

Non-State Law in the Hague Principles on Choice of Law in International Contracts

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Abstract: Article 3 of the Hague Principles on Choice of Law in International Contracts is the first quasi-legislative text on choice of law to allow explicitly for the choice of non-state law also before state courts. This paper, forthcoming in a Festschrift, puts the provision into a broader context, discusses their drafting history and particular issues involved in their interpretation. It also provides a critical evaluation. Article 3 does not respond to an existing need, and its formulation, the fruit of a compromise between supporters and opponents of choosing non-state law, makes the provision unsuccessful for state courts and arbitrators alike.

I. Introduction

Are we witnessing a revolution in choice of law for contracts? The Hague Conference on Private International Law is about to finalize work on so-called ‘Principles on Choice of Law in International Contracts’ (hereinafter called Hague Principles).¹ Formally, the novelty of the Hague Principles lies in their character as nonbinding soft law instead of, as has traditionally been the case at the Hague Conference, a Convention. Their substantive novelty is somewhat hidden, but—perhaps—just as important. After laying down rather uncontroversially, in Article 2(1), that “[a] contract is governed by the law chosen by the parties”, Article 3 introduces a definition of law that is novel, at least for state courts:

Article 3 – Rules of Law

Under these Principles, the law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.²

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¹ For the text, preparatory materials, and a bibliography, see http://www.hcch.net/index_en.php?act=text.display&tid=49.

² For this formulation, see *Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts* (November 2013) 18, available at http://www.hcch.net/upload/wop/princ_com.pdf. The text, together with the Draft Commentary, will be proposed to the Council on General Affairs and Policy in early 2014. The previous version of Article 3 had a slightly different wording:

“Rules of law,” as opposed to “law,” has traditionally been understood to include non-state law, and this is intended here, too. What the Hague Conference thereby introduces is the ability for parties to choose non-state law as the law applicable to their contract. Notably, such a choice is supposed to designate the applicable law in the sense of choice of law, not as mere incorporation into the contract.³ This is an important difference. If a body of rules is merely incorporated, the whole contract (including the incorporated rules) remains governed by a state’s law, including its mandatory rules. Where, by contrast, a body of rules is chosen in the sense of choice of law, that body becomes the applicable contract law and, at least in principle, no other contract law governs.⁴

In international commercial arbitration, the choice of non-state law has long been possible (though it has not been used as much as some proponents make us believe.)⁵ For state courts, by contrast, allowing for the choice of non-state law represents a novelty. Choice of non-state law is excluded in practically every national system of choice of law.⁶ Before courts, the choice of non-state law has played virtually no role, apart from limited exceptions concerning religious law, and isolated decisions rejecting the validity of the choice of non-state law like sports rules,⁷ ICC rules,⁸ or the UPICC.⁹ Where it is discussed it is rejected. Attempts to

In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.

³ Geneviève Saumier and Lauro Gama Jr, ‘Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts’ in Diego P. Fernández Arroyo & Juan José Obando Peralta (eds), *El derecho internacional privado en los procesos de integración regional* (San José, Editorial Jurídica Continental, 2011) 41, 44; Jan L. Neels and Eesa A. Fredericks, ‘Tacit Choice of Law in the Hague Principles on Choice of Law in International Contracts’ (2011) 44 *De Jure* 101, 109.

⁴ In practice, even if parties choose a law, the law that would have applied without the choice still plays an important role. See Ralf Michaels, ‘Die Struktur der kollisionsrechtlichen Durchsetzung einfach zwingender Normen’ in Ralf Michaels and Dennis Solomon (eds., *Liber Amicorum Klaus Schurig* (Munich, Sellier 2012) 191.

⁵ See Felix Dasser, ‘Mouse or Monster? Some Facts and Figures on the *lex mercatoria*’, in Reinhart Zimmermann (ed), *Globalisierung und Entstaatlichung des Rechts* (Tübingen, Mohr) 129.

⁶ Ralf Michaels, ‘Preamble I’ in Stefan Vogenauer and Jan Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts* (Oxford, Oxford University Press, 2009) 21, nos 49-63. The only state that allows for the choice of non-state law that I am aware of is Oregon; see *ibid* at no 58. On the Inter-American Convention, see *infra* section **I.C.**

⁷ Swiss Federal Court, DFT 20 December 2005, 132/2005 III 285, [2006] *Archiv für Juristische Praxis* 615, also available at <http://www.unilex.info/case.cfm?pid=2&id=1124&do=case>.

allow for such a choice—first in the Interamerican Conference, then in the reform of the European Rome I Regulation—have, so far, been unsuccessful. And indeed, it is not clear why we should expect there to be more interest before state courts—why should parties want to opt out of state-made law, but not out of state-made adjudication?

In this article, I try to do three things. The first is to lay out, in relative detail, the context for the provision, as well as its drafting history. Art. 3 of the Hague Principles is the latest intervention in the debate on the choice of non-state law; it can be better understood against this history. My second goal is doctrinal: I attempt to give guidance as to some of the issues of detail that are left open by the Principles, while at the same time maintaining a critical stance towards them. The third goal is a critical evaluation. I argue that Art. 3 is emblematic of a dangerous tendency of law made to educate parties as to what would be good for them.

II. Choice of Non-State Law in Transnational Codifications— Predecessors of the Hague Principles

The question whether non-state law can be chosen as the applicable law is, in the history of choice of law, a relatively recent one. That is not surprising, given that even party autonomy at large—the ability of the parties to choose the applicable law—is a very recent introduction. Party autonomy in the modern sense really arose only in the 19th century and became paradigmatic relatively late in the twentieth century.¹⁰ Still today, some legal systems, especially in Latin America, reject party autonomy altogether, at least in principle.¹¹

For a long time, discussions on party autonomy were thus, as a matter of course, restricted to state laws. The idea that secular non-state law could be chosen (and thus all state law deselected) seems to have come up in the context of discussions, especially among French law professors and practitioners, on a new *lex mercatoria*, which was supposed to enable either a *contrat sans loi* (that is a self-sufficient contract that requires no recourse to any other body of law than the contract

⁸ Tribunale di Padova, Sezione di Este 11 January 2005, available at <http://www.unilex.info/case.cfm?pid=2&id=1004&do=case>; for discussion, see Monique Luby and Sylvaine Poillot-Peruzzetto, 'Chronique: Droit international et européen' [2006] *Jurisclasseur Périodique (La semaine juridique)* 157.

⁹ Tribunale di Padova (n 8) (obiter).

¹⁰ See the extensive analysis in Yuko Nishitani, *Mancini und die Parteiautonomie im internationalen Privatrecht* (Heidelberg, Winter, 2000).

¹¹ See María Mercedes Albornoz, 'Choice of Law in International Contracts in Latin American Legal Systems' (2010) 6 *Journal of Private International Law* 23; Mónica Sofía Rodríguez, 'El principio de la autonomía de la voluntad y el Derecho Internacional Privado: asimetrías en su reconocimiento y necesidad de armonización legislativa en el Mercosur' (2011) 15 *Revista Científica de UCES* 15 112.

itself),¹² or the choice of an alleged transnational customary contract law, the so-called *lex mercatoria*.

The origins are of course complex, but it seems that we can recognize two interests underlying this support for non-state law. One was a professorial desire, emerging from a long academic tradition particularly in Europe, to “privatize” private law, by removing its source from the state and making it independent.¹³ Detachment from the state seems to enhance the private character of private law. In connection with this, it could maximize party autonomy, which is sometimes viewed as an unqualified good. A universal transnational private law would represent the return of an old dream, that of the *ius commune*. Diversity of laws is often viewed as undesirable—even by private international lawyers, who often view private international law as a second best solution that would be made unnecessary through the adoption of some universal law

The other was a practitioners’ interest in liberating transnational contracts from interference by states with their mandatory laws, a market-oriented project linked to the rise of international arbitration as an adjudicatory system liberated from the state. Some practitioners support the idea of a law that is, to the farthest extent possible, detached from the state, and thus guarantees maximum freedom to parties, and maximum business to their lawyers. This latter interest in a privatized substantive law was always closely linked to an interest in privatized adjudication (arbitration).

A. UNCITRAL Arbitration Rules and other Arbitration Texts

It is indeed in international arbitration that these ideas for the choice of non-state law had some success in international arbitration. Art. 28 of the UNCITRAL Model Law on International Commercial Arbitration allows for the choice of “rules of law,” which is meant to comprise law other than state law.¹⁴ “Rules of law” in the same sense can be chosen also under many other national and nonnational arbitration regimes.¹⁵ Indeed, in arbitration, *lex mercatoria* and other non-state law have occasionally been selected, though not frequently.¹⁶

¹² Léna Gannagé, ‘Le contrat sans loi en droit international privé’ (2007) 11.3 *Electronic Journal of Comparative Law*, <<http://www.ejcl.org/113/article113-10.pdf>>.

¹³ See Nils Jansen and Ralf Michaels, ‘Private Law and the State. Comparative Perceptions, Historical Observations, and Basic Problems’, in Nils Jansen and Ralf Michaels (eds), *Beyond the State? Rethinking Private Law* (Tübingen, Mohr, 2009) 15; also in (2007) 71 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 345.

¹⁴ *UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration* (2012) 121; for discussion, see Gama and Saumier (n 3) 46 ff.

¹⁵ Gama and Saumier *ibid*.

¹⁶ See Geneviève Saumier, ‘Designating the UNIDROIT Principles in International Dispute Resolution’ (2012) 17 *Uniform Law Review* 533, 539.

Before state courts, by contrast, the choice of *lex mercatoria* as applicable law has never been allowed.¹⁷ Certainly, one argument was that conflict of laws had traditionally (at least in the West and at least since the rise of the nation state) designated only state laws as applicable.¹⁸ However, there were also practical concerns having to do with the function of courts. State court decisions are published and may serve as precedent. This places greater requirements on doctrinal accuracy. And one problem with non-state law like the *lex mercatoria* has always been that its content could not be established with sufficient certainty.¹⁹

B. UNIDROIT Principles of International Commercial Contracts (1994) and Principles of European Contract Law (1995)

Such uncertainty is not a problem where the non-state law in question comes in the form of legal rules. This was, from the beginning, a great selling point for the UNIDROIT Principles of International Commercial Contracts (UPICC), which appeared, in a first edition, in 1994. Mostly, the UPICC are a text of substantive law; they only present themselves as a modern Restatement of the *lex mercatoria*, or of transnational commercial law.²⁰ They also include, however, in their Preamble, rules on when the Principles should be applicable, including a rule that “[t]hey shall be applied when the parties have agreed that their contract be governed by them.” The Principles of European Contract Law, whose first edition appeared in 1995, have a conflicts rule quite similar to the Preamble of the UPICC in their Article 1:101.²¹ These are, perhaps, the earliest examples of provisions in transnational legislative texts that explicitly endorse the choice of non-state law without restriction to arbitration. Their rules on applicability have created disproportionate interest in scholarship—quite likely, more ink has been spilled on the single question of whether the Principles can be chosen as applicable law than on all of their

¹⁷ It is sometimes claimed that state courts recognize *lex mercatoria* when they enforce arbitral awards that have been rendered on the basis of *lex mercatoria*. But this proves little, given that arbitral awards are regularly enforced without revision of the applicable law.

¹⁸ See Ralf Michaels, ‘The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism’ (2005) 51 *Wayne Law Review* 1209, 1244ff.

¹⁹ For a similar argument as regards religious law, see *Shamil Bank of Bahrain EC v. Beximco Pharmaceuticals Ltd and others* [2004] EWCA Civ 19, nos 51-52; see Adrian Briggs, *Agreements on Jurisdiction and Choice of Law* (Oxford, Oxford University Press, 2008) 386, 387f.

²⁰ Michael Joachim Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts* (3rd edn, 2005), esp. 9 ff.

²¹ Article 1:101 - Application of the Principles

(2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.

substantive provisions combined.²² For the PECL, the question has lost some interest, as they merged subsequently into predecessors of an EU instrument of contract law.²³ By contrast, for the UPICC the question remains relevant.

The UPICC are not binding law. Their Preamble is, therefore, a rather curious rule, because it attempts something logically impossible: the UPICC attempt to make themselves applicable, just like a bootstrap.²⁴ Nonetheless, the UPICC have had some success worldwide: they have occasionally been chosen as the applicable law (although, as far as can be seen, less frequently than their promoters suggest), and they are quite frequently referred to in judicial opinions.²⁵ Their choice has not been held valid before any state court, however. This is so although many commentators have argued that the UPICC are “law” in every relevant regard, and must therefore be a possible object of choice. But this has always been a non sequitur: even if the UPICC are indeed law in the sense of legal theory, this is not binding for the sense of the term “law” in a choice-of-law rule. Here, the matter is one of statutory interpretation, and confinement to state law is usually in accordance with legislative intent.

C. Inter-American Convention on the Law Applicable to International Contracts (1994)

The first treaty that allows, according to some, for the choice of non-state law as the applicable law before state courts was the Inter-American Convention on the Law Applicable to International Contracts, also called the Mexico Convention. Non-state law was actively pushed by some participants in the negotiations, in particular Fritz Juenger. It does indeed appear in the Convention, though not in direct connection to party choice. Thus, Art. 9(2)(2) requires the judge to look also to “general principles of law” when the parties have *not* chosen a law, but this hardly suggests that parties should be able to choose such general principles. In addition, Art. 10 gives a role to guidelines, customs, principles of international commercial law and commercial usage and practice, but that role is merely supplementary.²⁶

²² A comprehensive bibliography would be impossible. For a great number of publications, see the bibliography for the Preamble of the UPICC at www.unilex.info, and the bibliography in Vogenauer and Kleinheisterkamp (n 6) 1201.

²³ See Eric Clive, ‘The Lasting Influence of the Lando Principles’ in Michael Joachim Bonell et al (eds), *Liber Amicorum Ole Lando* (Copenhagen, DJØF, 2012) 69, 71. For a (critical) perspective on the trajectory from EPCL to European Sales Law, see Horst Eidenmüller et al, ‘The Proposal for a Regulation on a Common European Sales Law: Deficits of the Most Recent Textual Layer of European Contract Law’ (2012) 16 *Edinburgh Law Review* 301.

²⁴ See Ralf Michaels, ‘Privatautonomie und Privatkodifikation – Zu Anwendbarkeit und Geltung allgemeiner Vertragsrechtsprinzipien’ (1998) 62 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 580, 613.

²⁵ See Michaels (n 6) nos 88-117.

²⁶ Similarly now Articles 13(4) and 51 of the new Uruguayan Code for Private International Law. See Didier Opertti Badán and Cecilia Fresnedo de Aguirre, ‘The Latest Trends in Latin American Private International Law: The Uruguayan 2009

Where the Convention talks about party autonomy, by contrast, non-state law does not seem to be available. Article 7(1)(1) reads simply: ‘The contract shall be governed by the law chosen by the parties.’ Allowing parties to choose the applicable law was already a novelty for many countries in Latin America, where party autonomy is still viewed by many with suspicion.²⁷ Nonetheless, some commentators suggest that the provision is even more far-reaching: for them, “Law” has been read to include non-state law.²⁸ This would be rather unusual; in most other choice-of-law statutes, “law” is restricted to the law of states, and Article 17 defines law as “the law current in a State, excluding rules concerning conflict of laws.”. The Spanish version has “derecho” instead of “ley,” which could suggest a different meaning, but this seems by no means conclusive. In practice, this may matter little, since the Convention has been ratified only by Mexico and Venezuela.²⁹

General Law on Private International Law’ (2009) 11 *Yearbook of Private International Law* 305; eid., ‘El derecho internacional en el Proyecto de Ley general de derecho internacional privado del Uruguay—Una prima aproximación’ in Jürgen Basedow, Diego P Fernández Arroyo, José Antonio Moreno Rodríguez (eds), *Cómo se codifica hoy el derecho comercial internacional?* (Asunción, CEDEP/Thomson Reuters/La Ley Paraguaya, 2010) 385, 390-91, 410 et passim. According to Cecilia Fresnedo de Aguirre, ‘Party Autonomy—A Blanc Cheque?’ (2012) *Uniform Law Review* 655, 665, Article 13(4) reaches “the same conclusion” as Article 3 of the Hague Principles, which seems far-fetched, given that Article 13(4) does not deal with party choice.

²⁷ Supra n 11.

²⁸ Friedrich K. Juenger, ‘The Inter-American Convention on the Law Applicable to International Contracts; Some Highlights and Comparisons’ (1994) 42 *American Journal of Comparative Law* 381, 392; id., ‘Contract Choice of Law in the Americas’ (1997) 45 *American Journal of Comparative Law* 195, 204; Gonzalo Parra-Aranguren, ‘The Fifth Inter-American Specialized Conference on Private International Law, Mexico City, 14–18 March, 1994’ in Alegría Borrás et al (eds), *E Pluribus Unum: Liber Amicorum Georges AL Droz* (The Hague et al, Kluwer Law International, 1996) 299, 308; José Luis Siqueiros, ‘Los Principios de UNIDROIT y la Convención Interamericana sobre el derecho aplicable a los contratos internacionales’ in Instituto de Investigaciones Jurídicas (ed), *Contratación internacional: Comentarios a Los Principios sobre los Contratos Comerciales Internacionales del UNIDROIT* (Mexico, Universidad Nacional Autónoma de México, 1998) 217, 227; for a constitutional argument, see Lauro Gama, *Contratos Internacionais à luz dos Princípios do UNIDROIT 2004: Soft Law, Arbitragem e Jurisdição* (Rio de Janeiro, Renovar, 2006) 434-8; for extensive discussion, see Sven Schilf, *Allgemeine Vertragsgrundregeln als Vertragsstatut* (Tübingen, Mohr, 2005) 347–359; José Antonio Moreno Rodríguez and María Mercedes Albornoz, ‘Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts’ (2011) *Journal of Private International Law* 491, 502-7.

²⁹ <http://www.oas.org/juridico/english/sigs/b-56.html>.

D. Rome I Regulation (2008)

For some time, it looked as though the choice of non-state law would become available in a major transnational text. In a Green Paper of 2003, the European Commission considered enabling parties to choose ‘general principles of law’ as applicable law.¹²⁷ The background to the rather surprising proposal lay in other areas of European law: At the time, there were discussions about an optional Community instrument, which, to be effective, had to be electable. It was felt that a private international law text should formulate this possibility in a more abstract manner. Reactions to the proposal were mixed: While many academics were positive, professional associations and practitioners remained, by and large, more hesitant.³⁰ Nonetheless, a 2005 proposal for a new Regulation provided, in the first sentence of its Art 3(2), that ‘[t]he parties may also choose as the applicable law the principles and rules of the substantive law of contract recognized internationally or in the Community’.³¹ It was not, however, adopted in the final version of the Regulation.³² Recital 13 merely states that such general principles can be incorporated into the contract by means of freedom of contract under the applicable (state) law. A reason for the change of heart may well have been that the question had lost much relevance, once it was clear that a Europeanized contract law could be made applicable by other means.³³

III. The Genesis of Article 3 of the Hague Principles

In result, then, attempts so far to introduce a choice of non-state law have been unsuccessful, at least as regards courts. The UNCITRAL Model Law on International Commercial Arbitration and similar texts apply only in arbitration. The Mexico Convention contains no clear endorsement of the choice of non-state law and in any event has been largely unsuccessful so far. The Preamble of the UPICC has garnered much academic support but no followers among legislators or courts. The Rome I Proposal in the relevant parts did not become law.

³⁰ All reactions are available at http://ec.europa.eu/justice_home/news/consulting_public/rome_i/news_summary_rome1_en.htm.

³¹ Proposal for a Regulation of the European Parliament and the Council on the Law applicable to contractual obligations (Rome I), COM (2005) 650 final (15 December 2005) 5. See Zheng Sophia Tang, ‘Non-state law in party autonomy – a European perspective’ (2012) 5 *International Journal of Private Law* 22, 26.

³² See Rome I Regulation, Art. 3(1) and recital 13; Tang (n 31) 27.

³³ See now Sixto A Sánchez-Loreno, ‘Common European Sales Law and Private International Law: Some Critical Remarks’ (2013) 9 *Journal of Private International Law* 191; Gerhard Dannemann, ‘Choice of CESL and Conflict of Laws’ in Gerhard Dannemann and Stefan Vogenauer (eds), *The Common European Sales Law in Context—Interactions with English and German Law* (Oxford, Oxford University Press 2013) 21.

The Hague Principles start very much where the unsuccessful attempts for the Rome I Regulation left off. They represent another attempt to introduce the choice of non-state law in an international instrument. In order to understand the role that non-state law plays in them, it may be helpful to look in some more detail at the genesis of their Article 3, in the context of the general nature of the Hague Principles

A. Challenges for the Hague Conference

The Hague Conference on Private International Law, founded in 1893, is the most venerated institution for the international unification of private international law. In one way, it is a very successful organization—it counts 75 members from all five continents (74 states and the European Union), and many of its Conventions have been very successful. In another way, however, the Conference and its preferred instrument, the Convention, are in a crisis.

This crisis has several aspects. One is the fact that membership in the Conference has greatly increased; it now comprehends states with vastly different legal and economic conditions. A related problem is that member states are increasingly hesitant to ratify Conventions. In addition, the Hague Conference is no longer the unquestioned leader of private international law developments, now that the European Union has become very active in the field.³⁴

And although the Hague Conference has had success in the area of administrative coordination especially in family law, it has never been very successful with choice-of-law regimes. Choice of law for contracts is a prime example. The Hague Principles are not the first project of the Hague Conference devoted to choice of law in contracts. Conventions of 1955 and 1986 already addressed the law applicable to contracts for the international sale of goods.³⁵ The 1955 Convention went into force in 1964, the 1986 Convention never did. Neither of them addressed the choice of non-state law. Chances for ratification of a general choice of law convention, considered in the 1980s, were considered slim (not least because the EC member states had just concluded the Rome Convention and saw little need for a global treaty); the project was abandoned.³⁶ At the same time that the European Union has a comprehensive code on choice of law for contracts in the Rome I Regulation (albeit one in which, as discussed, non-state law cannot be chosen), international unification through hard law seems nearly impossible. Even the Exclusive Choice-of-

³⁴ See Jürgen Basedow, 'Was wird aus der Haager Konferenz für Internationales Privatrecht?' in Thomas Rauscher and Heinz-Peter Mansel (eds), *Festschrift für Werner Lorenz zum 80. Geburtstag* (Munich, Sellier, 2001) 463; Michael Traest, 'Development of a European Private International Law and the Hague Conference' (2003) 5 *Yearbook of Private International Law* 223.

³⁵ See Ole Lando, 'The 1955 and 1985 Hague Conventions on the Law Applicable to the International Sale of Goods' (1993) 57 *Rabels Zeitschrift für ausländisches und internationales Privatrecht* 155.

³⁶ Hans van Loon, 'Feasibility study on the law applicable to contractual obligations, Preliminary Document E of December 1983' in *Hague Conference of Private International Law: Proceedings of the Fifteenth Session, vol. I* (1983) 98.

Court Convention, which is, in its content, fairly uncontroversial has so far proven very hard to even ratify, let alone implement.³⁷

B. Principles as a Response

The combination of these challenges is what led the Hague Conference to adopt a new form for their contracts project: soft instead of hard law, principles instead of a convention. The UPICC provided a model in this regard.³⁸ Several years ago, Herbert Kronke, then director of UNIDROIT, floated the idea of principles of choice of law, though what he had in mind at the time was a more comprehensive project.³⁹ The Hague Conference has now taken up this idea.⁴⁰ On recommendation by the Council,⁴¹ its new text on choice of law in contracts comes as a non-binding text, notably as Principles, rather than as a Draft Convention. Their Preamble, which is modeled closely on that of the UPICC, suggests that they can be used as a model for legislation, or, by courts or arbitrators, as a supplementary source for interpretation. This suggests that the Hague Preamble does not aim to fulfil the third of the functions of the UPICC, namely its Restatement function—to serve, as an accurate description of the current state of the law.⁴² Their main function is rather to serve as a model for lawmaker (predominantly perhaps in Latin America).⁴³ In addition, they are supposed to play a supplementary role in the interpretation of existing regimes. Unlike the UPICC, the Hague Principles do not suggest that they themselves can be chosen by the parties (in line with the general opposition to allowing parties to choose the applicable choice-of-law rules).

The advantages should be obvious: Principles do not have to go through a difficult ratification process; instead, it can be hoped that they can influence legislators and

³⁷ See Marta Pertegás and Louise Ellen Teitz, 'Prospects for the Convention of 30 June 2005 on Choice of Court Agreements' in Permanent Bureau of the Hague Conference on Private International Law (ed), *A Commitment to Private International Law—Essays in Honour of Hans van Loon* (Cambridge et al, Intersentia, 2013) 465.

³⁸ Permanent Bureau of the Hague Conference, *Consolidated Version of Preparatory Work Leading to the Draft Hague Principles on the Choice of Law in International Contracts* (Prel Doc No 1, Oct 2012) no 7; Neels and Fredericks (n 3) 102.

³⁹ Herbert Kronke, 'Most Significant Relationship, Governmental Interests, Cultural Identity, Integration: "Rules" at Will and the Case for Principles of Conflict of Laws' (2004) 9 *Uniform Law Review* 467.

⁴⁰ They are not the only such project. For another project, see Spyridon V Bazinas, 'Towards Global Harmonization of Conflict-of-Laws Rules in the Area of Secured Financing: The Conflict-of-Laws Recommendations of the UNCITRAL Legislative Guide on Secured Transactions' in *Essays in Honour of Hans van Loon* (n 37) 1.

⁴¹ Conclusions and Recommendations adopted by the Council on General Affairs and Policy of the Conference (31 March – 2 April 2009), and in particular "Choice of law in international contracts", p 1.

⁴² For this function of the UPICC (and its limitations), see Michaels, Preamble I (n 6) nos 3-4.

⁴³ *Consolidated Version* (n 38) no 8.

courts in a more informal way. Their reception need not happen wholesale; lawmakers may pick and choose the provisions they like. In theory, their content can be changed more easily (although experience with the UPICC suggest that such changes will be rare).

However, these advantages come with disadvantages. The most obvious disadvantage arises from their nonbinding character: unlike a Convention, the Hague Principles have no binding force; they must convince before they can become relevant. Of course, this is true also for Conventions. But Conventions at least carry the weight that they have been negotiated by delegates of the ratifying country. It is not clear that a state would be more likely to adopt a text if it does not come as a Treaty.

A more pressing potential disadvantage concerns the negotiating process: Whereas negotiators drafting a Convention with a view towards ratification will, to a large extent, have the positions of potential ratifiers in mind, negotiators of a nonbinding instrument may feel less constricted. They are not subject to instructions or expectations to the same degree. As a consequence, they may hope that the quality of the text they agree on will alone suffice to make them attractive. This may occasionally be the case. Sometimes, legal rules are successful precisely because they are developed without direct political pressure from constituents. But the danger exists, instead, that negotiators will veer too far from the mainstream to produce a text that is accepted.

The difference in processes should not be exaggerated in this case. For work on the Hague Principles, the Hague Conference followed a semi-official procedure and organized the Special Commission as a diplomatic conference. Representatives from several governments were given relatively detailed instructions, and the EU representative in particular opposed Article 3 with vehemence. Still one may speculate that a government should be more in the content of a treaty it plans to enter into than of Principles that have no binding character.

C. Drafting History of Article 3

All of this seems especially relevant as concerns the drafting of Article 3. The question whether non-state law could be chosen must have been on the mind of negotiators from the beginning, in light of experiences with the Rome I Regulation drafting process.⁴⁴ Nonetheless, it was not in the forefront from the beginning.

The question of non-state law first appears in official materials of the Hague Conference in a feasibility study drafted in 2007.⁴⁵ The study suggests the question should be taken on because the choice of non-state law “has for long played an important role in arbitration but is also of growing importance in court

⁴⁴ Cf Gama and Saumier (n 3) 53-54.

⁴⁵ *Feasibility Study on the Choice of Law in International Contracts—Report on Work Carried out and Conclusions (Follow-Up Note)* (Prel Doc No 5, February 2008), available at http://www.hcch.net/upload/wop/genaff_pd05e2008.pdf.

proceedings.”⁴⁶ No evidence is provided for this finding. Indeed, although the Hague Conference had sent out questionnaires earlier in 2007 to member states and stakeholders whether and in what way uniform rules on choice of law in international contracts should be made, the questionnaires did not contain a question as to whether there was any need to choose non-state law.⁴⁷ Consequently, the question was not addressed in responses.

A later study suggests, appropriately, the Working Group should “take into consideration both the rules applied by State courts and specific international arbitration rules.”⁴⁸ That would suggest making a distinction between arbitration (where “rules of law” can be chosen) and courts (where only “law” can be selected).⁴⁹ The Working Group, however, took a different path. After an extensive discussion in its first meeting in January 2010, it established a subgroup to address the question, consisting of Lauro Gama (author of a very comprehensive book on the UPICC and subsequently a member of the UPICC working group)⁵⁰, Geneviève Saumier (a leading private international law expert at McGill), and, at different times, Emmanuel Darankoum from Montréal and José Moreno Rodriguez from Paraguay.⁵¹ The subgroup produced two reports which remain unpublished but form the basis of two articles.⁵² It found that non-state law could be chosen, at the moment, only in commercial arbitration.⁵³ Nonetheless, the subgroup advocated neither this solution nor another, namely to say nothing and leave the definition of “law” to further development. Instead, it supported a third option that was approved by the Working Group and ultimately made its way into the Hague Principles—to allow the choice of non-state law regardless of the mode of

⁴⁶ Ibid no 28: ‘The instrument might also need to clarify whether it is permissible for parties to choose not only national laws but also transnational or a-national rules or principles to govern the dispute. This has for long played an important role in arbitration but is also of growing importance in court proceedings.’ See also no 31 (applicability of a-national law in the absence of party choice in arbitration).

⁴⁷ *Questionnaire Addressed to Member States to Examine the Practical Need for the Development of an Instrument Concerning Choice of Law in International Contracts*, available at http://www.hcch.net/upload/quest_jan2007members.pdf; *Questionnaire Addressed to Stakeholders in the Field of International Commercial Arbitration to Examine the Practical Need for the Development of an Instrument Concerning Choice of Law in International Contracts*, available at http://www.hcch.net/upload/quest_jan2007stake.pdf.

⁴⁸ *Feasibility Study on the Choice of Law in International Contracts. Report on Work Carried Out and Suggested Work Programme for the Development of a Future Instrument*, Prel Doc No 7 (March 2009), available at <http://www.hcch.net/upload/wop/genaff2009pd07e.pdf> no 41.

⁴⁹ Cf. Gama and Saumier (n 3) 49.

⁵⁰ Gama (n 28).

⁵¹ Gama and Saumier (n 3) 44 fn 6.

⁵² Gama and Saumier (n 3) (see especially 44); Saumier (n 16) 540ff (see especially 541 note 32).

⁵³ Gama and Saumier (n 3) 45.

adjudication.⁵⁴ The main reasons given were that no meaningful difference exists between courts and arbitrators or between the choice of state law and that of non-state law, and that allowing for the choice of non-state law enhances party autonomy.⁵⁵

This suggestion was successful. Although parties in practice rarely choose non-state law—or, rather, precisely in order to overcome this situation⁵⁶—the Working Group decided, after further discussions, to allow parties to choose “the law or rules of law governing their contract”.⁵⁷ The formulation mirrored the UNCITRAL Model Law and thus allow for the choice of non-state law, but was meant to be available also to state courts. The ability to choose non-state law was justified with the need of the parties for specific rules and for stabilization of the parties’ expectations. The aim was to make the choice as broad as possible. The report also suggests that “the draft Hague Principles not include any express definition or limitation of the term “rules of law”, as this provides the greater support for party autonomy.”⁵⁸ Moreover, unlike the Draft Rome I Regulation, the Working Group explicitly rejected an additional criterion of legitimacy or international or regional recognition. The only restriction was that the chosen law had to be a body of rules.⁵⁹

The draft thus provided, for the first time, for the choice of non-state law without significant restrictions. This apparently went too far for members of the Hague Conference. According to one participant, non-state law was “the most controversial issue at the session of the Special Commission”⁶⁰ (which is not surprising, given that the other provisions are mostly well within the mainstream) and was discussed “for the better part of the week.”⁶¹ In the end, a compromise was reached: the choice of “rules of law” remained possible but was subjected to a number of qualifiers: these rules must be “generally accepted on an international, supranational or regional level as a neutral and balanced set of rules”. The Special Commission apparently demanded these qualifiers “to afford greater certainty as to what parties can designate as rules of law governing their contractual relationship”, though in reality the qualifiers seem to act more as substantive restrictions than as clarifiers, as I discuss in the next section. In addition, Article 3 now suggests that rules of law can be chosen only “unless the law of the forum provides otherwise.” This seems a

⁵⁴ Gama and Saumier (n 3) 50.

⁵⁵ Gama and Saumier (n 3) 50-52. I discuss these arguments in section V.B.

⁵⁶ See Gama and Saumier (n 3) 64-65.

⁵⁷ Available at http://www.hcch.net/upload/wop/contracts_rpt_nov2010e.pdf, 1 (Preamble), 2 (Formulation of the Principle of Party Autonomy in General).

⁵⁸ Ibid.

⁵⁹ Available at http://www.hcch.net/upload/wop/contracts_rpt_june2011e.pdf, 3.

⁶⁰ Symeon C Symeonides, ‘The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments’ (2013) 61 *American Journal of Comparative Law* 873, 892.

⁶¹ Symeonides (n 60) 893.

rather unnecessary clarification, given that the Hague Principles are not binding anyway.⁶²

After the session, the Working Group redrafted the provision and also drafted commentary, in which the drafting responsibilities for Article 3 were taken by Lauro Gama and Geneviève Saumier.⁶³ Because the final version differs significantly from the draft version of the Working Group, the draft commentary differs significantly from the 2011 policy document. The draft commentary is to be discussed and finalized in 2014.

IV. Particular Issues

With the changes introduced by the Special Commission, Article 3 has become significantly more complex than it was in its earlier formulation by the Working Group. This makes a closer look at individual requirements of the rule appropriate.

A. 'Rules of law'

What is actually meant by “rules of law”? Obviously, law does not mean state law here, as a positivistic understanding would have it.⁶⁴ Rules of law are, presumably, legal norms formulated by so-called “formulating agencies”,⁶⁵ be those intergovernmental (like UNIDROIT or UNCITRAL) or academic (like the Lando group that formulated the PECL) or representative of certain industries (like the International Chamber of Commerce).

Although “rules of law” is meant to designate non-state law, not all non-state law can qualify as “rules of law”. Mere principles of law are not rules. (UPICC and PECL however, although they carry the title of Principles, actually consist of rules.) *Lex mercatoria* for example, as an amalgam of rules and principles and maxims, does not qualify. However, it seems appropriate that a choice of *lex mercatoria* can often be reinterpreted as a choice of the UPICC according to their Preamble.⁶⁶

⁶² Symeonides (n 60) 894 finds the caveat useful in that it signals to courts that nothing changes even if their states acquiesce to the compromise. This seems a rather theoretical risk.

⁶³ Available at http://www.hcch.net/upload/wop/princ_com.pdf.

⁶⁴ Symeonides (n 60) 892 suggests that *real* rules of law must be state law. Debates on legal pluralism suggest that such a state-based concept of law is not necessary. See Ralf Michaels, ‘Was ist Recht jenseits des Staates? Eine Einführung’ in Graf-Peter Calliess (ed), *Transnationales Recht—Stand und Perspektiven* (Tübingen, Mohr, 2014).

⁶⁵ On the idea of formulating agencies, see Klaus Peter Berger, *The Creeping Codification of the New Lex Mercatoria* (The Hague et al, Kluwer Law International, 2010) 88ff; see also Ralf Michaels, ‘Rollen und Rollenverständnis im transnationalen Privatrecht’ in Bardo Fassbender et al, *Paradigmen im internationalen Recht—Implikationen der Weltfinanzkrise für das internationale Recht* (Berichte der Deutschen Gesellschaft für Völkerrecht 45), 175, 208-10.

⁶⁶ Michaels (n 6) no 67.

Another type of law that creates problems are most religious or customary laws, because they do not come in the form of rules.⁶⁷ Western courts have indeed expressed discomfort with a duty to interpret religious law like Islamic law, the content of which is often unclear.⁶⁸ At the same time, it would be quite unfortunate if religious law could not be chosen, especially given that this may be the only kind of non-state law that could actually matter before state courts. Religious actors choose religious law not infrequently for their business transactions;⁶⁹ for them, access to courts might be attractive if they could maintain the choice of religious law. In this regard, a broad interpretation of the term appears advisable.

B. 'Set of Rules'

In addition, Art. 3 requires that the rules of law come as a "set of rules." This has been explained as requiring that they are "fairly complete and comprehensive".⁷⁰ What does that mean? Is the CISG fairly complete and comprehensive? It covers only sales law, and even here it has gaps. Are the UPICC fairly complete and comprehensive?⁷¹ They have gaps, too. Even more problematic are rules like the Hague-Visby Rules, which cover only certain sub-themes of contract law. The Draft Commentary asks that sets of rules "allow for the resolution of common contract problems in the transborder context."⁷² But are not uncommon contract problems at least as important? Should a chosen law not resolve, potentially at least, all problems?

Notably, a similar restriction does not exist in arbitration, where the "rules of law" to be chosen can, in theory, be individual rules. The idea behind requiring a "set of rules" for the Hague Principles may have been that non-state law should be chosen only where it bears some similarity to state law (which is comprehensive), and that parties should not be allowed to pick and choose individual rules. But both concerns appear unwarranted. The idea behind sectoral codifications is not to achieve comprehensiveness beyond the respective sector, and not even necessarily within it. Such non-state laws will always govern in combination with another law (frequently the law of a state, designated through a choice-of-law rule). But that is not at all unusual in contract law. Notably, parties can even choose different laws for different parts of their contract in a process called *dépeçage*; the Hague Principles, which allow for this in their Art. 2(2),⁷³ only adopt a possibility that is already widely available. A clever use of *dépeçage* already allows parties to pick and choose

⁶⁷ For inclusion of such rules under Article 3, see Neels and Fredericks (supra n 3) 109 note 51.

⁶⁸ See references in n 19.

⁶⁹ See eg *Soleimany v Soleimany* [1998] EWCA Civ 285; *Halpern v Halpern* [2007] EWCA Civ 291; *Musawi v RE International (UK) Ltd* [2007] EWHC 2981 (Ch)

⁷⁰ Symeonides (n 60) 894.

⁷¹ Saumier (n 16) 545-6.

⁷² Draft Commentary, no. 3.9.

⁷³ Art. 2(2) reads:

The parties may choose (i) the law applicable to the whole contract or to only part of it and (ii) different laws for different parts of the contract.

individual rules from different legal systems. Restricting choice of non-state law to “sets of rules” thus seems, in the face of Art. 2(2), not to be a significant restriction.

C. ‘Neutral and Balanced’

More important is another restriction: chosen sets of rules of law must be “neutral and balanced”. A similar criterion had been discussed for the Rome I Regulation. But what does this mean? Does it mean a substantive standard? The Draft Commentary suggests as much: the designated rules ‘should not advantage one party’s interests over the other’.⁷⁴ That would be more than awkward: according to what standard should an adjudicator make this assessment? For example, the Convention on Contracts for the International Sale of Goods (CISG) has been criticized by some as being either too seller-friendly or too buyer-friendly, and thus not balanced.⁷⁵ For its legal treatment under existing law, this matters little: as an international law Convention, the CISG applies automatically within its scope unless the parties explicitly exclude it. A perceived lack of balance matters only in practice insofar as it may bring parties to opt out of the CISG. If, however, balance becomes a criterion for electability, one can expect contestations. Even the UPICC, perhaps the clearest example of a non-state text that the drafters have in mind, are not obviously balanced; they share this with the CISG.

More fundamentally, it is not clear at all why the parties, whose autonomy is otherwise emphasized, must be restricted to the choice of a balanced law at all. For the substantive terms of contracts, no such restriction exists; what we find instead, typically, is a far less demanding requirement of “good faith and fair dealing.” When parties choose the law of a state, that state law need not be neutral and balanced either, up to the limits of internationally mandatory rules and *ordre public*. It would be understandable to demand that non-state law, to be chosen, be as balanced as state law; it is not clear at all why higher requirements make any sense.

All of this suggests that the “neutral and balanced” requirement must be understood in a formal, not a substantive way. That means: non-state law can be chosen only when it has been formulated by an agency that is, with regard to the parties, neutral.⁷⁶ Even this restriction finds no similarity in the choice of state law, where parties can and frequently do choose one party’s home law. And it is hard to operationalize. The Draft Commentary requires that the body “represents diverse legal, political and economic perspectives”.⁷⁷ This confuses diversity with neutrality. Does the ICC represent diverse perspectives? (Or, more practically—will there not be dispute over whether any body really fulfils this requirement?)

⁷⁴ Draft Commentary 3.11.

⁷⁵ See the brief discussion in Ingeborg Schwenzer and Pascal Hachem, ‘The CISG—Successes and Pitfalls (2009) 57 *American Journal of Comparative Law* 457, 474-5. Their conclusion that both arguments neutralize each other appears to be wishful thinking.

⁷⁶ See Draft Commentary, no. 3.10.

⁷⁷ Draft Commentary, no. 3.10.

Even more strangely, the Special Commission asks that the body of laws should ‘not [be] imposed by market power.’⁷⁸ But is not every contract term, including every chosen law, a function of market power (or, more precisely: bargaining power)? Are not the drafters of nonstate law also competitors in the market for laws, and are not their products more or less successful as a function of their market power? (UNIDROIT has greater power than the Académie des Privatistes Européens, to name just one example.) This criterion appears unworkable.

A more appropriate criterion of neutrality would be to ask that an agency could claim to represent either all parties (like the ICC with regard to commercial actors) or none (like UNIDROIT). This leads to a relative concept of neutrality: Islamic law becomes neutral and balanced as between Muslims⁷⁹ but loses that character as between a Muslim and a non-Muslim.

D. ‘Generally accepted’

Another requirement is included, again one known from the European discussions: the chosen law must be “generally accepted”. This is a vague standard. Whose recognition matters for this? And how much recognition is required? The criterion is met most easily by laws that are already binding, like the CISG,⁸⁰ which have been accepted by the treaty partners and by numerous courts, even though even the CISG is not “generally accepted” in one sense: parties still regularly opt out of its use. Beyond the CISG, the UPICC are usually named as the most obvious candidate.⁸¹ But in what way are they “generally accepted”? They are certainly not accepted by courts, which never apply them, except by comparative reference. We find more acceptance among arbitrators, but acceptance only by one type of adjudication can certainly not be “general”.

More importantly, again, it is not at all clear what general acceptance should actually accomplish. Why is acceptance by the parties not enough, coupled with a supervisory control by the adjudicator? The problem is one of chicken and egg: as long as non-state law cannot be chosen it cannot be generally accepted, and as long as it is not generally accepted it cannot, under the new standard, be chosen. This may not be a problem for the UPICC, given the extensive debate that has occurred, but it is a problem for other, newer texts.

E. ‘International, Supranational or Regional Level’

Even stranger is the requirement that general acceptance must occur on a international, supranational or regional level. Maybe, the Hague Conference had in mind that international contracts require a law that somehow transcends locality. But ordinary party autonomy regularly goes to state laws that are, by definition, not accepted on a general or regional level. Why must non-state law then be

⁷⁸ *Choice of Law in International Contracts: Draft Hague Principles and Future Planning* (Prel Doc No 6, February 2013), Annex I (p iv).

⁷⁹ In addition the question arises whether Islamic law itself discriminates between men and women.

⁸⁰ Draft Commentary, no. 3.5.

⁸¹ Draft Commentary, no. 3.6.

transnational? Why should parties be allowed to choose the UPICC but not one of their models, the Uniform Commercial Code (UCC)? What does supranational or regional acceptance guarantee that is not already inherent in general acceptance? The Code of European Contract Law by the Académie des Privatistes Européens⁸² was drafted closely on a project for an English Code, the so-called McGregor Code⁸³—does it make sense to draw a distinction between them? Perhaps, the requirement should be read to simply mean wide acceptance—which could then include also local law as long as such law is widely recognized, like the UCC.

F. Filling Gaps

So far, these have all been interpretative problem. A more fundamental problem arises from the fact that all non-state sets of rules, other than state laws, are incomplete—they cover certain areas of the law, but not all. The CISG, for example, deals only with sale of goods contracts. The UPICC deal only with contract law and do not even extend to every aspect of it. Choice of non-state law is thus, almost necessarily, incomplete.

What follows? The draft commentary suggests, pragmatically, that parties should choose an additional law to fill the ensuing gaps.⁸⁴ This is of course possible, although it seems to reduce, significantly, the value of choosing non-state law. But it points to a more fundamental problem with the choice of non-state law: such choice is always, literally, choice of “rules of law”, not of a governing “law”. This may make sense in international arbitration, where the decision-making process, aimed at justice in the individual case, is often based on individual rules, and where mandatory rules can still often be entirely avoided. Before state courts it appears fairly unattractive. State courts already refer to individual rules of the UPICC frequently, though for comparative purposes rather than as actually applicable law.⁸⁵ It is not clear why the choice of a non-state law like the UPICC should be attractive if it requires the choice or determination of another contract law.

V. Evaluation

A. The Rule

All in all, Article 3 appears as a rather problematic provision in what should otherwise be a rather uncontroversial legal document. A provision allowing for the choice of non-state law is a bold novelty. Whether such a provision is a good idea is

⁸² Académie des Privatistes Européens, *Code européen des contrats, Avant-projet*, Coordinateur Giuseppe Gandolfi, *Livre premier, Edition de poche revue et corrigée par Lucilla Gatt, Professeur à l'Université de Naples 2* (Milan, Giuffrè, 2004).

⁸³ Published long after its first promulgation as Harvey McGregor, *A Contract Code: Drawn up on Behalf of the English Law Commission* (Milan, Giuffrè, 1993).

⁸⁴ Draft Commentary, no. 3.14.

⁸⁵ See Ralf Michaels, ‘Umdenken für die UNIDROIT-Prinzipien: Vom Rechtswahlstatut zum Allgemeinen Teil des transnationalen Vertragsrechts’ (2009) *73 Rabels Zeitschrift für ausländisches und internationales Privatrecht* 866.

another matter. Given the relatively low interest that parties have shown, so far, in the choice of non-state law (with the exception of religious law), it is not clear that it was worth including such a provision. Other than for the Rome II Regulation (which had to address, at the time, the potential of an optional contract code), there seems to have been no real need for such a provision. This is so especially for a rule that allows for the choice only of “rules of law” and thereby excludes, in all likelihood, those areas of non-state law that would potentially be most relevant, especially Jewish and Islamic law.

Still, a provision like the one originally proposed by the Working Group, that laid out no additional requirements for what could be chosen as rules of law would at least have made analytical sense. But the additional requirements, added at the request of the Special Commission, have made a problematic rule far worse. They may have been aimed at achieving more certainty, but, in the apt words of one (not so subtle) early commentator, “almost every word drips with uncertainty.”⁸⁶ They surpass what is required from state law (which need not be neutral and balanced) and thus reinforce, albeit in an ad hoc way, what was to be overcome—the arbitrary distinction between state and non-state law. Their introduction means that Article 3 is now too narrow for international arbitration (which mostly does not have similar requirements). At the same time it is likely too broad and also too imprecise for states (which so far do not allow for the choice of non-state law at all). All in all, the requirements express an understandable uneasiness with the choice of non-state law. But instead of either opposing the choice of non-state law altogether, or suppressing the concerns and trusting adjudicators to find appropriate criteria, the Special Commission found a compromise that cannot satisfy either side of the discussion.

The Hague Conference, by including Article 3 in the Hague Principles, takes a gamble. The hope is that the authority of the Hague Conference can finally bring about what earlier attempts failed at—to bring state courts to allow parties to choose non-state law. However, the gamble is not without risk. The novelty of the provision may well mean that Article 3 garners disproportionate attention in discussions, at the expense of the other provisions, which might well yield general assent. (Experience with the UPICC where the Preamble has been discussed more than all other provisions combined, might suggest as much.) Moreover, Article 3 might well cause lawmakers to trust the entire Hague Principles less; they might consider them more uncontroversial than they otherwise are.

B. The Arguments

With Article 3, then, the Working Group added a provision that is deeply problematic for the law and creates a great risk for the acceptance of the Hague Principles, while at the same time not responding to an actual practical need. This makes it worthwhile to look at the arguments brought forward.

One argument for the new rule can be found in a certain ideological commitment. The Principles, following the explicit mandate from the Council on General Affairs

⁸⁶ Andrew Dickinson, *A principled approach to choice of law in contract?*, (2013) 18 *Butterworths Journal of International Banking and Financial Law* 151, 152.

and Policy,⁸⁷ formulate the maximization of party autonomy as an explicit goal. And indeed, allowing the choice of non-state law obviously extends party autonomy. But it is not clear why the task of a legal text on party autonomy should be to promote party autonomy.⁸⁸ Robert Wai has pointed out, quite elegantly, that the task of private international law is not to promote enforcement of the will of the parties, but instead to lay down both the scope and the limits of such enforcement.⁸⁹ One may well think that the balance needs to be struck in a different way, but that a balance is necessary seems to be out of question, and thus the mere finding that allowing choice of non-state law enhances party autonomy is simply not enough. A second argument concerns the alleged similarity between state law and non-state law. Much has been made of this alleged similarity in scholarly discussions.⁹⁰ Expanding the notion of law to non-state law is fashionable; it is often called the more “modern” position,⁹¹ which alone seems to make it superior. Frequently, scholars point out that at least some non-state laws have great parallels with state law. Both arguments are debatable. But even regardless of these theoretical arguments, it should be quite obvious that non-state law and state law are not similar from a practical position. Members of the Hague group suggest that the process of choosing non-state law would not be very different from the widely accepted process of choosing state law.⁹² But there exists an obvious difference. The term “rules of law” is sometimes viewed as mere code for non-state law, but the term makes sense quite literally: rules of law, like the UPICC, are different from systems of law, like state law. Where state law is chosen, the result is a relatively comprehensive set of rules and principles and a relatively high degree of internal consistency (created by highest courts). Where rules of law are chosen, the result is, necessarily, an incomplete body of law. Practically, the choice of rules of law always makes it necessary to apply other rules, too. It may be possible to devise ways for how to do this. But the universal need to do so represents a fundamental difference to state law that is hard to overlook.

⁸⁷ See Permanent Bureau of the Hague Conference on Private International Law, ‘Choice of Law in International Commercial Contracts: Hague Principles?’ (2010) 15 *Uniform Law Review* 883, 885.

⁸⁸ See also Symeonides (n 60) 878-9.

⁸⁹ Robert Wai, ‘Transnational Liftoff and Juridical Touchdown: The Regulatory Function of Private International Law in an Era of Globalization’ (2002) 40 *Columbia Journal of Transnational Law* 209. The Hague Principles do lay down such limits in their provision on mandatory rules and public policy, Article 11. Cf Saumier (n 16) 543.

⁹⁰ See, eg, Matthias Lehmann, ‘Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws’ 41 *Vanderbilt Journal of Transnational Law* 381, 426 (“there is simply no reason why one should allow the parties to use the contract rules of Burma and not the rules of a business organization like the International Chamber of Commerce.”)

⁹¹ E.g. Lauro Gama jr., ‘Prospects for the UNIDROIT Principles in Brazil’ (2011) 16 *Uniform Law Review* 613, 638.

⁹² Gama and Saumier (n 3) 51.

This argument does not seem crucial in arbitration, and therefore a third argument brought forward in favor of Article 3 lies in the equation of courts and arbitrators. It is suggested that 'in most legal systems arbitration now carries the same legitimacy and effectiveness as the judicial dispute resolution system'.⁹³ This is a bold statement,⁹⁴ but legitimacy is not the most pressing issue. Even if it is true that courts and arbitrators are similarly legitimate, it by no means follows that courts and arbitrators should use the same rules. Notably, the use of 'rules of law' in arbitration is, comparatively, less dramatic than before courts.⁹⁵ Even where the arbitrator is required to apply the law, and cannot determine relevant issues on the sole strength of the contract terms, the legal argument on which arbitrators and counsel rely is often quite different from what one sees in state courts: counsel and arbitrators frequently argue on the basis of individual rules, sometimes drawn from different legal systems, and from uniform rules such as UPICC, which strictly speaking may not be applicable at all, but can be key to bolstering a legal argument based on the applicable law, or, to the contrary, to persuading the arbitral tribunal that the opponent's argument based on the applicable law leads to a result that is incompatible with other laws or instruments. The force of such indirect legal arguments is naturally greater before an international arbitral tribunal than in a court of law. In many cases, one or more arbitrators will not be qualified in the applicable law. If the solution found in the applicable law does not meet the expectations of said arbitrators they will be inclined to find a solution they find more appropriate, interpreting the law in a manner that may be driven more by pragmatism than by doctrinal rigor.

Finally, the expanded role for non-state law has been justified, somewhat ironically, with an interest in strengthening state courts and their role in international commercial litigation.⁹⁶ The hope is that state courts become more attractive vis-à-vis arbitration if they allow, as does arbitration, the choice of non-state law. Indeed, there would be many advantages to a situation in which state courts played a greater role, both in terms of development of commercial law through precedent, and in terms of legitimacy of adjudication. At present, state courts seem all too willing to defer commercial law to arbitration; a real competition does not seem to take place.⁹⁷ It seems doubtful whether parties will flock to state courts if they can choose non-state law. Moreover, it seems

⁹³ Saumier (n 16) 542; but see Symeonides (n 60) 894.

⁹⁴ See now the contributions in Walter Mattli and Thomas Dietz (eds), *International Arbitration and Global Governance: Contending Theories and Evidence* (Oxford, Oxford University Press, 2014).

⁹⁵ What follows is a quote from an email by Matthias Scherer; I am much obliged for his expert advice.

⁹⁶ Gama and Saumier (n 3) 52-53.

⁹⁷ See Ralf Michaels, 'Roles and Role Perceptions of International Arbitrators' in Mattli and Dietz (n 94) sub 2)c).

questionable whether state courts should really become more like arbitrators in order to compete better.

C. The Process

Positions on argumentative position are one thing; attention to needs and practice is another. This signifies the most puzzling element about the Hague Principles. From all one can see, the decision to allow for the choice of non-state law was taken not in response to requests from outside, but on the basis of the assessment by members of the Working Group on what would, in their view be the best law. Such a process of lawmaking, be it in soft law or in hard law, is always problematic, simply because the drafters' convictions are not tested. It is a danger already in negotiations for treaties, because negotiators are often more willing to move the law forward than their constituents. The danger is enhanced where law is made in a soft law process, with no check on the negotiators from their governments at all. As a consequence, drafters end up with what is in effect a subjective view on how the law should be, but formulated and promulgated in the form of law.

Strikingly, Article 3 was not drafted in ignorance of existing laws or legal practice. The drafters were by no means unaware of the fact that state courts do not allow for the choice of non-state law, and parties very rarely show an interest in the choice of non-state law even in arbitration. Instead of concluding that allowing such a choice would be unnecessary, the Working Group came to the exact opposite conclusion: if parties and states do not yet opt for such choice, they must be educated to do so. For example, one member of the Drafting group explicitly suggests that the only plausible reasons why the Inter-American Convention has not been adopted by more countries are lack of information and inherent conservatism.⁹⁸ He expresses the hope that the new Hague Principles can overcome both of these, without explaining why or how.⁹⁹ Similarly, another member of the Drafting group hopes that the Hague Principles can overcome the uncertainty which she believes alone keeps practitioners from selecting the UPICC and can therefore 'provide the impetus needed for the successful deployment of the UPICC.'¹⁰⁰ Elsewhere, she and another member are even more explicit. They believe the reason non-state law is not chosen is that parties avoid the risk of uncertainty about its content, and without allowing for the choice before state courts, no system of precedent will build that can enhance certainty.¹⁰¹ But what they call a vicious cycle is not broken by making non-state law available (as experience with the CISG shows) but only by providing

⁹⁸ José Antonio Moreno Rodríguez, *Contracts and Non-State Law in Latin America* (2011) 16 *Uniform Law Review* 877, 881-2, 888.

⁹⁹ José Antonio Moreno Rodríguez, the Paraguayan member of the Working Group and sometime member of the subgroup dealing with Article 3, has drafted a legislative proposal for choice of law legislation in Paraguay that has been put forward, in May 2013, by a senator; see the document available at http://www.hcch.net/upload/wop/contracts_legisl_py.pdf. Its article 5 is modeled after Art. 3 of the Hague Principles.

¹⁰⁰ Saumier (n 16) 535.

¹⁰¹ Gama and Saumier (n 3) 64-5.

incentives to choose it. All in all, the lack of interest by states and parties is explained away as the consequence of ignorance and conservatism. Whether parties or states will want to be educated by legal codes appears rather doubtful.

VI. Conclusion

Debates on whether non-state law can be chosen frequently focus on matters of legal theory (the definition of “law”), autonomy (the extent to which parties should be able to determine their respective rights and obligations) and legitimacy (whether law made by a Working Group can be as legitimate as law that has gone through a democratic process). In this article, I have deliberately refrained from joining the discussion with arguments on these issues. Instead I have tried to show that allowing the choice of non-state law responds to few existing needs, while necessarily running into a number of practical problems.

It is not certain that Article 3 will fail for these reasons. Perhaps, official reaction will be more positive than it has been with regard to earlier attempts to allow the choice of non-state law. The Principles have little to teach for systems that already accept party autonomy, and systems that have refused to allow for the choice of non-state law like EU law are unlikely to change in view of a new attempt to integrate them.¹⁰² Arbitrators are unlikely to find the restrictive criteria in Article 3 attractive. However, Latin American countries may view the Hague Principles as a model for the introduction of party autonomy.¹⁰³ They would then move immediately from a situation in which party choice is barred altogether to one in which it can cover even to non-state law. If indeed that is the modern solution, then those countries now have their chance to be really modern.

But such success does not seem likely. Article 3 responds to a need that is not really there. Procedurally, it was drafted from an academic perspective of education: because there is not yet interest in allowing the choice of non-state law, such interest must be created. Substantively, the rule does this in a manner that is, due to interference by the Special Commission, half-hearted, internally incoherent and hard to manage. All of these are reasons that not only make Article 3 unattractive; they also make it more than likely that Article 3 will have little impact. The Hague Principles will likely expand the list of projects attempting, and failing, to push the choice of non-state law forward. Those who wait for a revolution in choice of law for contracts must, in all likelihood, wait longer.

Should one deplore this? Would the world be a better place if parties could choose non-state law before state courts? Would it be good for courts in their competition with arbitrators?¹⁰⁴ I doubt this, but here I voice no strong opinion either way. Ultimately, it seems that whether non-state law can or cannot be chosen will have

¹⁰² See also Lando (n 35) 309.

¹⁰³ On the Paraguayan legislative initiative, see n 99. See also, more generally, José Antonio Moreno Rodríguez, ‘Los contratos y La Haya: ¿Ancla al pasado o puente al futuro?’ (2010) 15 *Revista Brasileira de Direito Constitucional* 125.

¹⁰⁴ Gama and Saumier (n 3) 52-53.

fairly little impact on transnational contracts. What matters is that parties can choose a state law as a comprehensive framework to give their transaction predictability. What matters also is the scope of mandatory rules that limit such freedom. All of these are issues that the Hague Principles take up in other provisions. Non-state law has a significant role to play in this context—usages influence contract interpretation, transnational notions of law may provide a transnational background law. Whether non-state law can be chosen as applicable law or not is, however, in comparison quite irrelevant.¹⁰⁵

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¹⁰⁵ For a more positive assessment from an outside observer, see Luca Radicati di Brozolo, 'Non-national rules and conflicts of laws: Reflections in light of the UNIDROIT and Hague Principles' (2012) 48 *Rivista di diritto internazionale privato e processuale* 841. See also Bénédicte Fauvarque-Cosson and Pascale Deumier, 'Un nouvel instrument du droit souple international: Le "projet de Principes de la Haye sur le choix de la loi applicable en matière de contrats internationaux"' (2013) 189 *Recueil Dalloz Sirey* 2185.

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