A Consideration of the Positive Law Application of Non-State Rules of Law

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Abstract

Non-state law is often, in private international law, considered as non-applicable before state courts. This article challenges that assumption by making an in-depth enquiry into its application, looking beyond legislation into the practice of state courts. While it is often true that the majority of the world's legal systems do not make allowance for the application of non-state law in their legislation, the practice of state courts would seem to tell a different story. The article adopts the methodology of investigating the above claim through exploring the application of non-state law instruments in different jurisdictions. It finds that while it is often the case that legislation does not make provision for the application of non-state law, the practice of courts would seem to be more amenable.

Keywords

Choice of law; non-state law; private international law; international commercial contracts.

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1 Introduction

There are various ways to ascertain whether a country allows for the application of non-state law. The first and most obvious way is to look at the private international law (PIL) code of the country, if such a code is in existence.[1] It is often true, if one analyses the cases below, that the private international law codes of a country will not tell the entire story. In most of the world's private international law codes the parties may choose the law applicable to their contract.[2] A code drafted in terms that allows the parties to choose the *law* applicable to their contract often does not allow for the application of non-state law. This is, however, not always the end of the enquiry. A deeper analysis of the court practice of several countries reveals anomalies that one would not expect to exist. One finds that courts are sometimes more amenable to this practical application of non-state law.[3] Determining whether a court would allow the application of non-state law is therefore not always a straightforward task. It requires the substantive assessment of cases in different jurisdictions, determining whether courts

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1 Private international law (PIL) codes are common for civil law countries; they are, however, rare in common law countries.

2 See, for instance, the following codes: Japan – art 7 of the *Act on General Rules for Application of Laws of* 2007, which states: "The formation and effect of a juristic act shall be governed by the law of the place which was chosen by the party/parties at the time when the act was made." The reference here to the law of the place is perhaps a clearer indication that the Japanese envision only the application of the law of a state as applicable to the contract. See art 1210(2) of the *Russian Civil Code,* which states that "an agreement of parties as to the selection of *law* to be applicable shall be expressly stated or shall clearly ensure from the terms and conditions of the contract or the complex of circumstances of the case" (my emphasis). See art 116(2) of the *Swiss Civil Code*: "The contract shall be governed by the *law* chosen by the parties." See art 24(1) of the Turkish *Act on Private International Law and Procedural Law of* 2007: "The law explicitly designated by the parties shall govern the contractual obligation relations. The designation which can be concluded without hesitation from the provisions of the contract or is understood from the affairs of the case is also valid." The *South Korean Private International Law Act* of 2022 is particularly interesting. Art 45 (Party's Autonomy) reads as follows: "(1) A contract shall be governed by the law chosen, explicitly or implicitly, by the parties: Provided, That the implicit choice shall be limited where reasonable recognition can be achieved, in consideration of the content of the contract and all other circumstances. (2) The parties may choose the law applicable only to part of the contract. (3) The parties may change, by agreement, the applicable law under this Article or Article 46: Provided, that any change in the applicable law following the conclusion of the contract shall not affect the validity of the contract type and the right of a third party. (4) Where all the elements are related to one country only, but the parties choose the law of another country instead, the application of the mandatory provisions of the relevant country shall not be excluded."

3 See the cases discussed below.

have allowed any one of the myriad non-state law rules that could be applicable and, if so, on what basis their application was allowed.

It was decided that the utility of a global survey would be limited in this article because the generally accepted positive law position is that states allow only the application of state law.[4] The countries that were selected for the analysis were chosen for specific reasons. Texts that were available in English or in authoritative translations that were available in English were selected.[5] Where these translations were unavailable in regard to cases that would take the study forward, the author relied on the goodwill of native language lawyers to assist in the translation.[6] Cases that appeared from the UNILEX database likely to further the discussion on the application of non-state law in positive law were also selected,[7] as were cases identified in the recent global survey undertaken by Girsberger, Kadner-Graziano and Neels.[8] These sources together assisted in directing the focus of this article, which is not purely on the identification of jurisdictions that allow for the application of non-state law but rather on demonstrating how this analysis should be embarked on, on what the considerations are and thus on furthering the discussion of the application of non-state law in positive law. The article thus approaches the analysis by first considering private international law codes that allow for a choice of non-state law and then considering the interpretations of different national courts when they have had to interpret a choice of non-state law made by contracting parties. For the purposes of completeness, the final part of the article considers private international law regional conventions (which have a bearing on positive law): as things stand, it is only the *Mexico City Convention* that will add to this discussion. The position in the *Rome I Regulation* (*Rome I*),[9] which applies to most European Union member states, is clear – parties may not choose non-state law as the governing law of the contract although they may choose to incorporate such instruments by reference into their contract as contractual terms.[10] The *Rome I Regulation*, although leading in the field

4 Such study has in fact been done and the same conclusion reached in Girsberger, Kadner-Graziano and Neels *Choice of Law* 44.

5 The translations below of both legislation and court decisions indicate that the present author was successfully able to find a number of texts that had been authoritatively translated.

6 My gratitude specifically to Dr Karl Marxen for the translations mentioned in specified footnotes below.

7 See the UNILEX database at https://www.unilex.info/.

8 Girsberger, Kadner-Graziano and Neels *Choice of Law*.

9 *Regulation (EC) 593/2008 of the European Parliament and of the Council of 17 June 2008 on the Law Applicable to Contractual Obligations (Rome I)* [2008] OJ L177/6 (the *Rome I Regulation*).

10 See Recital 13 which states: "This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention." When Recital 13 is read in conjunction with Art 3(1) of the *Rome I Regulation*, the position on the choice of non-state law is clear.

of choice of law, is thus of limited assistance. The *Regulation* has been discussed at length in other publications and will not be considered in this article.[11]

In terms of methodology, the comparative approach adopted here seeks to illustrate practical judicial responses rather than to construct a deep functionalist comparison. While a more granular study may yield different insights, the purpose of this article is to demonstrate that a broader review can reveal consistencies previously overlooked and practical judicial tendencies. It is likewise for this reason that the theoretical underpinnings of party autonomy and choice of law will not be interrogated in this article.[12]

2 States that allow for the choice of non-state law in their civil codes or legislation

2.1 Bahrain

Bahrain recently adopted Act 6 of 2015 on *Conflict of Law in Civil and Commercial Matters Involving a Foreign Element*. Article 4 of the Act allows parties to choose the "laws and customs of international trade" as the governing law. Commentators on Bahraini law interpret this provision as generally allowing for a choice of non-state law without limitations.[13]

2.2 Seychelles

The Seychelles recently adopted a new civil code. In terms of Article 14(3) of the *Civil Code of Seychelles Act*, 2020 (Act 1 of 2021): "Parties can, in the exercise of their contractual freedom, select as the proper law of the contract either the law of a country or an international set of norms." The reference to an international set of norms is a clear indication of the allowance for a choice of non-state law.

2.3 Latin America

Historically, post-colonial Latin American states have rejected the notion of party autonomy. Their reasons for this were primarily to protect territorial sovereignty, this need stemming from the experiences of Latin American

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11 For an authoritative overview of the reasoning and the debate that took place specifically on the issue of non-state law, see McParland *The Rome I Regulation* 150-170. Also see *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)* 14708/06 JUSTCIV 240 CODEC 1219; *Council Document 14708/06* JUSTCIV 206 CODEC 1219 at 19; and *Draft Report on the Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I)* (COM(2005)0650– C6-0441/2005– 2005/0261(COD)).

12 For a full excursus on party autonomy, see Adams and Kruger *Private International Law* 110-131; Mills *Party Autonomy in Private International Law*; Nygh *Autonomy in International Contracts*.

13 See Elbalti and Shaaban "Bahrain" 423.

parties with North American and European creditors.[14] The *Montevideo Treaties* of 1889 raised diverse interpretations on whether party autonomy was accepted or not.[15] The following Latin American countries have accepted party autonomy: Chile,[16] Cuba,[17] Ecuador,[18] Guatemala,[19]

14 Mills *Party Autonomy in Private International Law* 64; Nygh *Autonomy in International Contracts* 9.

15 Albornoz 2010 *J Priv Int L* 32.

16 Article 113 of the Chilean *Commercial Code* states: "AII the acts concerning the performance of contracts entered into in a foreign country that shall be performed in Chile are governed by Chilean law, in accordance with the provisions under A 16, last paragraph, of the Civil Code. So, delivery and payment, the currency in which the latter shall be made, measures of any kind, the receipts and their form, the responsibilities imposed by in the event of non-performance or imperfect or late performance, and any other act related to the mere performance of the contract, shall be in accordance with the provisions of the laws of the Republic unless otherwise agreed by the contracting parties." Art 16 of the Chilean *Civil Code* states: "The property located in Chile is subject to Chilean laws, even when the owners are foreigners and reside elsewhere. This provision shall be construed without prejudice of the stipulations contained in the contracts validly executed in a foreign country. But the effects of the contracts executed in a foreign country that are to be performed in Chile, shall conform to Chilean laws." I could not obtain an English version of the provisions above and have had to rely on the translation by Albornoz 2010 *J Priv Int L* 39.

17 Article 17 of the 1987 Cuban *Civil Code* determines the rights of the contracting parties to choose the law governing their obligations. Art 17 of the Cuban *Civil Code* states: "In the absence of express or tacit submission by the parties, all contractual obligations are governed by the law of the place of performance of the contract." I could not obtain an English version of the code and have had to rely on the translation by Albornoz 2010 *J Priv Int L* 38.

18 Article 154 of the *Commercial Code* of Ecuador is derived from Art 113 of the Chilean *Commercial Code* above.

19 See Art 31 of the Guatemalan *Ley del Organismo Judicial, Decreto* 2-89, 18.3.1989, which states: "Juridical acts and transactions are governed by the law, under which the parties have subordinated the contract, unless this choice of law is expressly contradictory to a legal prohibition or the *ordre public*." Translation obtained through Translex (see Trans-Lex date unknown https://www.trans-lex.org/604400/_/guatemalan-ley-del-organismo-judicial-decreto-2-89-1831989/).

Mexico,[20] Panama,[21] Paraguay,[22] Peru,[23] Venezuela[24] and, to a more limited extent, Argentina.[25] The countries that have rejected party autonomy based on their interpretations of the *Montevideo Treaties* are Bolivia[26] and Brazil.[27]

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20 I could not obtain an English version of Art 13.V of the *Federal Civil Code* of Mexico, and have had to rely on the translation by Albornoz 2010 *J Priv Int L* 38. Art 13.V accordingly reads as follows: "Except for provisions under the subsection *ut supra,* the legal effects of acts and contracts shall be governed by the law of the place where they must be performed, unless the parties had validly designated the applicability of another law."

21 Article 6 of the Panamanian *Commercial Code*. It provides that commercial transactions will be governed: "1. As for the essence and mediate or immediate effects of the obligations resulting from them and unless otherwise agreed, by the laws of the place where they are entered into; 2. As for the manner in which they are to be performed, by the laws of the Republic, unless otherwise agreed." Read with Art 1106 of the Panama *Civil Code*: "The contracting parties can establish the agreements, clauses and conditions they consider convenient, provided they are not contrary to the law, moral and public policy."

22 See the discussion on Paraguay directly below.

23 Article 2095 of *Title X on Private International Law* states: "Contractual obligations are governed by the law expressly chosen by the parties." It has allowed party choice since 1984. I could not obtain an English version of the code and have had to rely on the translation by Albornoz 2010 *J Priv Int L* 38.

24 See Art 29 of the Venezuelan *Private International Law Act* 1998, as published in Official Gazette (Venezuela) # 36.511 of 6 August 1998. Art 29 states: "Conventional obligations are governed by the Law agreed to by the parties."

25 The limited extent of Argentinian party autonomy is based on the idea that although the parties may not choose the governing law of the contract directly, the law of the place of performance would be applicable and the parties may choose the law of the place of performance of any obligation as the governing law of the contract. See Albornoz 2010 *J Priv Int L* 41. See further Art 1209 of the *Argentine Civil Code*: "The contracts entered into within or without the Republic, which should be performed in the territory of the State, shall be judged as for their validity, nature and obligations by the laws of the Republic, whether the contracting parties be nationals or foreigners." This should be read in conjunction with Art 1210 of the *Argentine Civil Code*: "The contracts entered into within the Republic in order to be performed elsewhere, will be judged, as for their validity, nature and obligations by the laws and usages of the country in which they should have been performed, whether the contracting parties be nationals or foreigners." I could not obtain an English version of the provisions above and have had to rely on the translation by Albornoz 2010 *J Priv Int L* 41.

26 Albornoz states that Bolivia has clearly accepted the provisions on freedom of contract, although it appears that Bolivia has not accepted this in a private international law sense. Albornoz relies on Art 454.1 of its *Civil Code* to support this assertion. See Albornoz 2010 *J Priv Int L* 43-44.

27 There is no regulation allowing party autonomy in Brazil's law as it stands. Art 13.10 of the 1916 *Civil Code Introductory Law* allowed for an express choice of law. The law of the place where the contract was perfected was applicable, unless otherwise stipulated. From 1942 the law applicable to the contract is determined by Art 9 of the *Introductory Law*, which adopts the *lex loci celebrationis* criterion and envisages no exception based on party autonomy. The silence has been considered by authors such as Albornoz to be a rejection of the principle. See Albornoz 2010 *J Priv Int L* 44.

Paraguay was the first country to adopt the *Hague Principles on Choice of Law in International Commercial Contracts* into its legislation in 2015 (while it was still in draft format).[28] The country did this through Article 5 of the Law 2555 of 2005 of the Paraguayan *Law on International Commercial Contracts*. The Article states that: "In this law, a reference to law includes rules of law of a non-State origin that are generally accepted as a neutral and balanced set of rules." The version drafted by Paraguay therefore makes slight changes to the wording of Article 3 of the *Hague Principles*.

2.3.1 Uruguay

Prior to the promulgation of the new Uruguayan *General Act on Private International Law* adopted on 17 November 2020,[29] Uruguay did not make provision even for the choice of state law by parties.[30] The new Act has in many ways completely overhauled party autonomy in Uruguay, allowing not only for party choice in terms of Article 45.1 ("International contracts may be submitted by the parties to the law they choose"), but also allowing for a choice of non-state law. Article 51, in accordance with Article 13, states that usages and principles that are generally accepted and recognised by international organisations of which Uruguay is a Member State are applicable.[31] Exactly which principles this provision has in mind is yet to be determined, but it would appear likely that instruments such as the *Vienna Sales Convention* of 1980 (CISG) and the *UNIDROIT Principles of International Commercial Contracts* (UPICC) would be among them.

2.3.2 Venezuela

In 1998 Venezuela became one of the first countries to adopt an act specifically on private international law.[32] Venezuela would appear to have taken a liberal stance on party autonomy even before the promulgation of this Act, allowing for a choice of *lex mercatoria* going as far back as 1988 in terms of Article 116 of the Venezuelan *Commercial Code*,[33] which although not explicitly allowing for a choice of *lex mercatoria* was interpreted by the Venezuelan courts as allowing for such a choice.[34] In the Act of 1998 Article 29 states that the law chosen by the parties govern contracts. In terms of Article 30, where there is no valid choice of law due regard should be taken

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28 Moreno Rodriguez "Paraguay" 1090.

29 See the Uruguayan *General Act on Private International Law* (2020) of 17 November 2020.

30 Article 2403 of the Appendix to the *Civil Code* expressly states: "The legislative and judicial competence rules determined in this title, cannot be modified by the will of the parties. That will could only act within the limits conferred by the competent law."

31 See Fresnedo de Aguirre 2021 *Yrbk Priv Intl L* 347.

32 See the Venezuelan *Act on Private International Law* of 1998.

33 Albornoz 2010 *J Priv Int L* 37.

34 Albornoz 2010 *J Priv Int L* 37 where the author refers to the case of *Banco Unidn v Banque Worms* [1989] Corte Suprema de Justicia, 144 Gaceta Forense, 507.

of the general principles of international commercial law accepted by international organisations and wherever applicable the principles as well as usages and practices generally accepted are to be applied in terms of Article 31.[35] These provisions have been interpreted as also allowing for the choice of non-state law as opposed merely to its application in cases where there is an absence of choice.[36]

3 The consideration of non-state law before state courts

3.1 The UPICC and the CISG as an indicator

3.1.1 Brazil

Brazil presents a unique case. It is clear from the legislation that it was the intention of the legislature to remove choice of law.[37] However, despite this there has in the past been a handful of Brazilian judges who have seemed more amenable to party autonomy and have allowed for the application of party choice.[38] Albornoz cautioned in the past that these cases, although they exist, are isolated instances and cannot be confidently said to demonstrate that case law allows for party autonomy.[39] This position has largely been overcome by the Brazilian Superior Court of Justice. Despite the restrictive language used by the legislature in Article 9 of the *Law of Introduction to the Norms of Brazilian Law*,[40] which would seem to indicate that Brazilian law did not allow for party autonomy, the Superior Court in 2016 clearly demonstrated that choice of law is a common feature of international transactions.[41] This was reaffirmed by the Court in 2019.[42] These decisions by the highest court in Brazil in relation to contractual matters would therefore indicate that Brazil does now make allowance for choice of law.

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35 See Parra-Aranguren 1999 *NILR* 391 on the Venezuelan 1998 *Act on Private International Law* for the source of the translation of these provisions.

36 Martinez "Venezuela" 1141.

37 Albornoz 2010 *J Priv Int L* 44.

38 Albornoz 2010 *J Priv Int L* 45. Albornoz refers to the following Brazilian cases as authority: *Dexbrasil Ltda v Navisys Incorporated 30a Vara Civil de Sao Paulo* (2002); *Total Energie do Brasil, SNC et al v Thorey Invest egdcios Ltda* 2003 12 Camara do Primeiro Tribunal de AlGada Civil do Estado de Sao Paulo 1.247.070-7; *Ciaci Com Internacional Ltda v The Lubrizol Corporation* 2007 Tribunal de Justiga do Estado de Sao Paulo Appeal 7.030.387-8.

39 Albornoz 2010 *J Priv Int L* 45.

40 See *Law of Introduction to the Norms of Brazilian Law Decree Law No 12.376*, September 2010. See further Gama, Tiburcio and Albuquerque "Brazil" 985.

41 Superior Court of Justice, Resp No 1280218/MG, 12 August 2016, Rel Min Paulo De Tarso Sanseverino, as referred to by Gama, Tiburcio and Albuquerque "Brazil" 985.

42 Superior Court of Justice, Resp No 1343290/SP, 20 August 2019, as referred to by Gama, Tiburcio and Albuquerque "Brazil" 990.

There have also been more recent cases from the Court of Appeal of Rio Grande do Sol in *Noridane Foods SA v Anexo Comercial Importação e Distribuição Ltda*[43] that have appeared to come out in favour of the application of non-state laws to the contract. The presiding Judge Sudbrack categorised the case as involving a sales contract and classified it further as a contract with a "transnational element". The contract was concluded between a Danish company and a Brazilian company. The Court determined that due to its being an international contract, the CISG and the UPICC formed the applicable legal framework. This would be an interesting position adopted by the Court as it seemed to indicate that once a contract had been categorised as having a transnational element, a legal framework of an international character applied to the agreement automatically. The CISG was not otherwise applicable to the agreement in question because Brazil had ratified the CISG only in 2014 (post the conclusion of the agreement). The CISG therefore had no applicability in the normative order of Brazil as far as this contract was concerned. The learned judge, however, made use of academic argument to sustain the application of the CISG by reference to the doctrine of manifestation, proof of international usages and customs and even as foreign law. The Court in this case considered the CISG as being "the lifeblood of international commerce" as a customary law and not the positive law of the system. The Court proceeded to apply the CISG to the agreement.[44]

The determination of the applicable law took the court a step further. As already stated, the court viewed not only the UPICC as applicable but the CISG as well. In justifying the application of the UPICC to the agreement, the court relied strongly on academic opinion, citing the academic views of both Bonell and Gama.[45] The primary reasoning behind the Court's decision to apply the UPICC to the agreement was that the Court considered the UPICC as forming part of the new *lex mercatoria*, which the Court described as the "group of norms gathered in principles, usages and customs, model clauses, model contracts, judicial decisions and arbitral awards".

The role of *lex mercatoria*, including instruments such as the UPICC and CISG, varies across jurisdictions. In some it is viewed as customary law supplementing gaps in domestic law; in others it is integrated more deeply. This article approaches *lex mercatoria* not as a monolithic doctrine but as a

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43 *Noridane Foods SA v Anexo Comercial Importação e Distribuição Ltda Apelação Cível* Court of Appeal of Rio Grande do Sul 70072362940 14 February 2017, summary accessed through UNILEX. UNILEX 2017 http://www.unilex.info/principles/case/2035.

44 UNILEX 2017 http://www.unilex.info/principles/case/2035.

45 See Bonell *UNIDROIT Principles in Practice* 26, where he discusses the co-application of the CISG and UPICC; and Gama 2011 *Unif L Rev* 613, where he discusses the application of the UPICC with specific reference to Brazil.

fluid, hybrid source whose legal status depends on jurisdictional context.[46] Nevertheless, the Court's approach to the application of private international law conflicts methodology was yet again remarkable. It involved a move away from the traditional connecting factor test, which in this case would have been the *lex loci celebrationis* and which would have resulted in Danish law being the law applicable to the contract.[47] The Court was of the view, however, that the centre of gravity was not in Denmark and that traditional conflicts methodology was outdated insofar as it did not take into consideration the dynamics and practices that had arisen in the field of international trade in the post-war period. The Court then proceeded to apply both the CISG and the UPICC to the contract as the governing law of the contract.

There are a few remarks that should be made on this case. The first is that it is apparent that as far as this article is concerned, this is not a *choice* of non-state law. The parties did not select the law that governed the contract. It was the Court that (almost unilaterally in this instance) decided to apply non-state law to the contract. The decision is relevant for choice of law purposes when one considers the reasoning of the Court, which described the current conflicts methodology as being outdated and failed in terms of taking into consideration the modern developments in conflicts of law. It therefore seemed apparent that an exercise of choice by the parties of a non-state law would be upheld where the contract had transnational elements.

It is not readily clear whether a Brazilian court would allow parties to themselves choose non-state law as the governing law of the contract. One may, however, presume that given the Court's approach and given the way that the Court considers international sales contracts to be part of a regulatory framework that consists of the new *lex mercatoria* (outside of domestic law), then when a party chooses a form of non-state law that fits within the category of *lex mercatoria*, it will be given effect. The extent to which the Brazilian courts will allow for the application of other non-state law that does not fit within the definition of *lex mercatoria* is debatable.

This position of the Court was confirmed a few months later. The same court, giving judgment on an international commercial contract, again applied the CISG and the UPICC as the governing law of the contract.[48] In

46 Adams 2024 *TSAR* 292; Adams 2021 *TSAR* 59; Adams 2022 *PELJ* 1.

47 See Toth *Lex Mercatoria in Theory and Practice* 304 for the discussion on *voie directe* and the direct application of substantive law. Her thoughts on the inclusion of a new connecting factor or closest connection test that made provision for a connecting factor that was not the law of a country could also be considered.

48 *Voges Metalurgia Ltda v Inversiones Metalmecanicas ICA – IMETAL ICA* Court of Appeal State of Rio Grande Do Sul 4-25.2016.8.21.7004192500 30 March 2017. See UNILEX 2017 http://www.unilex.info/principles/case/2042.

this instance the Court asked the parties to clarify the place where the contract was concluded in order to determine the applicable law. The parties, a Brazilian and Venezuelan company, both referred to their home countries as the place where the contract had been concluded. The Court found the submissions to be inconclusive and proceeded to apply the most significant relationship test or the closest connection test. In keeping with the earlier judgment of the same court, the Court found that the contract was most closely connected with the CISG and the UPICC and proceeded to apply those rules concurrently as the applicable law.

3.1.2 Colombia

A curious case presents itself in Colombia with reference to *lex mercatoria* and the application of the UPICC. In *Rafael Alberto Martínez Luna y María Mercedes Bernal Cancino v Granbanco SA*[49] the Court, in interpreting a general principle of revision of contract, came to the conclusion that the principles around supervening events formed part of the *lex mercatoria*. The parties, according to the reasoning of the Court, were therefore allowed to choose the UPICC or other soft-law instruments as the governing law of the contract provided they were not contrary to the domestic law provision. This in itself does not make the case curious; what does is that all three parties involved in this case were Colombian citizens and the contract was to be performed in Colombia. The contract had no international dimensions. The conclusion that can be reached as far as the subject matter of this article is concerned is that as the parties in this purely domestic contract were allowed to choose soft-law instruments as the governing law of the contract, then this would also surely be the case in a contract with international elements.

3.1.3 Russia

The Russian position cannot be stated with certainty. It is based on a 2012 excerpt from the UNILEX site.[50] In a very short English summary a claim is made that the Artbitrazh Court of the Tyumen Region allowed for the application of the UPICC along with the application of Russian law. Article 1210(2) of the *Russian Civil Code* states that "an agreement of parties as to the selection of *law* to be applicable shall be expressly stated or shall clearly ensue from the terms and conditions of the contract or the complex of circumstances of the case". The *Russian Civil Code* therefore makes no provision for the choice of non-state law. This case must be approached

49 *Rafael Alberto Martínez Luna y María Mercedes Bernal Cancino v Granbanco SA* Corte Suprema de Justicia 11001-3103-040-2006-00537-01 21 February 2012. UNILEX 2012 http://www.unilex.info/principles/case/1709.

50 *Sales Contract Between a Russian Business Person and a Company of Hong Kong* Arbitrazh Court of Tyumen Region A70-1319/2011 07 August 2012. UNILEX 2012 http://www.unilex.info/principles/case/2077.

with scepticism, however, as the referencing is not clear and the name of the case itself is not cited. The only authority for this assertion in these circumstances would appear to be that of the UNILEX database itself. Russian scholarship would appear to take the view that a choice of non-state law would not be successful in court proceedings.[51]

3.1.4 Ukraine[52]

The Higher Court of Ukraine has on several occasions endorsed the choice of the UPICC as the governing law of the contract. In 2008 the Higher Court published an Information Letter on Certain Issues on the Application of Provisions of the Civil and Commercial Codes (01-8/211).[53] This letter specifically acknowledged the UPICC as one of the documents that reflect international practice and trade usages. This position was confirmed in a case before the High Administrative Court of Ukraine.[54] The parties had chosen several different laws, invoking the notion of *dépeçage* as the governing law of their agreement. Ukrainian law, the CISG and the UPICC were all chosen to apply to their contract. The court deciding the matter accepted that all three were applicable to the agreement. The critical point in the case was whether a *force majeure* had occurred in the agreement. Coming to its decision on the basis of both the UPICC and CISG the Court came to the conclusion that the claimant in the case was excused from performance by virtue of the *force majeure*. Interestingly, in this case it was the sets of non-state rules of law that provided the gap-filling function. As recently as 2018 this position was confirmed by the Kyiv Commercial Court of Appeals, where the court again endorsed the application of the UPICC by stating that: "[A]ccording to the Preamble of the UNIDROIT Principles, they are to be applied where the parties have agreed to have the Principles applied to their contract."[55]

3.2 Other forms of non-state law as an indicator

3.2.1 England

The English position concerning non-state law – prior to the advent of the *Rome I Regulation* and the English *Contracts (Applicable Law) Act* of 1990 – is of interest because of its consideration of religious laws in the form of Islamic law. This choice raised some debate in the case of *Musawi v RE*

51 Karayanidi "Russia" 828.

52 See Art 5 of the Ukrainian *Private International Law Code* (2005), which allows parties to choose the governing law of the contract.

53 See Vorobey "Ukraine" 880.

54 *Supply Contract Between Ukrainian Company and Kazakh Company* High Administrative Court of Ukraine 2a-9871/12/2670 22 April 2013. UNILEX 2013 http://www.unilex.info/principles/case/1710.

55 Kyic Commercial Court of Appeals, 14 May 2018 (910/19691/17). Translation and case provided by Vorobey "Ukraine" 880.

International (UK) Ltd.[56] The extent of party autonomy was clearly demonstrated in this case as far as the choice of non-state law, in the form of religious law, was concerned. The parties had, in the contract in dispute along with previous contracts between them, selected Shia Shari'ah law as the governing law applicable to their contracts.[57] There was no dispute as to which school of Shia law applied to their agreement, and there was also certainty as to the exact body of law that the parties wished to apply to their agreement.[58] The parties had entered into this agreement in 1987, prior to the 1990 Act coming into force.[59] It is common cause that if the 1990 Act had applied, the parties would have been able to choose only the law of a country as the governing law of the contract.[60] The question posed to the Court and the assertion made by the parties was that the English common law did in fact allow for the application of non-state law.[61] The Court referred to the 11th (1987) edition of *Dicey and Morris on the Conflict of Laws*. This was the last edition before the enactment of the 1990 Act, which stated that the parties could choose the law of a country as the law applicable to the contract.[62] The Court also referred authoritatively to the case *of Amin Rashid Shipping Corporation v Kuwait Insurance Co* and Lord Diplock's dictum therein, which left no room for argument insofar as the position under English common law was that only the law of a country could be selected as the governing law.[63] Lord Diplock states the position as follows:

> There is no conflict between this and Lord Simonds's pithy definition of the 'proper law' of the contract to be found in *Bonython v. Commonwealth of Australia* [1951] A.C. 201, 219 which is so often quoted, i.e., 'the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection.' It may be worthwhile pointing out that the 'or' in this quotation is disjunctive, as is apparent from the fact that Lord Simonds goes on immediately to speak of 'the consideration of the latter question.' If it is apparent from the terms of the contract itself that the parties intended it to be interpreted by reference to a particular system of law, their intention will prevail and the latter question as to the system of law with which, in the view of the court, the transaction to which the contract relates would, but for such intention of the parties have had the closest and most real connection, does not arise.

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56 *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch).

57 *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) 4.

58 *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) 4. This is the difference between this position and the case of *Shamil Banking of Bahrain v Beximco Pharmaceuticals Ltd* [2004] APP LR 01/28 insofar as in this case the body of rules that was to be applied was certain, while in the case of the choice of Shari'ah in *Beximco Pharmaceuticals*, it was not entirely clear which school of Shari'ah should have been applied to the agreement.

59 *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) 7.

60 See Art 2 of the Act which brings the *Convention on the Law Applicable to Contractual Obligations* (1980) (*Rome Convention*) into force.

61 *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) 4.

62 *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) 4.

63 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* 1984 AC 50 65.

> One final comment upon what under English conflict rules is meant by the 'proper law' of a contract may be appropriate. It is the substantive law of the *country* which the parties have chosen as that by which their mutual legally enforceable rights are to be ascertained, but excluding any renvoi, whether of remission or transmission, that the courts of that country might themselves apply if the matter were litigated before them.[64]

Returning to the *Musawi* case, Justice Richards makes a valid point towards the end of the decision on the applicable law. He determines that in section 46(1)(b) of the *Arbitration Act* of 1996 the parties may choose the law that would be applicable to the substance of their dispute or, if they so choose, that would be applicable in terms of such other considerations (rules of law) as are agreed by them or determined by the arbitral tribunal.[65] The "law" that is referred to here would be an indication that the English legislature had only the law of a country in mind.[66] This position would be consistent with the position in common law. The reference then to other considerations does not allow the parties to choose non-state law or even the *lex mercatoria*,[67] or as in the particular case above Islamic law. There is, however, a clear differentiation made by the courts and the legislature as to what is considered "law" and what would then decidedly not be considered as law. The English common law position has become more relevant in the light of England severing its legal ties with the European Union. Thus, the future applicability of the *Rome I Regulation* may be in doubt, which may open potential new applications for non-state law.

3.2.2 Switzerland[68]

Switzerland presents two very interesting cases on choice of non-state law which are based on the same set of facts. These cases were the judgment of the court of first instance which was then overturned on appeal.[69] The

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64 *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* 1984 AC 50 61-62. This position was confirmed in *Halpern v Halpern* 2006 WL 1020561. *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) 5 – the quotation is stated in full in this case.

65 *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) 5.

66 *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) 6.

67 *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch) 7; *Amin Rasheed Shipping Corporation v Kuwait Insurance Co* 1984 AC 50 61-62. This position was confirmed in *Halpern v Halpern* 2006 WL 1020561, see the argument above (my emphasis).

68 See Art 116(2) of the Swiss *Civil Code,* which states: "The contract shall be governed by the *law* chosen by the parties." The Code allows parties to choose the law governing the contract but makes no mention that this law could be the law other than the law of a state. The position taken by the courts in the case below is therefore interesting.

69 *Contract for the Transfer of a Football Player Between a Swiss Company and a Greek Company* Bundesgericht Appeal Judgment BGE 132 III 285 20 December 2005. UNILEX 2005 http://www.unilex.info/principles/case/1124. Also see Bonell *UNIDROIT Principles in Practice* 1126.

facts of the case will be set out briefly.[70] A Swiss company (a football club) entered into a contract with a Greek company (another football club) for the transfer of a football player from the Swiss club to the Greek club. The parties chose both the FIFA Rules and Swiss law as the governing law of the contract. The limitation period in terms of the FIFA rules was two years, while under Swiss law it was longer. A claim was brought by the plaintiff (the Swiss company) after four years, claiming for breach of contract. This raised a question as to the validity of the FIFA Rules as the governing law of the contract. The Court acknowledged that in Switzerland opinions were divided as to whether parties could choose a national or supranational law as the governing law of the contract. The prevailing view, according to the Court, was that the parties could choose non-state law as the governing law provided that the Rules were coherent and balanced as to content, had intrinsic equilibrium, comprehensiveness and general recognition.[71] The Court compared the FIFA Rules to the UPICC and deemed them applicable. The next question that the court had to deal with was whether the FIFA Rules would override Swiss law on this matter, with both rules functioning as the governing law of the contract. The Court deemed that they would and could be applied as *lex specialis*. The FIFA Rules were thus applied as the governing law of the contract.

The decision by the *Handelsgericht* (the Swiss lower court) was overturned by the *Bundesgericht* (the Swiss Court of Appeal) a year later (2005).[72] It was decided in this case that the FIFA Rules, as the rules of a private organisation, could not take precedence over a domestic law.[73] The Rules could be incorporated into the contract only by reference. An incorporation as contractual terms would mean that the Rules functioned below the level of governing law. Where a conflict arises between the governing law and the contractual terms of the contract, the governing law will prevail as mandatory rules.[74]

A few comments on the cases above are necessary. Firstly, the approach taken by the Swiss courts is interesting. Both courts seriously considered whether the parties may choose non-state law as the governing law of the contract. The court *a quo* came to the decision that it was applicable as the

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70 *Contract for the Transfer of a Football Player Between a Swiss Company and a Greek Company* Handelsgericht St Gallen 12 November 2004. UNILEX 2004 http://www.unilex.info/principles/case/1123 (translations courtesy of Dr Karl Marxen); see further Bonell *UNIDROIT Principles in Practice* 1084.

71 Bonell *UNIDROIT Principles in Practice* 1126.

72 UNILEX 2005 http://www.unilex.info/principles/case/1124 (translations courtesy of Dr Karl Marxen). See also Bonell *UNIDROIT Principles in Practice* 1126.

73 Para 1.4 of the judgment (UNILEX 2005 http://www.unilex.info/principles/case/1124).

74 Para 1.4 of the judgement (UNILEX 2005 http://www.unilex.info/principles/case/1124).

governing law of the contract even though there is no indication in the Swiss *Federal Code of Private International Law* that such a choice would be upheld.[75] Article 116 of the Code simply states that "the contract will be governed by the law chosen by the parties". Both courts considered that there was no certainty in Swiss law on whether this provision could include an interpretation that allowed for the choice of non-state law.[76] The literature on this question is divided in Swiss law, and indeed seems to be in favour of its application. In contrast, the German literature which the Court references is against the position.[77] The highest Swiss court (the *Bundesgericht*) had previously come to the conclusion that rules made by private organisations could constitute *rechtsnormen* even if they were detailed and expansive.[78]

It is interesting that the Court did not summarily dismiss the idea that rules of law could apply as the governing law of the contract. The court *a quo* did in fact determine that if certain criteria were met, then the non-state rules could indeed have functioned as the governing law of the contract. If non-state rules – the FIFA Rules in this case – did function as the governing law of the contract, the outcome of the case would have been different. The criteria that the court *a quo* referred to bear a resemblance to the criteria advocated by Adams.[79] These criteria are the following: (i) the rules should be drafted by a body which has standing among the relevant community; (ii) the parties must intend these rules to be applicable as the governing law of their agreement; (iii) the rules must be generally accepted on an international, regional or supranational level; (iv) the rules must be comprehensive enough to satisfactorily address the particular aspect with which they are concerned and; (v) where the rules are drafted by a particular body or institute the rules must be intended for application as the governing law of the agreement.

If the criteria above were applied to the FIFA Regulations and the Status and Transfer of Players (the latest version of the rules that would have been applied above),[80] then it is *prima facie* likely that they would have met these criteria and could therefore have been deemed, on a principled basis, as

75 Swiss *Federal Code of Private International Law* of 1987.

76 The Court refers to it here as "die Wahl anationaler Normen" (translations courtesy of Dr Karl Marxen). The Court relies on two commentaries in this regard: Bucher and Bonomi *Droit International Privé* 258*,* and Vischer, Huber and Oser *Internationales Vertragsrecht* 69. The commentaries were considered during the law-making process in 1980. The drafting committee seems to have concluded that parties cannot choose non-state law as the governing law of the contract.

77 Reithmann and Martiny *Internationales Vertragsrecht* 79, as referred to by the Court.

78 See para 1.3 of the current judgment at UNILEX 2005 http://www.unilex.info/principles/case/1124.

79 See Adams 2024 *TSAR* 300-301.

80 FIFA 2022 https://digitalhub.fifa.com/m/620d0240c40944ed/original/Regulations-on-the-Status-and-Transfer-of-Players-October-2022-edition.pdf.

suitable as the governing law of the contract. If that were to have been the case, the domestic provisions of Swiss law, which were not mandatory in the international sense, could not have overruled Article 25(5) of the FIFA Rules and the outcome of the dispute would have been different. This case highlights the significance of the difference between the governing law of the contract and incorporation as contractual terms by reference.

4 Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention)

The Mexico City Convention has been in force for over 20 years.[81] It was originally signed by Bolivia, Brazil, Mexico and Uruguay. Article 28 of the Convention states that "the Convention shall enter into force for the ratifying states on the thirtieth day following the date of deposit of the second instrument of ratification". The instruments were deposited by both Mexico and Venezuela in 1996. The application of non-state law in Mexico and Venezuela is therefore to some extent based on the *Mexico City Convention*.[82] Despite the length of its service, the Convention is considered to be a failure due to the fact that only Mexico and Venezuela have ratified it.[83] The Secretariat for Legal Affairs of the Organisation of American States (OAS) proposed, as recently as March 2016, the widespread ratification of the *Mexico City Convention*.[84] This proposal was tentatively endorsed by Brazil, Canada, Chile, Jamaica, Mexico, Panama, Paraguay, Uruguay and the United States.

Despite the lack to date of ratification by American states, the Convention has still been widely held to be a progressive instrument.[85] In South America, at the time of the drafting of the *Mexico City Convention*, the lack of acceptance was largely due to the historical reticence towards party autonomy of those countries.[86] The *Mexico City Convention*, which predated the *Hague Principles* by almost two decades, was the first instrument of its kind to endorse the application of non-state law. However, whether non-state law could be selected by the parties themselves or whether it could be designated as the governing law only by a court or arbitral tribunal is still an issue of debate.[87]

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81 The Convention was concluded in 1994 but entered into force on 15 December 1996 as per OAS 2016 http://www.oas.org/juridico/english/sigs/b-56.html.

82 Moreno Rodriguez and Albornoz 2011 *J Priv Int L* 492.

83 The Convention is in force in both Mexico and Venezuela – see Moreno Rodriguez and Albornoz 2011 *J Priv Int L* 491-492.

84 See OAS 2016 https://www.oas.org/en/sla/iajc/docs/technical_secretariat-dil-supporting_documents_contracts.pdf.

85 Moreno Rodriguez and Albornoz 2011 *J Priv Int L* 492.

86 Juenger 1994 *Am J Comp L* 386-387; Nygh *Autonomy in International Contracts* 9; Moreno Rodriguez and Albornoz 2011 *J Priv Int L* 493.

87 Moreno Rodriguez and Albornoz 2011 *J Priv Int L* 502.

The *Mexico City Convention* does not explicitly allow the choice of non-state law. Article 7 merely provides that "the contract shall be governed by the law chosen by the parties". However, Article 9 provides that in the absence of a choice of law by the parties, "the court may take into account the general principles of international commercial law recognised by international organisations". Article 10 states: "In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case."

The possibility of the application of non-state law in the absence of choice of law in Articles 9 and 10 would clearly be in conflict with the limitation of the principle in Article 7 to include choice of state law only. According to Juenger,[88] the father of the *Mexico City Convention*, and modern commentators,[89] Article 7 is sufficiently wide to include the choice of non-state law. If this is indeed the case, the *Mexico City Convention* would be even more liberal than the *Hague Principles* in this regard, as no qualifiers or requirements are provided.

5 Conclusion

The purpose of this article was to investigate the allowance for choice of non-state law in states globally. The article begins with the presumption that most of the world's states do not allow for the application of non-state law. This was confirmed by the recent study undertaken by Girsberger, Kadner-Graziano and Neels in the form of the recently published manuscript on choice of law in international commercial contracts. The studies in this book independently confirm that while most states allow for parties to choose the applicable law, this choice does not extend to a choice of non-state law. There are only four countries globally that expressly allow for such a choice through codifications in their legislation (Bahrain, Paraguay, the Seychelles and Venezuela). In other countries it is necessary to investigate the decisions of the national courts in order to gauge the likelihood of the acceptance of a such a choice.

The decisions of the national courts reveal that in some countries a choice of non-state law may be allowed by the courts, but this is dependent on the nature of the instrument itself and the development and the openness of the courts to the application of the instrument. The nature of the instrument is a consideration that can been seen in the court practice of states. Colombia,

88 Juenger 1997 *Am J Comp L* 204.

89 Moreno Rodriguez and Albornoz 2011 *J Priv Int L* 505. Their main argument is based on the fact that it would be "incoherent, inconsistent, contradictory and inexplicable" not to allow parties to choose non-state law, while allowing a court to apply it in the absence of choice.

Brazil, Russia and the Ukraine, all of which show indications of allowing for a choice of non-state law, would appear to allow for its application on the basis of particular instruments only – in those cases specifically the CISG and the UPICC. One could safely assume that the allowance in those courts goes only as far as those instruments. One may, however, draw an inference that there are certain characteristics of those instruments that allow the courts of those states to accept their application as the governing law of the agreement. One could view the acceptance of these instruments in these countries as opening the door to further acceptance of other forms of non-state law. The cases discussed in Switzerland and England would also appear to demonstrate the idea outlined above. The application of the FIFA Rules in Switzerland was considered to be only an incorporation by reference because they were the rules of a private organisation and could not overrule domestic law. The finding in the appeal court in this case differed from the findings in the court *a quo*, where the FIFA Rules were considered to be of the same nature as the UPICC and should therefore have been applied as the governing law of the agreement. The consideration of Islamic law in England again demonstrated that not all forms of non-state law are the same and courts will make decidedly different choices on the basis of the type of instrument involved. The court went further in its consideration of non-state law in England, however, stating almost categorically that only state law could be considered law for the purposes of private international law in England.

Before this article is concluded there is one further consideration that should be brought to the fore. This is that most of the codes referred to or analysed above allow the parties to choose the law that governs the contract. The central reason why non-state law cannot be considered under these provisions is that non-state law is not considered to be law for the purposes of the codification.

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List of Abbreviations

Am J Comp L	American Journal of Comparative Law
CISG	Vienna Sales Convention on the International Sale of Goods
FIFA	Fédération Internationale de Football Association
OAS	Organisation of American States
PELJ	Potchefstroom Electronic Law Journal
PIL	private international law
J Priv Int L	Journal of Private International Law
NILR	Netherlands International Law Review

TSAR	Tydskrif vir die Suid-Afrikaanse Reg
Unif L Rev	Uniform Law Review
UPICC	UNIDROIT Principles on International Commercial Contracts
Yrbk Priv Intl L	Yearbook of Private International Law