘A new textiles economy’ (2017) (fn. 2), p. 20.

⁴ UNEP, ‘The One UNEP Textile Initiative’ (fn. 1).

⁵ There are no clear definitions of the terms fast fashion and ultra-fast fashion yet. At the EU level, ‘fast fashion’ implies ‘high volumes of lower quality garments at low price levels’ (see ‘EU Strategy for Sustainable and Circular Textiles’, 2023, no. 9) (fn. 1). ‘Ultra-fast fashion’ increases and accelerates fashion production, consumption and disposal, often combined with exclusively online sales and drop-shipping (see below, section II.B.2.).

⁶ See media reports such as *Süddeutsche Zeitung*, ‘Ultra-Fast-Fashion, Die neuen Opfer des Modekarussells’, 24 April 2024, <https://tinyurl.com/5c7m9ndn>.

⁷ UNEP, ‘The One UNEP Textile Initiative’ (fn. 1), see further UNEP’s Roadmap Report from 30 May 2023, ‘Sustainability and Circularity in the textile Value Chain’, <https://tinyurl.com/2exp8cmm>.

⁸ Commission’s request for information from online marketplaces *Temu* and *Shein* on compliance with the Digital Services Act, Daily News, 28 June 2024, <https://tinyurl.com/mpjeej5s>.

⁹ See the proposal by the member of parliament, *Anne-Cécile Violland*, in March 2024: *La Proposition de loi visant à réduire l’impact environnemental de l’industrie textile* (n° 2129), 7 March 2024, <https://tinyurl.com/yp2c8jy4>.

¹⁰ Directive (EU) 2022/2464 of the EU Parliament and of the Council of 14 December 2022 amending Regulation (EU) No 537/2014, Directive 2004/109/EC, Directive 2006/43/EC and Directive 2013/34/EU, as regards corporate sustainability reporting, OJ L 322.

¹¹ Directive (EU) 2024/1760 of the EU Parliament and of the Council of 13 June 2024 on corporate sustainability due diligence and amending Directive (EU) 2019/1937 and Regulation (EU) 2023/2859, OJ L 2024/1760, COM (2022) 71 final.

Standards (ESRS),¹² the EU Taxonomy for Sustainable Activities,¹³ and outside of Europe, examples include, inter alia, the U.S. California Climate Corporate Data Accountability Act.¹⁴ These frameworks require prioritising sustainability across the sector.¹⁵ One of the promising pathways to do so, taming over-consumption, over-production and overuse of natural resources and capacities in the fashion industry is the Circular Economy (CE) and its implementation in private law. CE has been defined as ‘an industrial system that is restorative or regenerative by intention and design.’¹⁶ The fashion industry’s potential for transitioning to CE models is higher than that of most others¹⁷ and it can be harnessed in each of the phases of production and distribution across the supply chain, from the design of clothes to be durable, repairable, and recyclable¹⁸ all the way to the consumption phase, where CE models can be used to give fashion items as long a life as possible, reducing waste and promoting resource conservation.¹⁹

Several fashion brands, retailers, their value chain partners, and logistic providers seem to be getting on board with the transition to CE,²⁰ piloting new business models, technologies and processes to that effect. Yet, how the evolving new regulatory paradigm, and these new business models, translate into B2B and B2C implementation via private law, particularly contract law, and cross-borderly via Private International Law (PIL), is underexplored and underdeveloped. Enhancing connectivity and integration is key to achieve commercially viable scaling and PIL can contribute to that effect. However, legal analysis is lagging the needs of our times for the system scalability that is necessary.²¹ Global value chains (GVCs) in this sector are fragmented into complex supply chains, with a multiplicity of actors, high use of subcontracting and forms of illegal work.²² One of the most important factors influencing practices in fast fashion has been the globalisation of all steps including sourcing, distribution and disposal. In turn, reverse logistics, central to CE, involves transporting and managing take-back systems for resale, remaking and recycling. It requires ‘a fundamental rethink of how to keep resources in a closed

¹² Commission delegated Regulation (EU) 2023/2772 of 31 July 2023 supplementing Directive 2013/34/EU of the EU Parliament and of the Council as regards sustainability reporting standards, OJ L, 2023/2772.

¹³ Regulation (EU) 2020/852 of the EU Parliament and of the Council of 18 June 2020 on the establishment of a framework to facilitate sustainable investment and amending Regulation (EU) 2019/2088, OJ L 198.

¹⁴ SB-253 Climate Corporate Data Accountability Act. (2023-2024), <https://tinyurl.com/3abtw33f>.

¹⁵ Globally over 520 regulations are promoting sustainability and circularity. Global Fashion Agenda (GFA), Reverse Logistics for Circular Fashion Systems (2024), <https://tinyurl.com/3jjs5hyh>. See also Fashion CEO Agenda 2024, <https://tinyurl.com/yc7wcu66>.

¹⁶ Ellen MacArthur Foundation, ‘Towards Circular Economy Vol. 1: an economic and business rationale for an accelerated transition’ (2013) p. 1, 8, <https://tinyurl.com/72usy8wz>

¹⁷ EU Commission, ‘A new Circular Economy Action Plan – For a cleaner and more competitive Europe’, COM (2020) 98 final, p. 10 (alongside electronics and ICT, batteries and vehicles, packaging, plastics, etc.).

¹⁸ *Dissanayake/Weerasinghe*, ‘Towards Circular Economy in Fashion: Review of Strategies, Barriers and Enablers’, 2 *Circular Econ. & Sustainability* 24 (2022).

¹⁹ *Ibid.* See also Ellen MacArthur Foundation, ‘A new Textiles Economy’ (2017) (fn. 2).

²⁰ 45 % of brands surveyed by Global Fashion Agenda (GFA) reported setting targets to derive 10 % of their revenue from circular business models by 2040; while 65 % of brands and 55 % of manufacturers have set targets to design all products for CE by 2040 (UNEP/GFA, Fashion Industry Target Consultation), <https://tinyurl.com/2ac8kejz>.

²¹ The resources of the earth are finite and the need to handle waste and avoid extracting more natural resources is alarmingly urgent. See ‘planetary boundaries’ Stockholm Resilience Centre of Stockholm University, according to which six of nine planetary boundaries had been crossed by the year 2023 already: <https://tinyurl.com/yfxu6xxy>; *Richardson et al.*, ‘Earth beyond six of nine planetary boundaries’, *Sci. Adv.* 9 (2023), <https://tinyurl.com/ezyhmdpa>; see also the predominantly constant advance of the ‘earth overshoot day’ since 1971: <https://tinyurl.com/4ja5hnb>.

²² *Jacometti*, ‘Circular Economy and Waste in the Fashion Industry’ (2019) 8 *Laws* 27.

loop and relies on local and global partnerships, interconnected networks and multidirectional flows of information'.²³

Investigating the thread of Private International Law (PIL) in GVCs in this sector is of pivotal importance to fully understand the potential of the CE shift. These GVCs, where the various stages of production take place in different countries, are strongly interconnected; stages including design, manufacture of materials and products, marketing, distribution, and sale to consumers, as well as waste disposal, span several countries and continents, economies and legal systems. They thus raise multiple, largely under-researched, issues of PIL.

After examining some of the relevant features of the current transition to CE (II), this paper draws attention to the sluggish advancement of legal recalibration towards CE in private law (III). To start filling the gaps, it provides a taxonomy of circularity enabling practices the fashion industry has developed and categorises them in contract law terms (IV). Ultimately the paper focuses on the cross-border dimension of contracts, mapping applicable law consequences under extant PIL rules, to provide a springboard from where to push legal thinking beyond its current linear lens (V). For this final step, the paper focuses on the cross-border aspects of retail and take-back systems ('reverse retailing') for up- and recycling as a key component of the shift towards CE, posing novel legal questions at the cross-border level.

The study focuses on the legal landscape of the EU, in the understanding that from the perspective of the regulatory, coordinative and facilitative functions of PIL,²⁴ and taking into consideration that the EU is the worldwide leading importer of textiles,²⁵ it is an appropriate stepping stone. This contribution's aspiration is, however, that the analysis can also contribute to delineate circularity in contracting far beyond Europe and towards the global dimension where the sector's GVC operates, to enable developing countries to harness the many opportunities deriving from the transition to CE, contributing to realise the objectives of UN Agenda 2030, particularly, SDG 12 (Sustainable Consumption and Production).²⁶

II. The Circularity Journey: Pathways, Opportunities and Pitfalls

CE models are designed to keep products and materials in economic circulation through processes like maintenance, reuse, refurbishment, remanufacture, recycling, and composting.²⁷

²³ GFA, *Reverse Logistics* (2024) (fn. 15).

²⁴ See *Michaels/Zeh*, 'Sustainability and PIL', in: Santos Silva et al. (eds.), *Routledge Handbook of Private Law and Sustainability* (2024), ch. 28; *Ruiz Abou-Nigm/Michaels*, 'Towards Private International Law for Everyone', in: *PIL Kramer/Piñeiro* (eds.), *Research Methods in Private International Law* (2024), p. 246–264.

²⁵ Taking the EU as the leading importer of textiles worldwide, with textile imports valuing approximately 78 billion U.S. dollars in 2022. That year, the United States and Vietnam were the next two largest importers of textiles, with imports of 39 billion U.S. dollars and 19 billion U.S. dollars respectively: Statista, 'Value of the leading 10 textile importers worldwide 2022, by country', published 17 June 2024, <https://tinyurl.com/4268xezv>.

²⁶ *Huck*, 'Sustainable Development Goals – commentary' (2022), Goal 12; *Saumier*, 'SDG 12: Sustainable Consumption and Production', in: *The Private Side of Transforming our World* (2021), *Michaels/Ruiz Abou-Nigm/van Loon* (eds.) p. 383–407.

²⁷ Ellen MacArthur Foundation, 'What is a circular economy?', <https://tinyurl.com/2f87hzm5>. CE models such as the 'Butterfly diagram' (Ellen MacArthur Foundation (2019), <https://tinyurl.com/dhyzfzaz>) or the 'Value hill' (*Achterberg/Hinfelaar/Bocken* (2016), p. 4 f., <https://tinyurl.com/2vb3bk7m>) illustrate the value preservation within these models.

The goal is not only to minimise the need of resources or the production of output, but to maximise value added at each point of the production and consumption cycle.²⁸ In this generality, CE has been explained as a “multi-R project: rethink, redesign, restructure, repair, redistribute, reduce, reuse, recycle, recover energy”²⁹. CE combines these goals with an attractive economic potential, able to unlock turnover and create new jobs.³⁰ CE models have started to gain traction on political agendas, industry practices, and regulatory frameworks. In the EU, the ‘New Circular Economy Action Plan’ (CEAP)³¹ and the ‘European Green Deal’³² refer to CE. The CEAP focusses on key product value chains from industry sectors with a high negative environmental impact and simultaneously a high potential for a shift towards CE – the textile industry being one of these sectors with the fourth highest-pressure category for the use of primary raw materials and water, and fifth for GHG emissions.³³

II.A. Two Sides of Circularity

Programmes to incentivise circularity enabling processes continue to spread at the global,³⁴ regional,³⁵ national³⁶ and local levels across the world.³⁷ They address two sides of circularity: on the one hand ‘slowing down the loop’ through longevity, durability and optimised designed products, as well as collection, repair and reuse of products. On the other hand, incentivising ‘closing the loop’ through up- and recycling for material reuse and the necessary logistics for this, which together form the process of ‘reverse retailing’.³⁸

²⁸ The OECD (Environment at a Glance (2020), <https://doi.org/10.1787/4ea7d35f-en>, p. 42) lists four elements: (i) maximizing the value of materials and products circulating in the economy, (ii) minimizing material consumption, (iii) preventing waste generation and (iv) reduction of hazardous components in products and waste.

²⁹ *Freyesleben/Maas dos Anjos*, in: J. Melgarejo Moreno (ed.), Congreso Nacional del Agua Orihuela: Innovación y Sostenibilidad (2019), p. 825.

³⁰ A recent study estimates that the application of CE principles across the EU economy has the potential to increase the GDP of the EU by an additional 0.5 % by 2030 and to create around 700,000 new jobs: Cambridge Econometrics, Trinomics, and ICF (2018), ‘Impacts of circular economy policies on the labour market’, p. 6, <https://tinyurl.com/c83bww3e>. See also ‘A new Circular Economy Action Plan – For a cleaner and more competitive Europe’, COM (2020) 98 final, p. 2; referring to a potential of USD 4.5 trillion in GDP growth by 2030, see Gill, Fortune 500, ‘What a circular economy means for sustainable retail’, 3 October 2022, <https://tinyurl.com/r7yhuysx>. CE is not the singular response to address sustainability challenges in global supply chains. Some CE models raise concerns in relation to the Global North–Global South divide. An inclusive CE transition could nevertheless serve as one important step into the right direction towards enhancing sustainability.

³¹ EU Commission, ‘A new Circular Economy Action Plan’, COM (2020) 98 final (fn. 17).

³² EU Commission ‘The European Green Deal’, COM (2019) 640 final.

³³ EU Commission, ‘A new Circular Economy Action Plan’, COM (2020) 98 final (fn. 17), p. 10.

³⁴ UNEP, ‘The One UNEP Textile Initiative’ (fn. 1).

³⁵ EU Commission, ‘EU Strategy for Sustainable and Circular Textiles’ COM (2022) 141 final, which led to the EU Parliament resolution on this topic adopted in June 2023.

³⁶ See, i.a. URUGUAY CIRCULAR 2024, <https://tinyurl.com/mvaujywy>; Roadmap for a circular Chile by 2040, <https://tinyurl.com/yc4rw3vx>; UNIDO, ‘Bangladesh: Circularity Opportunities in the Textile Value Chain’, <https://tinyurl.com/rah9bcx2>; in EU see Joint Research Centre (JRC) technical report Köhler *et al.*, ‘Circular Economy perspectives in the EU textile sector’ (2021), <https://tinyurl.com/mrtyydw>.

³⁷ See also auxiliary mechanisms around it, such as circular.fashion, <https://tinyurl.com/4y24mhpt>; and see Bleckmann Nederland B.V., <https://tinyurl.com/ye2ajkxa>.

³⁸ For a more general overview of different steps see also EU Environment Agency, ‘Textiles and the environment: the role of design in Europe’s circular economy’, Figure 7, <https://tinyurl.com/y8m7zdps>.

The Two Sides of Circularity:



Slowing down the loop (CE)

- Repair models
- Reuse models



Closing the loop (CE) through 'Reverse Retailing'

- Upcycling models reusing fabrics (pre- or post-consumer textiles)
- Recycling models, essentially relying on design and traceability
- Logistics for the reverse circle: collection and take-back systems

Legal instruments aiming to achieve more sustainability in the industry focus on prolonging the life cycle of a product by setting durability incentives for producers, including through the right to repair and extended limitation periods,³⁹ thereby targeting the task of 'slowing down the loop'. That is, for example, the case of the EU-Repair-Directive⁴⁰ promoting the post-production repair of goods and the Ecodesign Regulation⁴¹ with a focus on pre-production product design. The Repair-Directive aims at setting incentives to make repair options affordable and more attractive than the purchase of new goods for consumers, trying to minimise time and cost expenditures of repair processes.⁴² In turn, the Ecodesign Regulation intends to realise value-retaining operations at the stage of product design.⁴³ The higher the obligations to repair and product liability for a producer are, the higher the economic incentive may be for a producer to manufacture long-lasting, resistant high quality products which last long and are inexpensive in the repair process.⁴⁴

II.B. Active Engagement of Consumers in CE

Undoubtedly, consumers are key stakeholders across different stages of CE, in relation to both sides of circularity. A new understanding of consumption ('sustainable consumption') is necessary to conceptualise consumers' engagement and agency (**II.B.1.**). In turn, challenges to sustainable consumption in fashion have increased through newly implemented 'drop-shipping

³⁹ E.g. for both: EU Directive on 'Common rules promoting the repair of goods and amending Regulation (EU) 2017/2394, Directives (EU) 2019/771 and (EU) 2020/1828 (COM(2023)0155 – C9-0117/2023 – 2023/0083(COD)', P9_TA (2024) 0308.

⁴⁰ EU Directive on 'Common rules promoting the repair of goods', P9_TA (2024) 0308 (fn. 39).

⁴¹ EU Parliament, 'Ecodesign Regulation', P9_TA (2024) 0303.

⁴² E.g. recitals (3), (4) and Art. 1 of the Repair-Directive. So far, the scope of application of the directive is limited to the products enlisted in Annex II of the Directive (e.g. household washing machines, refrigerators).

⁴³ Recital (2) of the Ecodesign Regulation.

⁴⁴ However, economic analysis of incentives and disincentives for CE are much more complex (and beyond the scope of this paper). For a detailed analysis of the difficulties involved, particularly in relation to the balancing act between 'domestic' models and international externalities see *Barrie et al.*, 'The Role of International Trade in Realising an Inclusive Circular Economy' (2022), p. 59.

models' by ultra-fast fashion retailers, flooding the markets with unsustainable fashion products (II.B.2.).

II.B.1. Empowering Consumers for Sustainable Consumption

Sustainable consumption remains elusive both as a concept and as an objective.⁴⁵ *Mont* suggests a systemic transformation that would involve ramping up current technological and efficiency approaches while transitioning to a “planned reorientation of society towards slower economic growth or, when feasible, degrowth”.⁴⁶ Legal research is particularly slim in the field of sustainable consumption, however, literature addressing the interplay of consumer protection and CE⁴⁷ from different national legal systems⁴⁸ is starting to emerge, as well as voices that encourage consumer law rethinking to incorporate the environmental dimension.⁴⁹ In relation to consumer contracts further consumer protection through enhanced transparency and information on sustainability (traceability) of products has also been advocated for.⁵⁰ On those lines, regulatory interventions, such as the new European ‘Empowering Consumers Directive (ECD)’⁵¹ is likely to accelerate and amplify private law discourse. The new Directive requires the provision of pre-contractual information on a product’s durability and repairability to enable the consumer to take an informed decision before concluding a contract. The implications of this EU regulatory intervention relate to consumer protection as much as consumer empowerment as agents of circularity and sustainability.⁵² Therefore, the quest for environmental and social sustainability across GVCs through all stages will be strengthened also via the agency of consumers, i.e. via consumers’ demands, reflected and materialised in consumer contracts. Once implemented in national legal systems the new Directive will certainly affect contractual guarantees in B2C contracts, and via CE models it may well affect B2B, if the B2B customer plans to resell B2C (see diagrams below).

⁴⁵ *Saumier*, SDG 12 (2021) (fn. 26).

⁴⁶ *Mont* (ed.), A research agenda for sustainable consumption governance (2019), p. 9.

⁴⁷ *Mak/Terryn*, Journal of Consumer Policy 2020, p. 227–248; *Micklitz*, Journal of European Consumer and Market Law (EuCML) 2019, p. 229–237.

⁴⁸ See the line of essays on ‘Sustainability, the Circular Economy and Consumer Law in [...]’ with a different national focus in each paper in the Journal of European Consumer and Market Law (EuCML) i.a. *Hug*, EuCML 2023, 57 (Switzerland); *Pazos*, EuCML 2020, 212 (Spain); *Dalhammer*, EuCML 2020, 125 (Sweden); *Meller-Hannich/Krausbeck*, EuCML 2020, 168 (Germany); for an introductory overview on international and Ukrainian legal developments see *Mikichurova/Vlialko*, IOP Conf. Ser., Earth Environ. Sci. 2021, ‘Circular law as a legal basis for a circular economy’.

⁴⁹ *Micklitz* (2019), (fn. 47).

⁵⁰ *Mak/Terryn* (2020) (fn. 47), p. 231.

⁵¹ Directive (EU) 2024/825 of the European Parliament and of the Council of 28 February 2024 amending Directives 2005/29/EC and 2011/83/EU as regards empowering consumers for the green transition through better protection against unfair practices and through better information, OJ L, 2024/825, in force since 26 March 2024. The Directive must be transposed into national law by March 27, 2026, and applied from September 27, 2026. The ECD aims to protect consumers from being misled by communications relating to the environmental, social, or circularity aspects of a product, including goods and services. It amends the provisions of the Unfair Commercial Practices Directive (UCPD) and the Consumer Rights Directive (CRD) to introduce obligations to provide clear and relevant information concerning environmental or social claims and circularity aspects of the products.

⁵² See Reg Recitals (1) and (3). The conceptualisation of traceability of a product goes far beyond environmental traceability and encompasses ‘the social characteristics of a product throughout its value chain [...], for example, to the quality and fairness of working conditions of the workforce involved, such as adequate wages, social protection, the safety of the work environment and social dialogue. Such information can also relate to respect for human rights, to equal treatment and opportunities for all, including gender equality, inclusion and diversity, to contributions to social initiatives or to ethical commitments, such as animal welfare’ (Recital (3)).

This empowerment is key to prolonging the life cycle of a product, ‘slowing down the loop’, and to CE modelling aiming to ‘closing the loop’. This requires up-/re-cycling and material reuse processes and therefore the implementation of end-of-use mechanisms. If recycling enables the transformation of used materials into new ‘second-use raw materials’, these could then serve as resources to produce new goods – instead of using primary raw materials. The agency of consumers – via private law regulated consumer contracts – is key to enhancing sustainability⁵³ in the sector more broadly and particularly instrumental to the success of ‘closing the loop’ models.

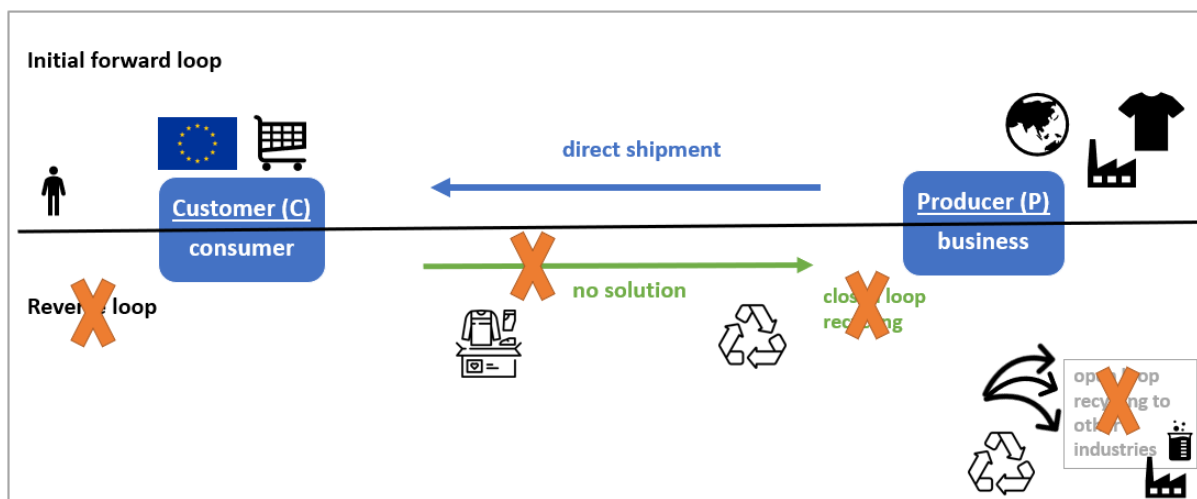
II.B.2. The Negative Impact of ‘Drop Shipping’ Models

New inflation-like trading business practices of ‘drop shipping’ pose novel legal challenges to the transition towards circular fashion businesses. At the same time, these reveal regulatory gaps in the EU market vis-à-vis international corporations. In drop shipping, companies sell directly to consumers within the EU. No intermediary retailer/trader seated in Europe is involved. As discussed throughout this paper retailers/traders play a pivotal role in relation to product traceability and are also key enablers in ‘take-back systems-systems’ instrumental to ‘closing down the loop’. Companies such as *Temu* or *Shein*, both with a focus on ultra-fast-fashion products, have based their business model on the drop shipping-system, where the products are shipped directly from the manufacturer's factory in China to countries within the EU (and elsewhere) making use of taxation exemptions vis-à-vis consumer trading.⁵⁴ Such models save cost of storage as the products are sent directly from the factory.⁵⁵ The downside for the customer may result in longer delivery times. From an environmental stand, however, the consequences are much more impactful: these business models run counter to any circular transformation efforts because its structure, visualised as follows, currently offers no ‘points of entry’ for CE adjustments.

⁵³ *von der Gathen et al.*, ‘Sustainability 2024: Navigating Consumer Behaviour’, 11 July 2024, <https://tinyurl.com/muxu4jw5>.

⁵⁴ *Gruet* (BBC), ‘How Temu is shaking up the world of online shopping’, 19 March 2024, <https://tinyurl.com/3rjtdur3>.

⁵⁵ Deutschlandfunk, ‘Billigplattformen. Temu, Shein & Co: Muss die Billigware aus China begrenzt werden’, 28 June 2024, <https://tinyurl.com/2ut4t9hf>.

Drop shipping structure in ultra-fast fashion business models in B2C-contracts

The French legislative proposal on the law to reduce the environmental impact of the textile industry⁵⁶ creates a first step towards reducing the amount of waste from ultra-fast fashion as well as disincentivising methods for textiles of extremely short product-life-cycle. Yet, no steps towards ‘closing the loop’ derive from such measures. Critical consumption appears key to the conceptualisation of sustainable consumption.⁵⁷ Without CE recalibration, consumer protection in substantive law can lead to unforeseen unsustainable by-products.⁵⁸ Rights of replacement instead of repair of defective goods; rights to return undamaged products for free, especially in online trade, generate immense amounts of waste each year ending up in land-fills or burned.⁵⁹ As *Salminen* and *Rajavuori* rightfully point out, “[i]n order to develop approaches towards sustainability, it is imperative to focus on both of these two aspects of law and sustainability agency, that is, recognise law not only as an instrument for steering *ex post* but also as a creator of specific sustainability mindsets *ex ante*.”⁶⁰ This is key understanding in relation to the role of consumers in the circularity journey.

II.C. Lack of Inclusive Global Circular Design

On the production side, the fashion industry is exploring and investing in circular business models both in small local and regional enterprises⁶¹ as well as in large global companies.⁶² These first steps of the transition from linear economic models towards CE mark an important shift of approach. However, bearing in mind the urgency of the climate crisis and the

⁵⁶ For details see fn. 1 (on environmental impact) and fn. 9 (on French legislative proposal).

⁵⁷ This is not uncontroversial. On the many social and cultural challenges in relation to understandings and positionalities in relation to sustainable consumption see, inter alia, *Anantharaman*, ‘Critical sustainable consumption: A Research Agenda.’, *Journal of Environmental Studies and Sciences* (2018), Vol. 8, p. 533–561.

⁵⁸ See also e.g. *Micklitz* (2019) (fn. 47), p. 230; *Mak/Terryn* (2020) (fn. 47).

⁵⁹ BBC Earth (*Constable*), ‘Your brand-new returns end up in landfill’, <https://tinyurl.com/22ewku4x>.

⁶⁰ *Salminen/Rajavuori*, ‘Law, Agency and Sustainability. The Role of Law in Creating Sustainability Agency’, in: *Teerikangas et al.*, *Research Handbook of Sustainability Agency* (2021),, p. 322–334..

⁶¹ E.g. *Reet Aus*, <https://tinyurl.com/mdea2eu6>; *TheJeansRedesign*, <https://tinyurl.com/4bmr4ar2>; *Bridge&Tunnel*, <https://tinyurl.com/4j64r86j>; *Kleideri*, <https://tinyurl.com/yvudekh3>; *SoleRebels*, <https://tinyurl.com/yt4vxtde>; *Soruka*, <https://tinyurl.com/y33mst8v>; *Rifo*, <https://tinyurl.com/5n7baser>. For more examples listed see <https://tinyurl.com/4ddzc28k>.

⁶² *Patagonia Inc*, <https://tinyurl.com/49um629s>; intention to introduce a circular business model announced as well by *H&M Group*, <https://tinyurl.com/djd9u92m>.

biodiversity loss, scaling becomes crucial, and socio-spatial dimensions become relevant to the re-thinking of business models and legal imaginaries alike.⁶³ Consequently, CE studies are developing at the local, sub-local, national, regional, international and global dimensions. All these dimensions and their interconnection are essential to circularity design.

Focusing on the international dimension, and specifically on international trade, in present times, according to available data,⁶⁴ the value of circular trade flows is distributed alarmingly unevenly (non-inclusively) across the world. Pursuant to that data, around 99 % of the total value of trade in secondary goods, materials, waste, scrap and residues in 2020 was traded between and among high- and middle-income countries, with 45 % of the total trade value traded solely between high-income countries. Conversely, trade to and from low-income countries comprised only approximately 1 % of the total value.⁶⁵ That is, international CE design is necessary to achieve ‘global circularity’ and so far, ‘global circularity law’ is strikingly absent.⁶⁶ It seems worthy, therefore, to design a roadmap to foster national pathways convergence towards circularity via PIL coordination in international contracts.

II.D. The Role of PIL and the Positionality of the EU to Foster Inclusive CE

Thus, in this paper we are concerned with the cross-jurisdictional: as a spatial dimension this is so far neglected in CE legal studies. The cross-jurisdictional analysis is paramount to the global dimension,⁶⁷ and, it is submitted, can be a driver of change for national and regional transformations towards an inclusive transition to CE. The cross-jurisdictional dimension is the spatial dimension of Private International Law (PIL). Long viewed as a merely technical field with no regulatory relevance, more recently PIL is recognised as a governance tool⁶⁸ that should contribute to the global transition to CE.⁶⁹ PIL generally, and PIL rules on international contracts in particular, are central to global supply chain governance and thus for the legal framework of CE on the cross-border/international trade dimension.

Thus, an important caveat follows: the road map proposed in this paper has a regional focus, that of the EU, taking into consideration the global-scale impact of CE policies enacted in Europe,⁷⁰ and their possible implementation via EU PIL rules on international contracts. However, it is undeniable that fast fashion based on a linear economic model poses global

⁶³ For a very interesting chapter see *Deutz et al.*, ‘Socio-Spatial Dimensions of a Circular Economy’ in: Deutz et al., *Circular Economy Realities* (2024), p. 123–148.

⁶⁴ See *Barrie et al.* (2022) (fn. 44), p. 44.

⁶⁵ *Ibid.*

⁶⁶ *Backes/Boeve*, *Environmental Policy and Law*, Vol. 52 (2022), ‘Envisioning the Future of the Circular Economy: A Legal Perspective’, p. 253–263.

⁶⁷ In relation to the importance of global trade for CE transition see *Barrie et al.* (2022) (fn. 44).

⁶⁸ *Wai*, *Columbia Journal of Transnational Law*, Vol. 40.2 (2002), p. 209–274; *Michaels/Ruiz Abou-Nigm/van Loon*, Introduction, in: *Michaels/Ruiz Abou-Nigm/van Loon* (eds.), *The Private Side of Transforming our World* (2021), p. 1–28; *Michaels* (2017), 59 *Japanese Yearbook of International Law*, ‘Towards a Private International Law for Regulatory Conflicts?’, p. 175–201; on using i.a. EU PIL-instruments through Global Value Chains as regulatory proxy: *Salminen/Rajavuori/Eller* (2024), ‘Global Value Chains as Regulatory Proxy: Transnationalising the Internal Market Through EU Law’, in *Beckers/Micklitz/Vallejo/Letto-Vanamo* (eds.), *The Foundations of European Transnational Private Law*, p. 367–397.

⁶⁹ Insights on PIL and the Sustainable Development Goals from the UN Agenda 2030 have paved the way in this direction. See *Michaels/Ruiz Abou-Nigm/van Loon*, Introduction (2021) (fn. 68), p. 1–28.

⁷⁰ See *Barrie et al.* (2020) (fn. 44), p. 63 et seq.

challenges, and that circularity needs to be ‘globally interoperable’, and inclusive, particularly, of the Global South.⁷¹ Yet, bearing in mind the impulse for the sustainability pursuit in the EU, the regional focus is proposed as a springboard.

III. Recalibrating Private Law Towards Circular Economy

III.A. Potential Role of Private Law and Private Ordering for CE

There is increasing awareness that private law in our times needs to tackle an array of challenges that go beyond the traditional remit of private law.⁷² In turn, the role of private law in framing and facilitating the development of the global economy is manifest.⁷³ Literature has recognised law’s ‘complicity’ in the linear economy leading to global crises against the background of the shrinking role of the state,⁷⁴ and the harmful impact that private business activities may have on the protection of the environment and sustainability, therefore, the central role that private actors and private law enforcement occupy in global governance.⁷⁵ On those lines, the significance of private law in organising and conceptualising production and consumption is undeniable.⁷⁶ As explained by *Salminen*, production models, such as GVC, digital platforms, and CE, introduce new types of liability, stakeholders and distribution of risk and responsibility.⁷⁷ These new elements of private governance affect societal expectations concerning sustainability, equality, and justice. In response, the evolving regulatory framework creates a new landscape for the legal understanding of governance and societal expectations, which should trickle down through the necessary recalibration of private law. This dynamic – where law acts both as a regulator and an enabler of change – plays a crucial role in advancing CE.

III.B. The Patchy Debate in Private Law and CE

However, despite the captivating boom of the circularity journey in the fashion industry, private law rethinking is emerging slowly.⁷⁸ There are studies analysing national and international law on sales contracts in commercial and consumer contracts and CE with a focus on the United Nations Convention on Contracts for the International Sale of Goods (CISG),⁷⁹ examining different regulatory options to prolong the ‘replacement cycle’ of a product such as the right to

⁷¹ *Barrie et al.* (2022) (fn. 44), p. 73; on the global tension and imbalance e.g. Greenpeace, <https://tinyurl.com/3vmbh738>; *Mensah*, *American Journal of Biological & Environmental Statistics* (2023), ‘The Global South as a Wasteland for Global North’s Fast Fashion: Ghana in Focus’, p. 33–40.

⁷² See, inter alia, *Law et al.*, ‘Private law, private international law and public interest litigation’ in *Global Constitutionalism* (2024), Havercroft et al. (eds.), Vol. 13:1, p. 1–12.

⁷³ *Pistor*, *The Code of Capital* (2019).

⁷⁴ *Law et al.* (2024) (fn. 72), p. 1–12.

⁷⁵ *Ibid.*

⁷⁶ *Salminen*, ‘From Market Contracts to the Circular Economy—Law and Increasingly Holistic Conceptualizations of Production’, CBS Law Research Paper No. 20-36 (2020), p. 1 ff.

⁷⁷ *Salminen* (2020) (fn. 76), p. 2.

⁷⁸ See *Micklitz* (2019) (fn. 47); *Ballardini/Kaisto/Similä*, ‘Developing novel property concepts in private law to foster the circular economy’, *Journal of Cleaner Production* Vol. 279 (2021), 123747; *Thomas*, ‘Circular Economy, Title, and Harmonisation of Commercial Law’, in: *Akseli/Linarelli* (eds.), *The future of commercial law: ways forward for harmonisation* (2020), p. 187–218; despite the title, referring only little to circular economy concepts in private law *Meller-Hannich/Krausbeck* (2020) (fn. 48).

⁷⁹ Adopted in Vienna on 11 April 1980, <https://tinyurl.com/4zkcwdtw>.

repair,⁸⁰ replacement with refurbished goods, and the sale of second-hand goods.⁸¹ Other contributions map out legal issues that will need further academic consideration in the area of enforcement, procurement and ownership⁸² as well as addressing a shift from ownership to use.⁸³ Unsurprisingly, one of the fields that has attracted more attention in this context is that of intellectual property (IP).⁸⁴ Although IP rights may generate incentives towards the transition towards sustainability, for instance, through patents providing an incentive for the development of new green technologies and sustainable business models⁸⁵ or, inter alia, the certification of garments contributing to sustainable consumption and traceability,⁸⁶ there is also growing awareness that IP rights may become a barrier in the quest for circularity. Prominent voices in the field are advocating for a radical push to adopt new exceptions and limitations to IP rights related to sustainability and circularity.⁸⁷ *Calboli* exposes recent legal challenges brought by IP owners to industry players engaging in circular and sustainable practices, demonstrating that the relationship between IP owners and these practices is, “at best, uncomfortable and generally controversial”⁸⁸. As she explains, IP owners rely on IP rights to oppose most attempts by third parties to repair, reuse, resell, upcycle, or recycle their products without their consent.⁸⁹ *Calboli* provides a detailed list of IP barriers to repairing, reselling, upcycling and recycling in the fashion industry⁹⁰ in the linear economy, and advocates for the necessary transition towards CE.

III.C. The Underexplored Analysis of PIL and CE

Although the emerging picture is still very patchy, attempts at harnessing the power steaming from the regulatory (‘top-down’) push into re-thinking and re-conceptualising private law, beyond traditional boundaries, seem welcome by the sector⁹¹ and continue to gain traction. Yet, the legal infrastructure sustaining the global supply/value chain contracts in the sector is still underexplored, and the alternative legal pathways are underdeveloped. Recognising the difficulty of conceptualising the processes involved, *Salminen* refers to *production liability*,⁹² to mirror in the transnational realm the traditional private law *product liability* doctrine.

⁸⁰ Art. 46 (2), (3) CISG.

⁸¹ *Kryla-Cudna*, European Review of Private Law 2020, ‘Sale Contracts and the Circular Economy’ p. 1207–1229. See also, *Kryla-Cudna*, ‘Right to Cure: The Odd One Out? The CISG’s Remedial Scheme and the Circular Economy’, in: Andenas/Heidemann (eds.), Quo vadis Commercial Contract? (2023), p. 129–150.

⁸² *Thomas*, ‘Legal considerations for a circular economy’, in: Tudor/Dutra (eds.), A Handbook of Waste, Resources and the Circular Economy (2021), ch 17, p. 176–186.

⁸³ *Thomas* (2020) (fn. 78).

⁸⁴ *Ballardini/Kaisto/Similä*, Journal of Cleaner Production 279 (2021), 123747 (fn. 78).

⁸⁵ *Calboli* (2024) ‘Pushing a Square Pin into a Round Hole? Intellectual Property Challenges to a Sustainable and Circular Economy, and What to Do About It’, IIC55, p. 237–248.

⁸⁶ World IP Day 2020: How Trademarks Can Promote Sustainability, WIPO, <https://tinyurl.com/mrystyh8>.

⁸⁷ *Calboli* (2024) (fn. 85), p. 237–248.

⁸⁸ *Calboli* (2024) (fn. 85), p. 240.

⁸⁹ *Calboli* (2024) (fn. 85), p. 240 referring to legal disputes listed in: *Calboli*, ‘Upcycling, sustainability, and IP: what it means for the world of fashion’, WIPO Magazine (July 2023), <https://tinyurl.com/ycxzp86t>.

⁹⁰ *Calboli* (2024) (fn. 85), p. 241–244.

⁹¹ Global Circular Fashion Forum (GCFE), <https://tinyurl.com/s87rvp7k>.

⁹² *Salminen* (2017), ‘From National Product Liability to Transnational Production Liability: Conceptualizing the Relationship of Law and Global Supply Chains’; *Salminen*, ‘From National Product Liability to Transnational Production Liability: Conceptualizing the Relationship of Law and Global Supply Chains’, Competition & Change (2019), p. 420–438.

The contribution of this chapter to that ‘difficult trajectory’⁹³ focuses on some of the synergies between private law and PIL to promote cross-border circularity. PIL, sometimes also referred to as ‘conflict of laws’, is the discipline that provides the rules and methodologies for dealing with the diversity of legal systems, particularly when people and/or companies, or their activities, cross jurisdictional borders.⁹⁴ PIL determines where a claim can be brought against which of the different chain links (acting companies and shareholders) in the GVC, what law(/s) apply to the contracts and related legal relationships and whether any resulting judgment will be enforceable in a different country from where it is rendered. It has a crucial, though underestimated, role to play towards sustainability.

Throughout the rest of the sections in this paper, three core functions of PIL doctrine⁹⁵ starting with (i) amplifying the enabling capabilities of private law; (ii) intervening with its own regulatory function in global governance; and (iii) coordinating normative orders at the cross-border level – including via international private law, are examined to demonstrate the impact of PIL in private governance, and the benefits of pursuing further private-international-law-doctrine-oriented research towards the transition to CE. These PIL functions do not work on their own – if there is no substantive law, pushing towards CE and laying the basic rules for this, there is no CE-transition that PIL on its own could coordinate. Rather, PIL and substantive private law, on the national and international (unified) level, are intertwined, and PIL can amplify private law potential and enable its cross-border enforcement. Hence, the significance of the conceptualisation of business models and contractual formats suitable to operationalise the transition to CE are provided in section IV, and PIL’s actual and potential impact on their cross-border dimension are examined in section V.

IV. Taxonomy of Circular Business Practices in Fashion and their Legal Categorisation

Fashion companies have pioneered testing out circular business models. Transparent communication of this transition⁹⁶ enables a scan of CE processes in the industry. Drawing from these insights, a preliminary legal categorisation of CE models in fashion is provided. The pathways taken so far embrace the different tasks of slowing down the loop through repair, refurbishing or reuse of products, addressing the challenges of up- and recycling for closing the loop, as well as providing logistical collection and return systems and services for the return of the textiles for the reverse loop, which is partly self-organised by the retailers and partly outsourced to third parties.⁹⁷

⁹³ *Salminen* (2020) points to PIL-relevance: “Like product liability before it, the doctrinal development of production liability no doubt faces a difficult trajectory to navigate, very much depending on [...] and their comparative success in navigating different legal systems and the parameters of PIL in relation to applicable forum and law.” (fn. 76), p. 13.

⁹⁴ *McClellan/Ruiz Abou-Nigm*, *Morris on The Conflict of Laws* (2021), para 1-001.

⁹⁵ See further *Michaels/Zeh* (2024) (fn. 24); *Ruiz Abou-Nigm/Michaels* (2024) (fn. 24).

⁹⁶ See extensive list in fn. 61 and 62.

⁹⁷ For a more general overview on the necessary steps to create circular business models: EU Environment Agency (fn. 38), figure 7. See also *Adam et al.* (2016), ‘Taking part in the circular economy: Four ways to designing circular business models’, p. 10 et seq., <https://tinyurl.com/4n4epyc5>. A complementary step taking place even before the product enters the loop – and thus outside the sphere of CE models – is the step of ‘introducing less into

In relation to repairing, industry examples show the growing number of companies' offers, explicitly introducing this to foster circularity.⁹⁸ The regulatory strengthening of the right to repair⁹⁹ will nurture these business models.¹⁰⁰ Additionally, reuse models consisting of rental, swapping or leasing alternatives, have been tried out by the industry. For fashion items, rental models originally appeared on the market for expensive garments used for special occasions (e.g. formal evening gowns or special sportswear for rare occasions). However, the sustainability push has seen this model grown beyond these types of clothing to everyday wear, including all sort of clothing, shoes, and accessories.¹⁰¹ These reuse models are built on different concepts where either the company takes back post-consumer textiles in exchange for a voucher,¹⁰² or models including monthly memberships offering the use of a number of garments per month,¹⁰³ and others focusing more on single rents offering a pay-per-rent model. These business models have a substantial impact on private law concepts related to ownership/use, sale/service, etc, that indicate a shift in focus from property towards 'product as a service'.

The focus of section V will be on the legal conceptualisation on the level of PIL of solutions the fashion industry has implemented so far for 'closing the loop'. These business models can be grouped under the title 'reverse retail', subdivided into upcycling (1); recycling (2); and collection and take-back-systems (3). The CE side of 'closing the loop' is the chosen model for the PIL legal analysis due to involving cross-border interdependencies to the largest extent – whereas repair and reuse models are mainly organised on a local level. Reaching optimal, commercially viable flow of materials and products from users back into the value chain is key to the sector. In the following, the three sub-categories, together forming the reverse retailing in the fashion industry, will be outlined to lay the basis for the legal analysis. As an overview, these can be illustrated as follows:

the loop'. This preliminary step takes place during the production process targeting the greater aim of sustainability. As pre-CE-step, its analysis is outside of the scope of this paper.

⁹⁸ See repair models offered e.g. by Patagonia, <https://tinyurl.com/c3z7nhe5>; Bridge&Tunnel, <https://tinyurl.com/t33zmhn5>; Hawico, <https://tinyurl.com/3fe3avye>; The North Face, <https://tinyurl.com/mryx8tdz>; Armedangels, <https://tinyurl.com/45bcxc3c>; Globetrotter, <https://tinyurl.com/y88uw4sv>.

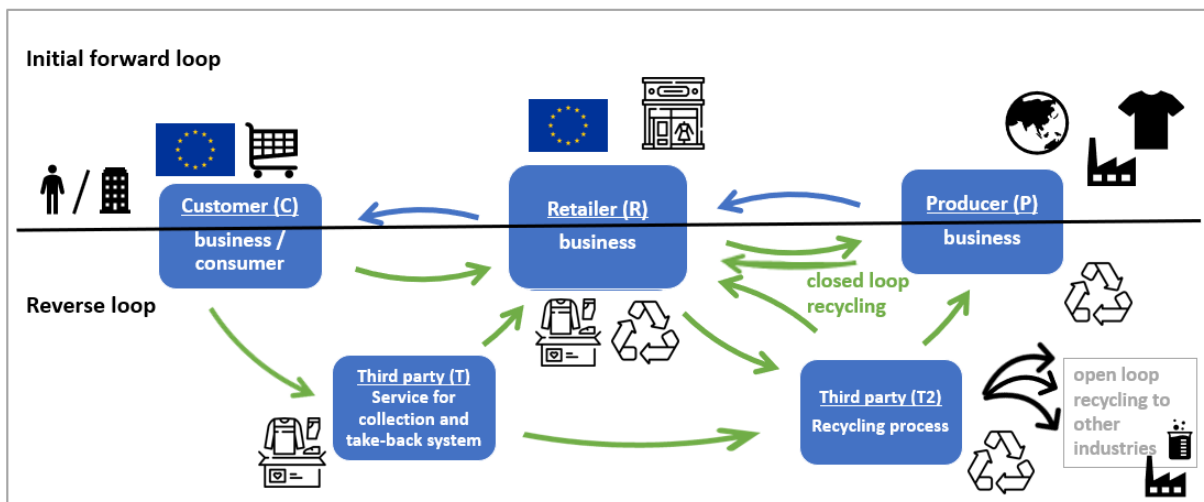
⁹⁹ EU-Repair-Directive (fn. 40).

¹⁰⁰ To incentivise such services economically as opposed to new purchases, Sweden has introduced tax breaks for repairing services, <https://tinyurl.com/yek7vu59>.

¹⁰¹ 1000razones, <https://www.1000razones.com/products>; Kleiderei, <https://tinyurl.com/yvudekh3>.

¹⁰² E.g. WornWear form Patagonia, <https://tinyurl.com/8sur3h86>.

¹⁰³ E.g. Kleiderei, <https://tinyurl.com/y54nv79c>; 1000razones, <https://tinyurl.com/4fb2c2a4>.

Basic Structure for Circular Reverse Retailing in Fashion**IV.A. Upcycling Models Reusing Fabrics**

A variety of business ideas for circularity have evolved around upcycling of garments in order to reduce waste through reusing fabrics or collecting the unused left-over fabrics during the production process. Post-consumer textiles¹⁰⁴ are collected¹⁰⁵ and upcycled to create new textiles. Also pre-consumer production left-overs, or so-considered waste, is being upcycled.¹⁰⁶ This has even been taken to the larger scale of mass production made from collected pre-consumer material.¹⁰⁷ The returning of the post-consumer textiles is organised through donations, sending the used products from customers (consumers or businesses) to the upcycling company¹⁰⁸ or to the initial retailer, who in return offers a ‘trade-in’ in form of a voucher for new products from the retailer.¹⁰⁹ Pre-consumer textiles are collected from the factories, which would else consider these materials as ‘pre-consumer waste’ and waste/by-product of the production.¹¹⁰

Which different legal concepts apply here to the return cycle for the question of the bilateral agreement between the consumer and the retailer, is a more difficult question, which will be analysed through the PIL-lens in section V. In this complex set of diverse obligations in ‘reverse retailing’, under the current linear understanding, different private law contract types could be compiled. In contract law terms, the categorisation depends on whether the return is conducted free-of-charge as donation by the customer to the retailer, if there is an ‘obligation to return’ for the customer or an ‘obligation to take-back the return’ for the retailer. Under current linear private law, no such obligations are imposed on any of the parties to a sales contract, yet. Rather,

¹⁰⁴ Collecting textile remnants: Bridge&Tunnel, <https://tinyurl.com/2vf359zx>; collecting pre-owned or damages own products: Tommy Hilfiger’s Tommy For Life, <https://tinyurl.com/tzpt3cfv>.

¹⁰⁵ Collecting recycled car tires for footwear-soles: SoleRebels, <https://tinyurl.com/yt4vxtde>.

¹⁰⁶ Collecting leather remnants from factories: Soruka, <https://tinyurl.com/y33mst8v>.

¹⁰⁷ Collecting roll-ends and cutting scraps: Reet Aus’s UPMADÉ-Collection in joint work with Beximco, <https://tinyurl.com/mdea2eu6>, documentary ‘Out of fashion’, <https://tinyurl.com/34f34w6j>.

¹⁰⁸ Such model run by Bridge&Tunnel, <https://tinyurl.com/y3ttazmp>.

¹⁰⁹ Such model run by Tommy Hilfiger named ‘trade in’ which started in the Netherlands and is now also available in the US and Mexico, <https://tinyurl.com/4pd7f87c>.

¹¹⁰ Such model used by ReetAus, <https://tinyurl.com/3cr8r273>, and Soruka, <https://tinyurl.com/y33mst8v>.

return obligations in the linear economy are generally ascribed to contracts covering the ‘use of a product over a certain time’, thus, depending on different legal systems and the respective circumstances a rental, lease or service contract. Businesses wanting to include a return obligation in a sales contract, would best be advised to add this as an agreed contractual term into their contract. Circular legal design could lead to ‘circular (sales) contracts’, including take-back obligations for the contractual parties.¹¹¹

IV.B. Recycling Models (depending on Design and IT for Traceability)

The material design factoring in its composition for cyclability is central already in the pre-production process.¹¹² This step deeply depends on the traceability of materials, which later enables recycling and reuse of materials. Different companies have shown first models on how recycling is possible in the fashion industry with regards to recycling jeans fabric,¹¹³ pre-consumer cotton,¹¹⁴ as well as wool or cashmere.¹¹⁵ Yet, the recycling processes towards a ‘fibre-to-fibre’ recycling still face a range of difficulties ranging from technical challenges (including shortening of fibre lengths, separation of fibre types in products with fibre mixes and the presence of persistent chemicals in some specialised products), logistical challenges (related to gathering and sorting of sufficient quantities of recyclable used textiles) and economic challenges for being competitive *via-à-vis* newly produced, linear textiles.¹¹⁶

With a stronger focus on one of the crucial technical challenges, that of traceability for recycling, a certification process for factories has been implemented¹¹⁷ as well as a digital product passport for textile companies been introduced through a software analysing their material flow to enable an easier transition to CE.¹¹⁸ These processes help overcoming the remaining three major issues for the recyclability for the fashion industry: the design for material cyclability; circular retail and take-back systems; information systems for material sorting as this is only possible when the sorters can identify the material for closing the recycling loop.¹¹⁹ For tackling the information problem, the introduction of a QR-Code or different coding system into clothes that entail all the necessary information for efficient recycling and reuse of fabric has been proposed in connection with an online database, where the product data concerning the material and chemical composition of the item can be retraced.¹²⁰

¹¹¹ Which then again may well be outsourced for the execution of a third-party engaged by the parties. For a deeper analysis of these circular rethinking opportunities see below in sec. V.C.1.a.).

¹¹² This is often criticized, e.g. raised by circular.fashion. Insights from circular design practitioners in fashion available in: Ellen MacArthur Foundation, Circular Design for Fashion (2021), <https://tinyurl.com/2hhsbb66>.

¹¹³ TheJeansRedesign, <https://tinyurl.com/4bmr4ar2>, offering guidelines: <https://tinyurl.com/3k9uafcy>.

¹¹⁴ Rifo, <https://tinyurl.com/5n7baser>.

¹¹⁵ Rifo’s organised take-back system for wool, cashmere or denim for recycling with a home-pick-up in Italy and drop of collection points, <https://tinyurl.com/2ja9ptzr>. Patagonia uses mechanical and chemical recycling processes, <https://tinyurl.com/3a2rh8r8>, <https://tinyurl.com/5n6u22k>.

¹¹⁶ Joint Research Centre (JRC) technical report Köhler *et al.* (2021) (fn. 36), p. 10.

¹¹⁷ ReetAus, <https://tinyurl.com/88j5vdar>.

¹¹⁸ ReetAus, <https://tinyurl.com/mtxvtp9a>.

¹¹⁹ Circular.fashion, <https://tinyurl.com/579tm7w9>; <https://tinyurl.com/nhzvphcd>, p. 3 et seq.

¹²⁰ The ‘circularity.ID’ proposed by circular.fashion, <https://tinyurl.com/4u49b9tf>.

Conceptualising this in contract terms raises the same issues as the upcycling models in the previous section (IV.A.). The questions of consideration and scope of contractual obligations – statutorily or via supplementary contractual terms – are decisive here, too.¹²¹ These novel legal challenges will be analysed from the perspective of PIL, which becomes relevant first in cross-border contexts, in sec. V below.

For both models closing the loop, upcycling and recycling, the question of IP rights and design in the process of contracting becomes especially essential for circular loops where the recycling process is conducted by another company than the initial producer or retailer of the product. If this information must be disclosed for the matter of contracting for recycling options at the end of use, rights have to be protected. Here, differentiation on the contracting models is necessary to differentiate between recycling loops which return the product to the initial producer or retailer and others in which multiple parties are involved in the loop. Moreover, environmental and social traceability can be included here and legal instruments, such as the ECD, requiring disclosure of relevant information, may be instrumental, including in B2B, as explained above in section II.B.1.

IV.C. Collection and Take-back Systems (Reverse Logistics)

Collection and take-back systems are a logistical necessity for many of the circular fashion models.¹²² They are conducted by the retailers themselves or outsourced to independent third parties (T in the diagram at the beginning of this section). In part, companies organise the collection system themselves through bilateral arrangements in the B2B-sector or via parcels send by/collected from consumers by post/in person/from homes in the B2C-sector,¹²³ or a combination of pick-up-services and collection points.¹²⁴ If outsourced, the independent businesses using this newly developed business opportunity offer a collection and transport system between customers and retailers or recycling companies. Reverse logistics technology managing and reselling returned products,¹²⁵ and collection and sorting-systems for reuse-options can be found on the market.¹²⁶ Organising the logistics is a crucial step for the attractiveness of circular models in the sector, as only when they are less time and cost consuming than disposing the product and buying a new one, they can become competitive with linear alternatives.¹²⁷ This becomes especially relevant for sustainable consumption.¹²⁸

Depending on the organisation of the collection system, the return side of the model can be legally categorised as an additional obligation of the initial sales or rental contract, or

¹²¹ For more details see above sec. IV.A.

¹²² And for CE more generally across industries.

¹²³ E.g. the collection system used by *Bridge&Tunnel*, <https://tinyurl.com/y3ttazmp>.

¹²⁴ E.g. the collection system used by *Rifo*, <https://tinyurl.com/2ja9ptzr>.

¹²⁵ Optoro, Inc., <https://tinyurl.com/5dvw95km>.

¹²⁶ Recyclehero: <https://tinyurl.com/2kt6c9uv>.

¹²⁷ In the business and economics discussion these are identified as ‘reverse retailing business models’, where the retailers collect end-of-life products that would otherwise be wasted, centralise them and then sell them to their manufacturers or to recycling companies, *Adam et al.* (2016) (fn. 97), p. 13 et seq.

¹²⁸ The logistical planning crucially depends on coordination and information to enable easy access especially for consumers to foster such circular business models. See e.g. Patagonia laments a lack of well-established collection infrastructure for old garments, <https://tinyurl.com/5n6u22kb>.

alternatively as an independent service contract. Decisive factor for this differentiation is the scope of obligations defined or understood to derive (from statutory law, or from the terms of the contract) for the retailer in the initial purchase agreement.¹²⁹ Collection services relevant to CE models in the fashion industry are also very common in non-profit organisations, such as charities in the United Kingdom,¹³⁰ key stakeholders in relation to second-hand shops. In this context the category of unilateral obligations (in the form of a donation) may become pertinent, and its cross-border dimension has hardly been explored.¹³¹

V. Private International Law and Cross-border ‘Reverse Retailing’ for Circular Fashion

Can PIL contribute to promote the CE objectives of these business models? Our hypothesis is that commercially viable scaling, necessary for some of these models to bring about the radical transformation planetary boundaries demand, cannot be achieved without consideration of the cross-border implications of their functioning. CE needs stakeholders interconnected networks leveraging global, regional and local partnerships enabling multidirectional flows of data, goods and services. International contracts are amongst the vehicles to implement those interconnected networks and partnerships. PIL rules determine, inter alia, the private law that governs those international contracts. Choice of law rules, central to PIL doctrine, assign the regulation of a particular legal issue to *one* substantive law, in the hope of minimizing conflicts between legal orders.¹³² This coordination function of PIL is key to respond to the legal demands of the fashion industry in the transition to CE: the need to navigate inconsistent policies and regulations across different jurisdictions governing circularity practices has been identified as one key barrier to the adoption of circular business models in fashion.¹³³

Current legal thinking in private law seems to be ‘locked-in’ on the linear economy – and, in turn, as shown by modern literature, the linear economy with its GVCs is largely supported by PIL. Hence, recalibrating PIL-thinking to support CE is based on a principled understanding of how cross-border processes are legally enabled via rules on jurisdiction, applicable law, and the recognition of foreign documents, status, judicial decisions, arbitral awards, etc. These avenues for cross-border legal design, that up to a considerable extent have been developed to support linear business models, can be rethought to support the transition to CE. That CE legal mindset is critical to facilitate the transition. The following section will thus explore the legal conceptualisation on the level of PIL¹³⁴ for the reverse loop of ‘reverse retailing’ in the fashion industry.

¹²⁹ Further legal questions, which do however, not matter for the basic PIL characterisation of contract type, go towards the question which role third parties play in performing the collection and take-back service. These can be sub-contractors, performing the obligation for one main party or also be engaged as independent third-party service provider.

¹³⁰ E.g. Oxfam shop, <https://tinyurl.com/yzrwantd>.

¹³¹ Maher, ‘Unilateral Obligations and International Private Law’ (2002), p. 317–334.

¹³² Ruiz Abou-Nigm/Michaels (2024) (fn. 24).

¹³³ GFA, Reverse Logistics (2024), (fn. 15).

¹³⁴ ‘The level of PIL’ implies thinking across jurisdictions. On PIL’s inter-systemic way of thinking see Ruiz Abou-Nigm/Michaels (2024) (fn. 24).

Fashion industry models show a multitude of sub-varieties of organising retail and take-back systems (see diagram above, sec. IV). They can be implemented by involving the same parties on the initial forward and reverse loop or by engaging third parties, either as independent contractors or as sub-contractors fulfilling obligations ascribed to one of the main contracting parties. Moreover, these models can involve B2B as well as B2C transactions. Furthermore, non-profit models exist. Bracketing some of these variations, the analysis focuses on one of the cross-border legal implications (that of the applicable law, leaving the jurisdiction question aside) for business models addressing the reverse loop for up- and recycling of textile material between the same parties involving B2B- and B2C-contexts. Thereby, the exercise consists of outlining relevant legal issues in the current dominant linear economy (*de lege lata*), addressing what kind of rethinking could be useful to foster the transition to CE within the given framework, at times suggesting further and bolder transformations (*de lege ferenda*).

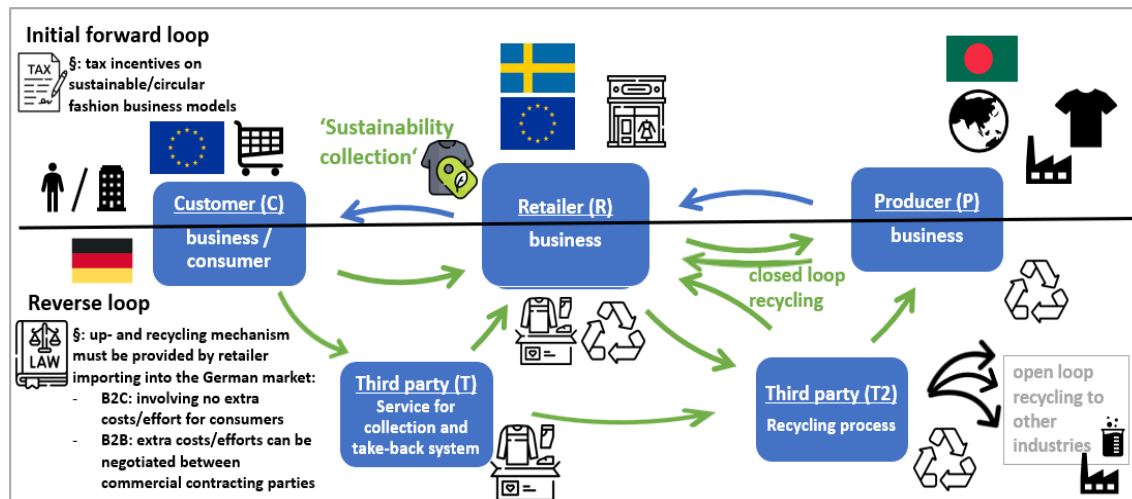
V.A. Case Study Illustration

To picture the legal framework of the circular recycling business model this paper uses a simplistic hypothetical scenario from a European standpoint,¹³⁵ consisting of a non-European producer of garments, selling them to a EU-based retailer (or non-EU-based retailer, having a certain net turnover within the EU) which then sells them to a EU-based customer (B2B or B2C). Thus, for most claims involving disputes amongst the supply chain, recourse to a EU jurisdiction,¹³⁶ leading to the applicability of EU-PIL rules of the forum, is conceivable.

To illustrate this, the following case study may serve as example: A German customer (C) purchases garments from a Swedish retailer (R) in a shop in Berlin. The clothes are run within the ‘sustainability collection’ of the brand. (R) had purchased the garments originally from a Bangladeshi producer (P). The general terms and conditions which (R) uses for all purchase contracts do not include any rules on end-of-life handling of the textiles. In German substantive law however, a hypothetical newly implemented rule requires retailers selling within the German market to provide for up- and recycling mechanisms for their imported textiles if these are sold with reference to a ‘sustainability labelling/collection/production’, as for these, incentives have been implemented on the level of tax law, to foster the transition to CE. These up- and recycling options must be offered in B2C-contracts with no extra costs for consumers; in B2B-contracts, the contracting parties can freely negotiate the extra costs between them. This hypothetical case can be illustrated as follows:

¹³⁵ Taking the EU as the leading importer of textiles worldwide, see fn. 25.

¹³⁶ Based on the rules on jurisdiction provided for in Regulation (EU) No 1215/2012 of the EU Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (recast), OJ L 351.

Circular Reverse Retailing in Fashion – Illustration

In the reverse loop, ‘own take-back systems’, where companies take back their own-branded products will be examined. For these, in-store collection programmes¹³⁷ or online return processes are being implemented¹³⁸ as well as options for engaging a commercial collector¹³⁹ (T in diagram) are models used in practice.¹⁴⁰ For the recycling process itself, businesses might handle this themselves or outsource this to another third party (T2 in diagram), which returns garments or materials to them or to the producer (P in diagram).

V.B. Weaving CE Threads into International Contracts via EU PIL-rules on Applicable Law

The EU PIL-rules establishing how to ascertain the applicable law to international contractual relations are provided for in the Rome I Regulation.¹⁴¹ Party autonomy in choice of law is possible within certain limitations. The impact of these rules for weaving CE in international contracts will be demonstrated first for commercial contracts (B2B) (V.C.). Secondly, it will be outlined for consumer contracts, where different default rules may apply and higher constraints for party autonomy are in place (V.D.). More broadly, the prospective use of overriding mandatory provisions as a way of intervening in the choice of law process to safeguard circularity in both contexts is also considered (V.E).

V.C. PIL and Reverse Retailing in Commercial Contracts

The effects of PIL rules for international contracts absent a choice of law (V.C.1.) and including a choice of law (V.C.2.) will be examined.

¹³⁷ E.g. H&M Garment collection of own and or other brands, <https://tinyurl.com/ya8ebmh3>, which is however under critique for greenwashing: <https://tinyurl.com/475dkst2>; Patagonia’s Common Threads Garment Recycling Program, <https://tinyurl.com/yt8u3e2j>.

¹³⁸ E.g. Filippa K, <https://tinyurl.com/yknw3jdy>.

¹³⁹ E.g. Bleckmann Nederland B.V., <https://tinyurl.com/ye2ajkxa>.

¹⁴⁰ See Global Fashion Agenda, Reverse Logistics for Circular Fashion Systems (2024), <https://tinyurl.com/3jjs5hyh>.

¹⁴¹ Regulation (EC) No 593/2008 of the EU Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I).

V.C.1. Applicable Law Absent a Choice of Law in B2B Reverse Retailing International Contracts

Looking first into purely commercial contracts (B2B), absent a choice of law expressly provided for as a contractual clause or implied by the terms of the contract between (R) and (C), in the hypothetical example, the Rome I Regulation provides a default scheme to ascertain the applicable law to the contract. The ‘applicable law’ is the legal system that will determine: the interpretation, performance, consequences of a breach of obligations, including the assessment of damages, the ways of extinguishing obligations, prescription and limitation of actions, and the consequences of nullity of the contract.¹⁴² Art. 4 of the Regulation provides that in general the law applicable to the contract shall be the law of the country where the party required to effect the characterising performance of the contract has their habitual residence. Such party is expressly designated for a range of contracts in the provision (most notably, the seller for a sale of goods contract, and the service provider, for a provision of services contract)¹⁴³ and a fall-back-rule for all other contracts.¹⁴⁴ Moreover, a displacement rule (escape clause) in favour of the ‘manifestly closer connected’ law applies¹⁴⁵ in exceptional cases¹⁴⁶ or the ‘most closely connected’ law as a rule of last resort.¹⁴⁷ For circular business models, the pivotal question, entailing different legal consequences for the contracting parties (R and C) is the question of characterising the contract vis-à-vis the provisions of the Rome I Regulation. Should the reverse part of the loop (take-back) be understood as an independent contract or as part of the initial sales contract? The answer to this question has two related legal consequences for the legal framework of the contract: First, what is the applicable law, that is, the private law of which country sets the framework for the contract, and secondly, is the Convention for the International Sale of Goods (CISG) as international unified sales law applicable? This is examined pursuant to current linear understanding of existing PIL-rules (V.C.1.a.) before providing food for thought for circular rethinking (V.C.1.b.).

V.C.1.a. Linear lens, applying existing PIL rules

Through a linear lens, applying existing PIL rules, different results are possible: If the contract is characterised as a single one, both parts of the transaction – initial and reverse loop – would be governed by the same law, that of the country of the party effecting the characteristic performance.¹⁴⁸ Doubts could arise as to whether the circular reverse retailing contract can be qualified as a sales contract or any other of the listed common contracts of Art. 4 (e.g. provision of services, franchise or distribution contract) where, as previously explained, there is a statutory ‘short-cut’ to ascertain the characteristic performance.¹⁴⁹ If none of the enlisted contract-types matches, the fall-back rule then deems the law of the country where the party required to effect the characteristic performance of the contract has their habitual residence, as

¹⁴² Art. 12 (1) Rome I Regulation.

¹⁴³ Art. 4 (1) Rome I Regulation.

¹⁴⁴ Art. 4 (2) Rome I Regulation.

¹⁴⁵ Art. 4 (3) Rome I Regulation.

¹⁴⁶ Interestingly, in order to determine that law, account should be taken, *inter alia*, of whether the contract in question has a very close relationship with another contract or contracts (Recital (20), Rome I Regulation).

¹⁴⁷ Art. 4 (4) Rome I Regulation.

¹⁴⁸ Art. 4 Rome I Regulation.

¹⁴⁹ Art 4 (1) Rome I Regulation.

applicable. This could equally lead to the initial retailer or, if the return of the product has sufficient importance for the holistic consideration of the contract, it may lead to the law of the country where the customer has their habitual residence. It depends on the contract's centre of gravity.¹⁵⁰ Furthermore, it might be that the initial forward loop and the reverse one are construed as two independent contracts with the risk that two different legal systems could be deemed applicable to the bilateral relation between (R) and (C). This can entail problems, when the legal systems are not aligned in terms of circularity policy objectives, leading to true 'conflict' of laws. Therefore, construing the reverse retailing between (R) and (C) as an independent contract could result in the initial loop treated as a sales contract governed by the law of the seller, thus the retailer (R)'s law, Swedish law.¹⁵¹ In turn, if the reverse retailing was understood as a buyback-contract – and therefore, plausibly, within the autonomous characterisation of a sales contract in the Rome I Regulation – the reverse loop would be governed by the law of the habitual residence of the 'seller', hence for the reverse retailing contract, the customer (C)'s law, German law.¹⁵² The same result will be reached by applying the fall-back-option, as then the characteristic performance, probably the return of the garment, will be the connecting factor to ascertain the applicable law.¹⁵³ Thus, this leads to the customer (C)'s law (of their habitual residence), making German law applicable for to the reverse loop. In the linear lens it may also be relevant to take into consideration that in substantive private law in B2B sales contracts return-related obligations only arise in case of a warranty, defect, etc. Outside specific provided for scenarios, return processes of the sold good would typically not be covered by the contract of sale, which may speak in favour of two different connecting factors for the question of applicable law for the sale and the reverse loops.

Furthermore, even if the context enabled taking recourse to the exception to apply the law of the country which is 'manifestly more closely connected' to the contract,¹⁵⁴ based on the relationship between the contracts,¹⁵⁵ or to the last resort 'most closely connected' law,¹⁵⁶ neither of these would necessarily resolve the potential problem that may derive from the bifurcation of legal ordering. Ascertaining which law is closer or closest connected to the reverse loop – the law of the customer (German law), of the retailer (Swedish law) or any other (eg. because of a very close relationship with yet another contract)¹⁵⁷ poses challenges that translate into lack of legal certainty and foreseeability for the parties. This, in turn, is known to increase transactional costs. That should prompt commercial parties to reach legal certainty by including a choice of law clause in their circular contracts to have all transactions within the loop governed by the same law.¹⁵⁸

¹⁵⁰ Recital (19) of Rome I Regulation provides that: "In the case of a contract consisting of a bundle of rights and obligations capable of being categorised as falling within more than one of the specified types of contracts, the characteristic performance of the contract should be determined having regard to its centre of gravity."

¹⁵¹ Art. 4 (1) (a) Rome I Regulation.

¹⁵² Art. 4 (1) (a) Rome I Regulation.

¹⁵³ Art. 4 (2) Rome I Regulation.

¹⁵⁴ Art. 4 (3) Rome I Regulation.

¹⁵⁵ Recital (20) Rome I Regulation.

¹⁵⁶ Art. 4 (4) Rome I Regulation.

¹⁵⁷ As required factor to be taken into account by recitals (20) and (21) to the Rome I Regulation.

¹⁵⁸ Analysed in detail below, sec. V.C.2.

In relation to the second question, the unified substantive law of the CISG may also become relevant if the parties' place of business are in different countries that are contracting States to the CISG, or the rules of PIL lead to the application of the law of such State.¹⁵⁹ If parties do not opt out of the application of the CISG,¹⁶⁰ the convention is the primary source for the regulation of international sales of movable goods in contracting States.¹⁶¹ Thus, its applicability to circular retail and take-back fashion business models is at stake. The convention's scope is limited to commercial contracts (B2B).¹⁶² Further limits derive from the conceptualisation of a 'contract of sale' (Art. 1 (1) CISG) in combination with the requirement of this sale to be the 'preponderant part of the obligations' in situations of mixed goods or service contracts (Art. 3 CISG). The CISG does not expressly define a 'contract of sale', yet it shows the understanding that the seller owes the delivery of the goods and documents and a transfer of title,¹⁶³ and the buyer owes the payment of the price and the taking of the delivered goods.¹⁶⁴ Not typically mentioned, but generally understood to be governed by the CISG are buyback-sales.¹⁶⁵ Therefore, depending on the actual contract design, if the return was understood as an individual buyback-sale, it would be governed by the CISG, too. The same result is reached, if the return obligation were considered to be part of the initial sales contract, entirely governed by the CISG. However, diverging results leading to the inapplicability of the CISG would arise if the return process is not a sale-back contract but a donation without any purchase price¹⁶⁶ (or any other contract type outside the scope of the CISG).

V.C.1.b. Circular Rethinking

Thinking outside the linear trajectory could lead to different results via PIL coordination. Linear thinking has shown the risk of unintended legal-ordering bifurcations of the circular transaction, which might become problematic, unintendedly, if circular policies embedded in the different applicable laws are inconsistent or even incompatible. This could create unforeseen pitfalls for CE. Circular rethinking could steer interpretation of the initial and the reverse obligations as jointly forming a single *circular* contract, ensuring applicability of the same law for all obligations under circular contracting. Without a CE mindset it might be difficult to encompass within a contract for the sale of goods the returning of such goods for recycling purposes. Circular rethinking could enable such construction to flourish. In turn, such circular contract could be understood as a special type of sales contract, thus a 'circular sales contracts', or understood to be a new contract type *sui generis*, combining property transfer, use and return at the end-of-use and thus a 'wholly circular contract'.

¹⁵⁹ Art. 1 (1) (a), (b) CISG.

¹⁶⁰ According to Art. 6 CISG.

¹⁶¹ See e.g. Magnus/Mankowski/*Magnus*, Rome I Regulation – Commentary (2017), Art. 4 para 246.

¹⁶² Thus, not applying to B2C- or C2C-contracts, Art. 2 (a) CISG. See further *Honnold/Flechtner*, CISG, 5th ed. (2021), Art. 2 para 63.

¹⁶³ Art. 30 CISG.

¹⁶⁴ Art. 53 CISG; e.g. Schlechtriem/Schwenzer/Schroeter/*Hachem*, CISG-Commentary, 5th ed. (2022), Art. 1 para 9.

¹⁶⁵ Schlechtriem/Schwenzer/Schroeter/*Hachem* (2022) (fn. 164), Art. 1 para 11; MüKoBGB/*Gruber*, 8th ed. (2019), CISG, Art. 14 para 3.

¹⁶⁶ MüKoHGB/*Mankowski*, 5th ed. (2021), CISG, Art. 1 para 16.

Going a step even further, *de lege ferenda* PIL rules could ensure ‘single’ characterisation and thus, the avoidance of any unwanted splits at the stage of ascertaining the applicable law via (i) a clarifying sentence added to the recitals of the Rome I Regulation, expressly indicating that circular trading agreements between the same parties over the same product should be regarded as one single circular contract for the purposes of the application of the Regulation; (ii) adding circular contracts to the list of Art. 4 (1) Rome I Regulation in a parallel way as financial contracts under multilateral systems in Art. 4 (1) (h) Rome I Regulation;¹⁶⁷ a similar path was taken for franchise and distribution contracts;¹⁶⁸ (iii) treating ‘circular contracts’ separately from the general rules of Art. 4, comparable to what has been done for contracts of carriage, consumer-, insurance- and individual employment contracts.¹⁶⁹ The significance of CE for sustainability may justify the departure from general rules, taking the regulatory function of PIL to its utmost potential, as it has been the case with consumer contracts in the EU. The different intensity of the normative emphasis in these options are policy-related rather than merely technical ones, where legal design should strive to meet the needs of CE. The resulting legal certainty and amplification of circularity-fostering private laws could certainly contribute to the promotion of circular fashion.

V.C.2. Party Autonomy in Reverse Retailing in B2B International Contracts

Having exposed the risks and pitfalls PIL-rules hold for B2B reverse retailing fashion business models, the exercise of party autonomy via choice of law is analysed in this section. Which options do the parties, (R) and (C), have, to choose the legal system/s to govern their transaction?

V.C.2.a. The Facilitative Function of Party Autonomy in the Linear Economy

Choice of law clauses are commonplace in international commercial contracts.¹⁷⁰ This is one of the most well-known enabling functions of PIL. It is cost-efficient for parties to have legal certainty from the outset of their contractual relationship in relation to the applicable law. In EU PIL-rules the chosen law does not need to have any connection to the contract.¹⁷¹ However, the choice is limited to the law of a country; a non-State body of law or an international convention can nevertheless be incorporated by reference in the contract.¹⁷² There are certain limits to this party autonomy for choice of law: for ‘domestic’ contracts, that is, contracts that except for the choice of law of a different country, have all other elements connected only to

¹⁶⁷ Here, the legislator has shown already, that a holistic understanding of a bundle of contractual relations is possible. Having added this provision to ensure that the law of the place of the stock exchange was applicable. Recital (18) Rome I Regulation; Magnus/Mankowski/*Magnus*, Rome I Regulation – Commentary (2017), Art. 4 para 148.

¹⁶⁸ For these, in the interest of clarity for the matter of characterisation, a specification was enlisted in Art. 4 (1) (e), (f) Rome I Regulation, too. See *v. Bar/Mankowski*, *Internationales Privatrecht* (2019), para 270, 274.

¹⁶⁹ See Art. 5–8 Rome I Regulation.

¹⁷⁰ In the EU this is provided for in Art. 3 of the Rome I Regulation; see for incentives for such behaviour: *Merrett/Sommerfeld*, ‘Incentives for Choice of Law and Forum in Commercial Contracts: Predicting the Impact of Brexit’, *European Review of Private Law* (2020), p. 627–663.

¹⁷¹ *Dicey/Morris/Collins on The Conflict of laws* (2022), Vol 2, para 32-072.

¹⁷² Recital (13) Rome I Regulation; *Dicey/Morris/Collins on The Conflict of laws* (2022), Vol 2, para 32-075, 32-077. Particularly relevant in this context as non-State law are the Unidroit Principles of International Commercial Contracts. See further below in this sec. on the special situation of the CISG.

one legal system, parties cannot avoid the effect of provisions which cannot be contracted out from of the law of that legal system.¹⁷³ Furthermore, in intra-EU contracts the restriction extends to mandatory provisions of EU law.¹⁷⁴ For circular business models, these can become entry points for regulatory interventions for legislators at national and EU level.

In a linear view, as previously discussed, return and take-back obligations are not mandatory in statutory substantive private law and thus, without any contractual stipulation to that effect, would not fall within the scope of obligation of a usual sales contract. Companies intending to cover the entire circular business between them and their customers by the same law should currently state this explicitly in their choice of law clause. Otherwise, it might happen that the contracts for the initial purchase and the return process are regarded as independent contracts, leading to different applicable laws. In this context the CISG may also become relevant, if the chosen law by the parties is the law of a country that is a contracting State to the CISG,¹⁷⁵ in the same way as discussed earlier.

V.C.2.b. Circular Rethinking

Similar considerations to the examination of circular rethinking apply in relation to party autonomy. For (R) and (C) in the example, circular rethinking could ensure interpretation of the scope of the choice of law clause as to be governing the entire loop of obligations between them. If they then chose German law as applicable law, the hypothetical circularity substantive law provisions would apply to their entire contractual circular business relationship.

V.D. PIL and Reverse Retailing Involving Consumers

For circular retail and take-back systems, consumer contracts play a major role for the fashion industry. A sizeable proportion of the online available business models for reverse retailing is B2C.¹⁷⁶ For consumer contracts, limits are imposed on freedom of contract by Art. 6 Rome I Regulation, to protect the consumer as the weaker party. This protection has implications for ascertaining the applicable law absent a choice of law clause,¹⁷⁷ and for the effectiveness of choice of law clauses in such contracts.¹⁷⁸ These PIL direct regulatory interventions were conceived to promote the functioning of the internal market, and not to tame consumerism, therefore there is scope for shifting that lens towards sustainability and CE.¹⁷⁹

An adapted illustration, where (C) is now a consumer based in Germany instead of a company seated in Germany, allows for the analysis that follows: absent a choice of law clause in the consumer contract (**V.D.1.**), and including a choice of law therein (**V.D.2.**).

¹⁷³ Art 3 (3) Rome I Regulation; *Michaels*, ‘Die Struktur der kollisionsrechtlichen Durchsetzung einfach zwingender Normen’, in: *Michaels/Solomon* (eds), *Liber amicorum Klaus Schurig* (2012), p. 191.

¹⁷⁴ Art. 3 (4) Rome I Regulation.

¹⁷⁵ Art. 1 (1) (a), (b) CISG.

¹⁷⁶ GFA, *Reverse Logistics* (2024) (fn. 15).

¹⁷⁷ Art. 6 (1) Rome I Regulation.

¹⁷⁸ Art. 6 (2) Rome I Regulation.

¹⁷⁹ See in detail *Saumier*, *SDG 12* (2021) (fn. 26), p. 383–407.

V.D.1. Applicable Law Absent a Choice of Law in Consumer Contracts

The analysis follows the previously adopted structure, applying existing EU PIL rules through a linear lens (**V.D.1.a.**) and proposing circular rethinking (**V.D.1.b.**).

V.D.1.a. Linear lens, applying existing PIL rules

Questions of contractual construction and interpretation as well as characterisation in PIL present themselves in similar fashion in B2C as examined in the B2B scenario. Looking at the example, qualifications of the sale and take-back obligations as independent¹⁸⁰ would raise questions as to the extent of PIL's consumer protection in relation to the reverse loop. It is doctrinally disputed whether in constellations where the consumer conducts the characteristic performance, such C2B-contract (reverse side of the loop) falls into the scope of such consumer protection,¹⁸¹ that is, within the definition of consumer contract in Art. 6 of Rome I Regulation. The inclusivity of the protective PIL provisions to encompass C2B contracts has been advocated for, too.¹⁸²

If the reverse loop was considered to fall outside PIL protective rules any consumer-related-circularity protection in the substantive law of the consumer's habitual residence could be displaced, for instance, by a choice of law clause in favour of the retailer's law (or any other chosen) to govern the reverse loop. Therefore, any national (in the example, hypothetically: German) legislative intention to promote B2C take-back systems would be jeopardised.

If qualified jointly, the entire obligation consortium between (R) and (C) (as consumer) will be governed by the law of the country of the consumer's habitual residence (here: German law), if the commercial party pursues its activities in the country of the consumer's habitual residence, or by any means directs such activities to that country or several countries including that country and the contract falls within the scope of such activities.¹⁸³ Thus, any offering of the products in local shops or online will lead to this result. In such understanding, the entire contract would be governed by German law in the example, thus ensuring the cost- and effort-free return process for up- and recycling for the consumer.

V.D.1.b. Circular Rethinking

Circular rethinking could weave CE policy objectives into B2C-contracts. In take-back systems, this could lead to the construction of reverse retailing obligations as constitutive of the same original sale contract and ensure that consumers living within the EU could not be deprived of the protection afforded to them by the substantive law of the country of their habitual

¹⁸⁰ An 'objective dépeçage' or objective division in PIL methodology, see e.g. *v. Bar/Mankowski* (fn. 168), para 376 et seq.

¹⁸¹ See for an overview of the dispute BeckOGK/Rühl, 1.2.2023, Rom I-VO, Art. 6 para. 56–57; Ferrari, *IntVertrR/Staudinger*, 3rd ed. (2018), VO (EG) 593/2008 Art. 6 para. 17.

¹⁸² See e.g. BeckOGK/Rühl, 1.2.2023, Rom I-VO, Art. 6 para. 56–57, rightly stressing recital (23) and the ratio of protection for the consumer against information asymmetries.

¹⁸³ Art. 6 (1) (a) or (b) Rome I Regulation.

residence.¹⁸⁴ Bringing about the regulatory function of PIL, these provisions amplify the effects of consumer protection onto foreign businesses which reach out to the local market of the country of the consumer within the EU, if the commercial party pursues its activities in the country of the consumer's habitual residence, or by any means directs such activities to that country or several countries including that country and the contract falls within the scope of such activities.¹⁸⁵ Thus, any offering of fashion in local shops within the EU or online¹⁸⁶ will lead to this result. In the illustration, such understanding would result in the entire contract being governed by German law, ensuring the cost-free return process for up- and recycling for the consumer. Additionally, this would create a level playing field for CE models of international businesses operating within the local market of the consumer, incentivising the investment and implementation of circularity competitively with local businesses in the consumer market.¹⁸⁷

V.D.2. Party Autonomy Restrictions in Consumer Contracts

Generally, a choice of law is possible in consumer contracts.¹⁸⁸ However, such choice cannot deprive the consumer of the protection afforded to them by provisions that cannot be derogated from by agreement by virtue of the law which would be applicable absence of choice,¹⁸⁹ that is, the consumer cannot be put into a worse position than that under their own habitual residence law via a choice of law clause.

V.D.2.a. Linear lens, applying existing PIL rules

The protective regime offered by EU PIL rules for consumers, risks to be circumvented through a choice of law clause by the retailer if the initial sales and the return obligation are separable for the purposes of ascertaining the applicable law. As discussed above, the main issue, controversial in current doctrinal debate, is whether a C2B contract (reverse-side of the loop) falls within the definition of consumer contract in Art. 6 of Rome I Regulation. If it does not, the protective regime of Art. 6 (2) Rome I Regulation will not operate, and there would be no restrictions to the effectiveness of choice of law clauses in this regard. The return process would then be governed by Art. 4 Rome I Regulation (examined above in relation to B2B contracts). Consequently, no limits to party autonomy other than the generally imposed one based on provisions which cannot be derogated from¹⁹⁰ and overriding mandatory provisions,¹⁹¹ as well as the public policy exception,¹⁹² would apply.

¹⁸⁴ Art. 6 (1) Rome I Regulation

¹⁸⁵ Art. 6 (1) (a) or (b) Rome I Regulation.

¹⁸⁶ See recital (24) explicitly referring to 'internet sites'.

¹⁸⁷ Alongside other investment and incentives for business transformation coming from tax and financial law (e.g. eco-taxes) to make circular fashion businesses economically more attractive.

¹⁸⁸ Art. 6 (2) Rome I Regulation.

¹⁸⁹ Art. 6 (2) 2nd sentence Rome I Regulation.

¹⁹⁰ Art. 3 (3), (4) Rome I Regulation.

¹⁹¹ Art. 9 Rome I Regulation.

¹⁹² Art. 21 Rome I Regulation.

This could run counter to the CE aspirations and endeavours pursued by regulatory interventions of the country of the consumer's habitual residence. In the first section the EU impulse for the shift to CE, including the potentially very impactful Empowering Consumers Directive, was mentioned. The effect of these regulatory interventions would be severely diminished in reverse retailing unless a holistic construction and characterisation of the contract could ensure the application of PIL protective rules to the circular transaction as a whole. In the example, this would mean that even if the Swedish retailer (R), selling in stores in Germany to the consumer (C), included a choice of law clause in favour of any law that substantively did not provide for the same level of CE-objectives-promotion as the hypothetical German 'circularity' substantive law, the latter would nevertheless apply. Assuming that the choice of law clause was valid, such choice would not deprive the consumer of any rights granted through the 'otherwise' applicable law. In the example, the cost-free return process for up- and recycling mechanisms for the consumer in a circular contract, would be applicable. No contractual choice of law clause could derogate from such obligation.

V.D.2.b. Circular Rethinking

As outlined earlier the engagement of consumer contracts is central to take-back systems and to the scaling necessary towards CE.¹⁹³ Circular rethinking at PIL level could also foster the shift to CE moving beyond consumer 'protection' to promoting sustainable consumption. For that major shift in emphasis, changes to existing rules may be necessary (*de lege ferenda*). And it remains to be seen if the booming regulatory push for CE is as strong as willing (politically and economically) to tame the consumerism promoted by consumer protection in the internal market of the EU.

Moreover, from a linear standpoint, the legal relations between the consumer and the retailer are understood as independent bilateral contract/s not necessarily influenced by the other contractual obligations in the value chain. This could lead to an exuberant obligation programme for the retailer, responsible for more obligations and bearing more risks and costs towards consumers than could be contractually imposed on the producer.¹⁹⁴ Circular rethinking could lead to an understanding of the entire circular value chain to be a 'network of contracts'¹⁹⁵ for the sake of 'circular legal alignment'. The European legislator has shown openness to the recognition of such 'multilateral systems' in PIL rules to ensure alignment in the laws applicable in financial contracts.¹⁹⁶

¹⁹³ See Global Fashion Agenda, Reverse Logistics for Circular Fashion Systems (2024), <https://tinyurl.com/3jjs5hyh>.

¹⁹⁴ Practical consequences of this could be a trickling-down effect in the long-term: If negotiation and/or market-power allowed, the retailer could demand for conditions of the contract or product to be better suitable for its own circular obligations towards the EU-based consumer.

¹⁹⁵ It goes beyond the scope of this contribution to engage in the scholarly work that has explored this in recent years. See further Teubner (2011), Networks as Connected Contracts.

¹⁹⁶ Art. 4 (1) (h) of the Rome I Regulation. Recital (28) of the Rome I Regulation. Yet, in the context of financial instruments the rationale behind this was quite to the contrary, ensuring that the law of the country of habitual residence of the consumer will not interfere with the rules applicable to financial contracts concluded within those systems.

V.E. Ensuring Impact of Substantive Circularity Laws vis-à-vis International Contracts via Overriding Mandatory Provisions

A much more trailed technique for implementing policy objectives in PIL that could also be instrumental to the effectiveness of CE-promoting-laws vis-a-vis international contracts is the use of overriding mandatory provisions (OMP). The concept of OMP is provided for in the Rome I Regulation¹⁹⁷ and a range of different policy-enabling provisions in national legal systems have been considered to fit within that conceptualisation. Relevant OMP in international contracts are provisions of the national law of the forum, or, in exceptional circumstances, the law of the place of performance of the contract,¹⁹⁸ that safeguard fundamental public interests of the legal system of the forum/place of performance, respectively. OMP as a PIL mechanism should be used exceptionally.¹⁹⁹ Such provisions, irrespective of their private or public nature, influence the formation, the validity, or the interpretation of a contract, or on the rights and duties of the parties thereof.²⁰⁰

An example could be the hypothetical provision from German law used as part of the illustration in this study; it could be enacted explicitly to fall within the concept of OMP. Thus, a mandatory rule demanding up- and recycling mechanisms from retailers where their contractual customers are offered return-mechanism for their purchased textiles would need to be implemented with overriding mandatory effect. In such scenario, PIL can amplify their regulatory impact in international contracts. Regarding the scope of application (i.e. which contracts would be affected, or vis-à-vis which companies such OMP could be enforced) for such hypothetical OMP, three options could be envisaged *de lege ferenda* in order to ensure an effective impact on the legislator's market: (i) a market-based approach applying according to net turnover in a certain jurisdiction; (ii) an approach focussing on the seat of the company – which nevertheless would pose difficulties vis-à-vis foreign companies seated outside the respective jurisdiction; or (iii) a mix of both previous approaches. The last option was chosen by the EU for the scope of application of the Corporate Sustainability Due Diligence Directive (CSDDD).²⁰¹

Other types of rules could also become relevant through OMP technique. In that sense, circular rethinking could lead to extended producer responsibility (EPR) provisions of relevant national laws, implemented to factor in the negative externalities of global ultra-fast fashion, to have that overriding mandatory effect. Pioneering examples of national provisions that could have that effect for the textile sector can be found in the Netherlands, France²⁰² and Hungary.²⁰³

¹⁹⁷ Art. 9 (1): "Overriding mandatory provisions are provisions the respect for which is regarded as crucial by a country for safeguarding its public interests, such as its political, social or economic organisation, to such an extent that they are applicable to any situation falling within their scope, irrespective of the law otherwise applicable to the contract under this Regulation." See further e.g. Magnus/Mankowski/*Bonomi*, Rome I Regulation – Commentary (2017), Art. 9 para 1.

¹⁹⁸ Art. 9 (2), (3) Rome I Regulation.

¹⁹⁹ Recital (37) Rome I Regulation.

²⁰⁰ Magnus/Mankowski/*Bonomi*, Rome I Regulation – Commentary (2017), Art. 9 para 20.

²⁰¹ Directive (EU) 2024/1760. For the regulatory effects regarding jurisdiction of the CSDDD see *Michaels/Sommerfeld*, 3 Aug. 2023, <https://tinyurl.com/3mbsetb9>.

²⁰² See e.g. <https://tinyurl.com/5n7w7u49>.

²⁰³ <https://tinyurl.com/2s49y5zu>, p. 22, 23.

Moreover, rules of such nature are under legislative discussion in Chile.²⁰⁴ For them to qualify as OMP, sustainability should be considered “crucial by a country for safeguarding its public interest, such as its [...] economic organisation”.²⁰⁵ Bearing in mind the climate crisis this is not unpalatable. Taking a closer look at the Dutch example, in the Netherlands producers are responsible for an appropriate collection system, recycling and reusing of clothing and household textiles and the financing of this entire system.²⁰⁶ The EPR uses a market-based approach, addressing producers that place textiles on the Dutch market.²⁰⁷ Undoubtedly the provisions of this system implement fundamental public policy objectives towards CE, which directly addresses all producers and international importers offering textile products first on the Dutch market.²⁰⁸ It is also expected that gradually reporting obligations on information on the amounts of recycled textiles will become mandatory.²⁰⁹

The recent French fast-fashion law proposal goes into a similar direction.²¹⁰ The proposal aims at addressing the social and environmental impacts of the fast fashion industry,²¹¹ explicitly naming (shaming?) the company *Shein*.²¹² It intends to implement ecological penalties²¹³ in the French *Code de l'environnement* for producers placing more than one thousand new models per day on the market, basing this on the principles of EPR. It is not unforeseeable that French courts could consider crucial provisions of any fast-fashion regulation that may follow, if crucial to safeguarding sustainability objectives, as mandatorily applicable to international contracts, regardless of the applicable law.

However, these are waters to thread extremely carefully. Not only technically OMPs in PIL should be exceptional, for national public policies should not trump PIL systemic objective of coordination of legal diversity. Moreover, fundamentally, whenever they operate the negative externalities would need to be factored in vis-à-vis the global operability of CE mentioned at the beginning of this paper, and particularly, the circular divide between the Global North and the Global South. PIL coordination of regulatory frameworks across all jurisdictions in which fashion industry operations are located has been identified by key stakeholders as essential for the transition to CE.²¹⁴

²⁰⁴ According to *Saieg*, <https://tinyurl.com/5a7aepcb> (min 22:05).

²⁰⁵ Art. 9 (1) Rome I Regulation.

²⁰⁶ From 1 November 2023, Dutch-EPR for Textiles Decree <https://tinyurl.com/rdw5y6yn>; Infographic, <https://tinyurl.com/48sr7rmd>.

²⁰⁷ Art. 1, 3 Dutch-EPR for Textiles Decree.

²⁰⁸ Infographic (fn. 206), p. 2.

²⁰⁹ From 2024 onwards, an annual report including the amount of textiles sold is demanded; from 2026 on, an annual report including the objectives becomes necessary, aiming for 50% recycled textiles by 2025 and 75% recycled textiles by 2030, Infographic (fn. 206), p. 3–4.

²¹⁰ See the French proposal (2024) (fn. 9). The draft law adopted by the *Assemblée nationale* on 14 March is currently under discussion in the *Sénat*. Comment on the draft law see *Leray*, ‘Vers une loi pour démoder la fast fashion’, *Recueil Dalloz* (2024), p. 960; Reuters, ‘French lawmakers approve bill to apply penalties on fast fashion’, 14 March 2024, <https://tinyurl.com/yj9wub6c>.

²¹¹ See also *Leray* (2024) (fn. 210), p. 960.

²¹² Proposition de loi visant à démoder la mode éphémère grâce à un système de bonus-malus, No. 2268, le 5 Mars 2024, <https://tinyurl.com/yx6npzu4>.

²¹³ The maximum penalty shall be in the amount of 5 EUR per newly introduced product starting from January 2025 and gradually rising to 10 EUR. See the French proposal (2024) (fn. 9).

²¹⁴ GFA, Reverse Logistics (2024), (fn. 15).

VI. Conclusion

In a world where sustainability concerns have become ubiquitous, understanding the opportunities, challenges, and pathways of the journey towards CE seems imperative for the fashion industry. Conceptualising the trajectory, the alternative business models, visualising the engagement of a diverse range of stakeholders and the risks and untapped potential along the way, is crucial to fashion businesses and regulators' policy agendas.

Legal design can foster the necessary transformation, yet legal infrastructure may also become chains rather than loops in the required paradigmatic shift.

Drawing from PIL regulatory, coordinative and facilitative functions, this study has identified some of PIL 'entry points' to the CE loop. The analysis of the potential impact of PIL in cross-border reverse retailing contracts and the circular rethinking offered in this study is a stepping stone towards demonstrating more comprehensively PIL functions' scaling potential in the transition to CE. Ascertaining the applicable law in international contracts in 'reverse retailing' for circular fashion, making this process more foreseeable and legally certain does not per se promote sustainability. Yet, PIL techniques coordinate the cross-border legal landscape and as such provide the legal matrix where national, international and supranational legislators can intervene, and businesses can design, create and implement their business models to promote CE in fashion.

This first study of PIL legal design in the field of circular fashion identifies regulatory and enabling possibilities that can be used to exit the legal 'lock-in' of the linear economy. The study singles out PIL loopholes, for instance, in relation to crucial B2C models in 'reverse retailing', and the role of traditional PIL corrective interventions, as well as novel regulatory features of the evolving sustainability-enabling EU legal landscape.

The circular economy offers hope, opportunities, and creative potential to turn the linear economy unfathomable tide. The transformation required is enormous, and for law to play its part, sustainability and CE rethinking need to become bold and immersive in legal discourse. Let's hope that little grains of sand like this contribution can add to the colossal efforts that many regulators as well as industry stakeholders are investing in the emerging transition.

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