The Legal Authority of Non-State Rules: Application in International Commercial Contracts

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Summary

This thesis examines the legal authority of non-state rules in international commercial contracts and their application in state courts. Non-state rules can be divided in uncodified rules and codified rules. Uncodified non-state rules are general principles of law, practices, trade usages, and custom. They have a customary origin. Codified non-state rules are model laws, restatements of law, standard terms and conditions, and guidelines. They are created by international organisations and trade associations.

Non-state rules have legal authority in the national and the international sphere. Their legal authority can be established by looking at different factors: promulgator, substance, support, and application. It is especially the last factor which plays a deciding role in measuring their legal authority. This thesis uses three main case studies: France, England, and the US to understand the legal authority of non-state rules. After having established what non-state rules are and how their legal authority can be measured this thesis concentrates on their application in courts. It asks three important questions: when can non-state rules be applied? When are they applied? And how are they applied?

There are four scenarios in which non-state rules are applied in descending degrees of legal authority: first of all, they are applied as the applicable law to the contract, secondly they are applied as sources of domestic law, thirdly they are used to interpret the applicable law, and fourthly they are applied as contractual rules. Legislations have a preference for uncodified non-state rules such as trade usages and general principles. These are often sources of domestic law. To apply these uncodified non-state rules judiciary resorts to codified non-state rules to go from the general principle to the practical application. After studying the application of non-state rules in depth, this thesis concludes with a framework and classification that leads to understanding the legal authority of non-state rules.

Abbreviations

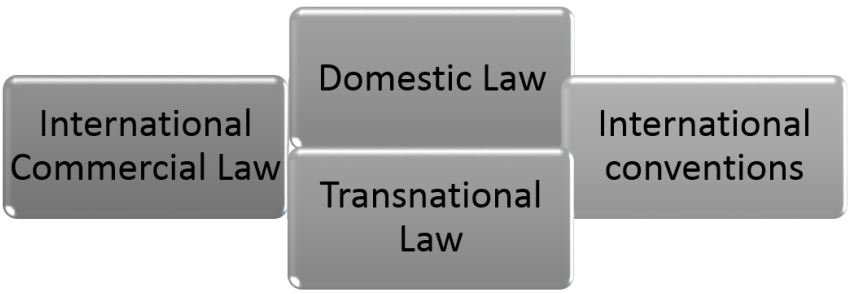
ALI	American Law Institute
B2B	Business to Business
B2G	Business to Government
C2B	Consumer to Business
C2C	Consumer to Consumer
CESL	Common European Sales Law
CFR	Common Frame of Reference
CISG	Convention for the International Sales of Goods
CMI	Comité Maritime International
DCFR	Draft Common Frame of Reference
EFTA	European Free Trade Association
EU	European Union
FAA	Federal Arbitration Act
GAFTA	Grain and Free Trade Association
Hague Principles	The Hague Principles on Choice of Law in International Contracts
Hague-Visby Rules	The 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading amended by the 1968 Visby Protocol and the 1979 Special Drawing Rights Protocol
HCCH	Hague Conference of Private International Law
ICC	International Chamber of Commerce
ICJ	International Court of Justice
ICSID	International Centre for Settlement of Investment Disputes
Incoterms	International Commercial Terms
ISDA	International Derivatives and Swaps Association
OAS	Organisation of American States

OHADA	Organisation pour l'Harmonisation en Afrique du Droit des Affaires
NAEGA	North American Export Grain Association
NCCUSL	National Conference of Commissioners on Uniform State Laws (See also ULC)
New York Convention	The New York Convention of the Recognition and Enforcement of Foreign Convention Arbitral Awards of 1958
PECL	Principles of European Contract Law
Rome I	Rome I Regulation on the Law Applicable to Contractual Obligations
SME	Small and Medium Enterprises
UCC	Uniform Commercial Code
UCP	Uniform Credits & Practices
UCTA	Unfair Contract Terms Act
ULC	Uniform Law Commission (See also NNCCUSL)
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	Institution for the Unification of Private Law
ULFIS	Uniform Law on the Formation of Contracts for the International Sales of Goods
ULIS	Uniform Law on the International Sales of Goods
UPICC	UNIDROIT Principles of International Commercial Contract

Chapter 1: Introduction

1.1 The Application of Non-State Rules in International Commercial Contracts

Advancing technology and furthering globalisation of the economy have intensified and complicated international commerce. As a consequence of this, the legal implications of conducting commerce abroad have become more intricate. International commercial law is regulated on two different levels: domestic and transnational. Domestic law is the largest component of international commercial law. The second smaller component is transnational law. This consists of anational sources which are called soft law or non-state rules. International conventions are a sub-category which have a transnational origin, but become part of domestic law if they are ratified. They can thus belong to both categories. Schematically this division could be summarised as follows:



This thesis critically analyses the legal authority of non-state rules and their application within the framework of state courts in the context of international commercial contracts. The goal of this thesis is to understand how the legal authority of non-state rules can be measured and under which circumstances these can be applied. The application of non-state rules is

analysed by determining firstly, what non-state rules are, secondly, when they are applied and thirdly, how they are applied. Through this analysis, the legal authority of non-state rules can be understood.

The term non-state rules is used to denominate those rules that have an anational origin. Non-state rules can be uncodified, such as trade usages and general principles, or they can be codified, such as restatements, model laws, and standard contract terms. Their origin can be spontaneous or they can be created purposefully by (international) organisations.

The focus of this research is on establishing the legal authority of non-state rules. This thesis argues that the most important factor to understand this legal authority is the application of these rules in state courts. This research concludes that if the focus is on private international law it is easily assumed that the scope for applying non-state rules is limited. If the focus is shifted to the application of non-state rules as a source of domestic law, to interpret the applicable law, or as contractual rules this changes. It then becomes evident that non-state rules occupy a prominent place in international commercial law. When courts apply non-state rules there is a significant preference for uncodified non-state rules as these can be a source of domestic law and they are chosen more frequently as the applicable law by the parties to the contract. When it comes to how non-state rules are applied courts have a preference to use codified non-state rules as an expression or as a reflection of these uncodified non-state rules.

Legal authority is a means of measuring when and how norms and rules can be imposed and under what conditions they should be adhered to. A rule can have legal authority under specific circumstances, but not under other circumstances. Therefore, when legal authority is defined this does not mean that this is a definite measurement as perspectives change so the practice is more fluid than the theory. Legal authority is what makes rules or social norms law. Legal authority can come from the state. The state decides whether the rule or social norm is law. However, this legal authority can also come from other entities than the state as

is analysed in this thesis. These could be international organisations, trade associations, supranational bodies, communities of people, and international treaties among others. Legal authority is not an absolute, but rather works on a progressive scale. The legal authority of non-state rules weighs their status as (a source of) law in legislations, in contracts, and before the courts. This thesis provides benchmarks against which this legal authority can be measured.

This project is divided in two main parts. The first part explores the background of the subject. It defines what non-state rules are, what their place is in international commercial law, and how their legal authority can be ascertained. The second part focuses on the application of non-state rules. This part of the thesis analyses when non-state rules can be applied, when they are applied, and how they are applied. The conclusion ties these chapters together and analyses what non-state rules are, when they are applied, and how they are applied to come to a complete understanding of how the legal authority of non-state rules can be measured. The remainder of this introduction focuses on the rationale for the project, the aims and scope of the research, the methodology, and the structure of the thesis.

1.2 Rationale and Significance

This thesis addresses both the theoretical and practical issues related to the application of non-state rules. Through the further development of (communication) technology, it has become significantly easier for smaller enterprises and sole traders to conduct business abroad. However, the legal issues associated with international commerce have not lessened in complexity. Therefore, it is important that businesses understand these issues. One of these legal issues is the place of non-state rules in international commercial law. The practical impact of this thesis is hence in providing a comprehensive analysis of non-state rules. It answers three important questions: what is the legal nature of non-state rules, when can non-state rules be applied, and how are they applied. For practitioners and merchants having a complete understanding of the answers to these questions enhances predictability and security

in business relations as non-state rules play an important role in international contracting. This predictability and security is what businesses are looking for.[1] This would especially be important for small and medium enterprises (SME) as they do not have access to the same amount of legal advice as multinationals have due to monetary constraints. The analyses in this thesis are thus especially interesting for SME that wish to trade abroad. This project is also specifically interesting for judges and arbitrators as it provides a comprehensive theoretical and practical framework on the application of non-state rules by defining their legal authority and through that their value as a source of law. It could thus assist in the application of non-state rules.

The academic significance lies in providing clarity on issues which have been discussed regularly, but typically in the context of the harmonisation of international commercial law. This thesis focuses on the legal authority of non-state rules and their applicability. This has been subject to significantly less scholarship. Furthermore, this thesis concentrates on the application of non-state rules in domestic courts whereas the research focus in this area is mainly on arbitration. The reason for this is that the scope for the application of non-state rules in arbitration is larger and they are thus applied more often in that context. International commercial contracts often contain an arbitration clause, especially B2G (Business to Government) contracts. However, despite the prominence of arbitration clauses many disputes do end up in state courts. In contractual negotiations attention is mainly focused on the key points of the contract: price, quantity, quality, and delivery.[2] Choice of law and choice of jurisdiction clauses are frequently omitted from the contract as they do not form part of these core contractual negotiations.[3] Therefore, the application of non-state rules in state courts is significant and merits attention. Furthermore, as this thesis analyses it is especially through their application in state courts that the legal authority of non-state rules

[1] Lord Justice Mustill, 'Contemporary Problems in International Commercial Arbitration: A Response' (1989) 17 International Business Lawyer 161,163
[2] Ibid,161
[3] Ibid

can be understood. And only through understanding this legal authority can it be completely understood what place non-state rules have in international commercial law.

This thesis aims to present a comprehensive analysis of the application of non-state rules in state courts so as to better understand their legal authority and their place as a source of law. The originality of this thesis lies in that it provides a framework and benchmarks against which this legal authority can be measured and through which their place as a source of law can be understood. The character of international commercial law is moving away from a national perspective to a more universal conception.[4] Non-State rules are the key part of this and therefore understanding the exact limits of their legal authority is important in theory and in practice.

1.3 Approach of the Study: Methodology

The methodology is based upon the process of identifying and analysing the key fundamentals of non-state rules. This thesis uses black-letter law research which mainly relies upon critical analysis of statutory law and case law. The legislation used is both procedural (private international law) and substantive (domestic commercial law, international conventions, and non-state rules). The case law used is mainly from domestic courts, but arbitral awards are included when necessary to obtain a complete analysis.

This thesis focuses on international commercial contracts. These contracts could be sales or services contracts (including carriage of goods and financing contracts). Goode defines a commercial contract as a contract *'in which both parties deal with each other in the course of business, whether as merchants or as provider and recipient of financial or other services supplied for business purposes.'* [5]

[4] Clive M Schmitthoff, 'International Business Law-A New Law Merchant' (1961) 2 Current Law and Social Problems 129,129
[5] Roy Goode, *Commercial Law* (Second Edition, Penguin Books 1995) 11

Different criteria are used to determine whether a contract is international. Firstly, it depends on the jurisdiction. Defining factors can involve differences in nationalities, domicile, residence, or it can be a contract which involves a choice of law, or a contract which concerns the interests of international trade.[6] At its broadest a contract is international when not all elements of the contract belong to the same legal system.[7] This definition is so broad that it can be artificial as the foreign element would not necessarily be intrinsically important to the contract.

In France article 1504 of the procedural code reads that arbitrage is international when it affects the interests of international commerce.[8] Judiciary has extrapolated from this, that a contract is international when it affects the interests of international commerce.[9]Also used is the judicial criterion: a contract is international when it is attached to two different legal orders.[10] By combining these criteria one comes to a definition of what in France constitutes an international contract: a contract that is attached to at least two different legal orders and that affects the interests of international commerce.

In England one could look at the Unfair Contract Terms Act (UCTA) where Article 26 on international supply contracts is applicable to contracts made by parties whose places of businesses are in territories of different states.[11] The Convention for the International Sale of Goods (CISG) defines an international contract as follows: *(1) This Convention applies to contracts of sale of goods between parties whose places of business are in different States*. [12]

[6] Michael Joachim Bonell, 'The Unidroit Principles of International Commercial Contracts: towards a new lex mercatoria?' [1997] International Business Law Journal 5
[7] Jean de la Colette, *Les Contrats de Commerce Internationaux* (Third edition, De Boeck Université 1996) 12
[8] Code Procédure Civile, Livre IV L'Arbitrage, Titre II L'Arbitrage International, Article 1504
[9] Pierre-Alain Gourion, Georges Peyrard and Nicolas Soubeyrand, *Droit du Commerce International* (fourth edition, L.G.D.J. Lextenso Editions 2008) 168
[10] Ibid, 169
[11] Unfair Contract Terms Act 1977, Article 26
http://www.legislation.gov.uk/ukpga/1977/50/section/26
[12] Some legal instruments like the UNIDROIT Principles of International Commercial Contracts do not include a definition of an international contract and leave this definition with the courts who apply the instrument.

This reflects the criterion used in the UCTA and uses the place of business as the defining factor. For the purpose of this thesis it is not necessary to make a choice between the different criteria used to determine when a contract is international, but it is important to keep in mind that diverging definitions exist in different jurisdictions and in different legal instruments.

Non-state rules are applied in national courts and as time and space do not permit a comprehensive analysis of all domestic laws in the world this project concentrates on a limited number of jurisdictions. Therefore, this thesis uses some comparative aspects although it does not qualify as a complete comparative study. The examples are used as critical case studies to better understand the place non-state rules have in domestic law and to evaluate the legal authority of non-state rules from different standpoints.

As it is more beneficial if a more in depth analysis is given of several countries with differing legal traditions, rather than many examples which would give breadth, but not enough depth this thesis concentrates on three jurisdictions. The main jurisdictions this thesis draws its examples from are France, the United States, and England. The first is a civil law system and the other two are common law systems. Examples from other countries are used to give the also necessary breadth, when these countries have another approach that helps to come to a better understanding of the nature and application of non-state rules. This is, for instance, the case in chapter 4 where the example of Brazil is used as it has a different approach to party autonomy than the aforementioned three countries.

These three countries have been chosen because they each play an important role in international commerce and transnational commercial law. They have differing antecedents, but each played an important role in the formation of the main legal systems on earth. Their influence is significant until this day. Most commercial contracts are nowadays written on the basis of English or American contract models, irrespective of whether the contract has any

relation to England or the US, which makes an inclusion of these countries pertinent.[13] In 1988 Agostini already notes the importance of Anglo-Saxon style contracts in France.[14] Another important reason for including American law is that its influence on other legal systems in the second half of the twentieth century is prominent.[15] France has a noteworthy tradition of scholarship in the area of non-state rules and this is also an important factor in the decision to include France. Using examples from different jurisdictions helps to understand how different legal regimes deal with the application of non-state rules.

In order to understand the legal authority and the application of non-state rules this thesis poses several questions. Firstly, what are non-state rules and how can their legal value be understood? To answer these questions, the concept of non-state rules is examined further. To understand how non-state rules can be applied it must first be defined what non-state rules are. In order to do so different types of non-state rules are analysed and categorised. The third and fourth questions are when can non-state rules be applied and when are non-state rules applied. To answer these questions private international law legislation from three jurisdictions is evaluated. These jurisdictions have been chosen because they each represent a different approach to party autonomy. Brazil largely rejects party autonomy, the United States favours party autonomy, but requires a signification relationship between the contract and the chosen law, and the European Union (EU) accepts party autonomy without this restriction. The fifth question is how non-state rules are applied. This question is answered by examining court decisions and arbitral awards to analyse the application of non-state rules in practice.

[13] Giudetta Cordero Moss, 'International contracts between common law and civil law: is non-state law to be preferred? The difficulty of interpreting legal standards such as good faith' [2007] Global Jurist 5,5

[14] Eric Agostini, 'La Circulation des Modèles Juridiques' (1990) 42 Revue Internationale de Droit Comparé 461,465

[15] Ugo Mattei, 'Why the Wind Changed: Intellectual Leadership in Western Law' (1994) 42 American Journal of Comparative Law 195

What follows here are the specific legislative instruments that are studied for this thesis. Two types of legislation are studied: private international law and substantive commercial law. Please note that laws on arbitration are discussed in chapter 6, but as these do not form the focal point of this thesis they are not mentioned here in this section.

With regards to the United States the point should be made that private international law and many aspects of commercial law are legislated by the individual states. Although the legislation of the individual states can be divergent its study is facilitated by several important instruments that contribute to the harmonisation of private international law and commercial law in the United States. These are the works by the American Law Institute (ALI) and the National Conference of Commissioners on Uniform State Laws (NCCUSL).

ALI is, in its own words, *'the leading, independent organisation in the United States producing scholarly work to clarify, modernize, and otherwise improve the law.'*[16] ALI was founded in 1923 and is composed of 3,000 elected members who are judges, legal scholars, and lawyers. Their most well-known works are the Restatements of Law. These are treatises that extract general principles of law from current case law. They are not binding, but they are influential in the judiciary. The Restatement (Second) of the Conflicts of Law is used in this thesis to better understand private international law in the US. This is among the most commonly cited legal treatises in the US.[17]

The National Conference of Commissioners on Uniform State Laws (NCCUSL) is also known as the Uniform Law Commission (ULC) and was established in 1892. Its goal is to provide states with *'non-partisan, well-conceived, and well drafted legislation that brings clarity and stability to critical areas of state statutory law.*'[18] Their most well-known work is the Uniform Commercial Code (UCC) which has the goal to harmonise the law on

[16] American Law Institute https://www.ali.org/about-ali/
Last accessed: 26 February 2016
[17] Lloyd Bonfield, *American Law and the American Legal System* (Thomson West 2006) 103
[18] Uniform Law Commission http://www.uniformlaws.org/Default.aspx
Last accessed: 26 February 2016

commercial transactions in the United States. The UCC has been adopted by all 50 states. The UCC is analysed in this thesis in the context of party autonomy and to evaluate the place non-state rules occupy within the UCC as a source of law.

With regards to private international law in England and France this thesis concentrates on the Rome I Regulation on the Law Applicable to Contractual Obligations (Rome I). This Regulation came into force on 17 December 2009.[19] It applies to different types of contracts, including commercial contracts. The Regulation is applicable in both France (by default) and the UK (after opting in).

Apart from Rome I this thesis studies internal conflicts of law legislation in France and England. In France, private international law is composed of the aforementioned European instruments, international conventions,[20] articles 3, 4 and 5 of the civil code, and the case law which has been extracted from these articles. Apart from Rome I the international private international law instruments that are in force in the UK are not related to the topic of this thesis.[21] Internal private international law is regulated mainly through case law and there are no overarching statutory instruments.

The final legal instrument that is analysed is the Convention for the International Sale of Goods (CISG). This convention dates from 1980 and currently has 85 signatory states. The CISG is in force in the United States and in France, but not in the UK. The CISG contains several provisions with regards to the application of non-state rules. The CISG is used in this project to analyse the application of non-state rules through another legislative instrument.

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[19] There is also the Rome II Regulation concerning non-contractual obligations and the Rome III Regulation which covers the law applicable to divorces (also called the European Union Divorce Law Pact). The latter is applicable in 15 EU states including France, but not in the UK. These fall outside the scope of this thesis. The same applies to the Brussels Regulations which cover the jurisdiction of courts in civil and commercial cases (Brussels I (Recast)) or family law cases (Brussels II). With regards to the subject matter discussed here the Brussels I Regulation is important, but it falls outside of the direct scope of this thesis which does not deal with the applicable jurisdiction.

[20] For this thesis the CISG and the Convention on the Law Applicable to International Sale of Goods of 1955 are pertinent

[21] These include for example:
The Hague Convention of 1961 on the Conflicts of Laws Relating to the Form of Testamentary Dispositions
The Hague Convention of 1 July 1985 on the Law Applicable to Trusts and on their Recognition

Therefore, this thesis studies the place non-state rules occupy in international commercial law, it establishes the legal framework within which non-state rules operates and it studies the application of non-state rules in court. Through these three aspects, the legal authority of non-state rules and the benchmarks against which this legal authority can be measured and understood are established.

1.4 Structure

This thesis is divided into seven chapters. The first is this short introduction which serves to explain the exact scope, aims, and methodology of the thesis. The second chapter focuses on defining several key concepts. Those are international commercial law, transnational commercial law, the lex mercatoria, and non-state rules. Examining and defining these concepts is needed to fully analyse the legal authority of non-state rules. The second part of chapter two focuses on harmonisation and non-state rules. Although harmonisation is not the main focus of this thesis an understanding of the role non-state rules play in this process contributes towards understanding the legal nature of non-state rules and the context in which they operate. Therefore, the purpose of the second chapter is to provide a solid understanding of the subject to the reader.

The third chapter concentrates on understanding the legal authority of non-state rules. This chapter analyses whether non-state rules are sources of law. The secondary purpose of this chapter is to give an overview of what specific types of non-state rules exist and how these can be classified. Furthermore, this chapter evaluates how the legal authority of non-state rules could be evaluated and provides the benchmarks against which this can be measured. Together chapters 2 and 3 thus answer the question of what non-state rules are and what their place in the (international) commercial law landscape is. Chapter 3 also provides the framework on how the legal authority of non-state rules can be analysed.

As the legal authority of non-state rules is best understood through their application in state courts the second half of the thesis concentrates on this aspect. Chapter 4 focuses on party

autonomy and non-state rules. It analyses whether parties to an international commercial contract can choose non-state rules as the lex contractus. The purpose of this chapter is to understand the place non-state rules have in private international law and what the agency is that the parties to the contract have to use non-state rules, as either the governing law or as contractual terms. This chapter thus answers the question of when non-state rules can be applied.

Chapter 5 considers the application of non-state rules through the applicable domestic law. It analyses when courts apply non-state rules outside of the context of private international law. The objective of this chapter is to gain a better understanding of the application of non-state rules by the courts. This chapter answers the question of when non-state rules are applied in full.

Chapter 6 is divided into two parts. The first part focuses on arbitration. The first section of this part examines the role non-state rules play in arbitration law. Although this thesis focuses on court litigation, understanding the role of non-state rules in arbitration contributes to a better understanding of their application in courts. The second section looks at the enforcement of arbitral awards where non-state rules are the applicable law. This section contributes to a greater understanding of how courts approach non-state rules. The second part of chapter 6 focuses on a trend that has been prominent in the application of non-state rules: the application of codified non-state rules in lieu of uncodified non-state rules. Analysis of this trend is fundamental to comprehend how non-state rules are applied by courts. Therefore, the question of how courts apply non-state rules is fully answered in chapter 6.

Finally, the concluding chapter 7 draws upon the conclusions in the previous chapters to provide a full analysis of how the legal authority of non-state rules can be measured and understood through their application in courts. The conclusion also examines whether there are any current legislative developments to further the application of non-state rules and it offers some policy recommendations in this area.

Chapter 2: Defining Non-State Rules

2.1 Introductory Remarks

The primary aim of this chapter is to analyse the concept of non-state rules and their place in international commercial law. The second goal is to define some of the most important concepts in this thesis. Defining the terminology is an aspect of research that is often overlooked; there is an assumption that this is not necessary and that the reader will already know the meaning of these terms. Legibility of a text would seriously diminish if every term was explained; however, using common terms without properly exploring their meaning could create presumptions that might be misleading. The meaning is perceived by writers and readers through their own lenses: '*the shifting perspectives that colour what is seen of the world at a given moment.*'[22] There is no such thing as an objective reader or writer. Everyone absorbs information through previously held lenses, ideas, and assumptions.[23] Thus, it would be prudent on the part of the author to begin with defining the most commonly used concepts in the work so that the reader will better understand the lenses of the author. This chapter advances the central research questions by providing a contextual analysis of the concepts used in this thesis as well as the background information necessary to develop an understanding of the legal authority of non-state rules.

The starting point of this chapter is the term international commercial law. In order to understand what non-state rules are and what their place is within international commercial law it is prudent to start with an exploration of this term. Reading works by esteemed authors shows that there does not seem to be one overarching commonly accepted definition. The

[22] Thomas Nelson, Zoe M Oxley and Rosalee A Clawson, 'Towards a Psychology of Framing Effects' (1997) 19 Political Behavior 221, 222

[23] Michael X Delli Carpini and Bruce A Williams, 'Let us Infotain You: Politics in the New Media Environment' in W. Lance Bennett and Robert M Entman (editors), *Mediated Politics: Communications in the Future of Democracy* (Cambridge University Press 2004) 161

second part analyses what non-state rules are. This is followed by a section that examines the different approaches to the lex mercatoria to determine whether it can be assimilated to non-state rules. The importance of the lex mercatoria in the application of non-state rules warrants an inclusion of this subject.

After having established these key notions the second half of the chapter examines the place non-state rules have in international commercial law. This part analyses the harmonisation of international commercial law and the role non-state rules play in this process. Although the focus of this thesis is not on harmonisation, an exploration of this issue contributes to understanding the nature of non-state rules and their legal authority.

2.2 Defining International Commercial Law

2.2.1 International Economic Law and International Commercial Law

Regulation of international commerce occurs on two different levels. The first is the international public law level where regulations are made through international organisations, including principally the World Trade Organisation, the World Bank, and the International Monetary Fund. This area is commonly referred to as *international economic law*. Its goal is to organise the legal rules of the economy on a global and regional level through, for instance, tariff and custom regulations, and import and export agreements. These regulations apply to merchants in an indirect way as the regulatory framework is aimed at the participating states. The second level of organisation is that which is generally referred to as *international commercial law*. This applies to private law regulations in international trade.

The term international trade law is typically used synonymously with international economic law. However, in the UK international trade law is used to incorporate international

commercial law and international economic law in one term.[24] In most other countries, including the United States, international trade law is used as a synonym for international economic law.[25]

International economic law is considered public law whereas international commercial law is private law. In practice this division is more blurred. Gourion et al write that international commercial law is a hybrid between private law and public law as certain public aspects of company law, fiscal law, and intellectual property law should be included.[26] Berger writes that the boundaries between public law and private law are fading and that perhaps international economic law and international commercial law should be considered one single subject.[27] According to Mistelis: *'International commercial transactions are the interchange between public and private law.'* [28] The qualification of international commercial law as a solely private branch of law might thus be an oversimplification, even though the majority of international commercial law does belong to the private law domain.

2.2.2 Confusing Terminology: International Commercial Law, a Branch of Domestic Law

International commercial law can be considered as a branch of domestic law. There is no international court or overarching international legislative body in this area. International commercial law is not a body of law which is imposed by a supranational organisation. It is under the auspices of the nation state more than it is outside its realm. International commercial law is a national law that regulates international commerce.

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[24] Jan Hendrik Dalhuisen, *On Transnational and Comparative Commercial, Financial and Trade Law* (third edition, Hart Publishing 2007) 2
[25] Ibid
[26] Pierre-Alain Gourion, Georges Peyrard and Nicolas Soubeyrand, *Droit du Commerce International,* (fourth edition, L.G.D.J. Lextenso Editions 2008) 86
[27] Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1999)160
[28] Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors) *Foundations and Perspectives of International Trade Law,* (Sweet & Maxwell 2000) 5

The term international law is often used to refer exclusively to public international law. Text books entitled 'international law' frequently just discuss public international law. Jessup wrote in his work *Transnational Law* that the term international law is misleading as it seems to refer only to interstate relations.[29] The objective of international commercial law is to regulate international commerce and is thus international. Furthermore, not all components of international commercial law are internal, as explained in chapter 1.1. International conventions are international in origin and in objective, even if they become part of domestic law upon ratification. Non-state rules are anational in origin and international in objective. Therefore, although not a branch of public international law, the use of the word international is justified.

Gourion et all include international commercial law under private international law and define the latter as: *'the designated legal branch to deal with any private law affairs where there is an external element.'* [30] In France, private international law includes the laws on nationality and on immigration. This is different from most jurisdictions where private international law is exclusively concerned with conflicts of law and conflicts of jurisdictions. It is questionable whether international commercial law should be qualified as a branch of private international law. It seems an anathema as private international law is procedural law whereas international commercial law is substantive law. This changes if you include nationality and immigration laws in private international law as the latter then also becomes a substantive branch of law. From that perspective the inclusion of international commercial law in private international law could be justified. However, this would mean altering and enlarging the most widely accepted definitions of private international law. This does not seem like a wise course of action in the international context.

[29] Quoted in Roy Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46 International & Comparative Law Quarterly 2
[30] Pierre-Alain Gourion, Georges Peyrard and Nicolas Soubeyrand, *Droit du Commerce International* (fourth edition, L.G.D.J. Lextenso Editions 2008) 163

International commercial law can be classified as a sub-branch of commercial law. Foster defines commercial law as '*the law relating to the facilitation and regulation of commerce.'*[31] The definition of Goode et all is: '*the totality of the law's response to mercantile disputes, encompassing all these principles, rules and statutory provisions of whatever kind and from whatever source, which bear on private law rights and obligations of parties to commercial actions*.'[32] Going on these definitions international commercial law should be incorporated in domestic commercial law. International commercial law is then the sub-branch of commercial law that regulates and facilitates international private commercial relations, and includes international elements next to domestic elements.

2.2.3 Transnational Commercial Law

The term transnational law became well-known through the works of Jessup although it had been used previously.[33] Transnational law according to Jessup is: *'all law which regulates actions or events that transcend national frontiers.*'[34] Lalive calls transnational law a system of law in between international law and domestic law which consists of substantive rules.[35]

Goode considers that the definition of Jessup is not applicable to transnational commercial law given that this includes national sources of law and merely replaces the term international with transnational.[36] According to Goode transnational commercial law is *'... not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems or even a collection of rules which are entirely anational and have their*

[31] Nicholas H D Foster, 'Comparative Commercial Law: Rules or Context?' in Esin Örucü and David Nelken (Editors) *Comparative Law, A Handbook* (Hart Publishing 2007) 263
[32] Roy Goode, Herbert Kronke, Ewan McKendrick and Jeffrey Wool, *Transnational Commercial Law*: *Text, Cases and Materials* (Oxford University Press 2007) 4
[33] Olugbenga Bamodu, 'Extra-national Legal Principles in the Global Village: a Conceptual Examination of Transnational Law' (2001) 4 International Arbitration Law Review 7,7
[34] As quoted in Roy Goode, Herbert Kronke, Ewan McKendrick and Jeffrey Wool, *Transnational Commercial Law: Text, Cases and Materials* (Oxford University Press 2007) 4
[35] Jean-Flavien Lalive, 'Contracts between a State or a State Agency and a Foreign Company' (1964) 13 International and Comparative Law Quarterly 987, 1008-1009
[36] Roy Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46 International & Comparative Law Quarterly 1,2

force by virtue of international usage and its observance by the merchant community. In other words, it is the rules, not merely the actions or events that cross national boundaries.'[37]

Loukas Mistelis defines transnational commercial law as follows: '*the corpus of law resulting from the harmonisation or convergence of national laws, whether by international convention, conscious or unconscious judicial parallelism, uniform rules for specific types of contract and international restatements of principles of contract law.'*[38] If one follows Goode's and Mistelis' definitions transnational commercial law incorporates solely those legal elements that are international in objective and origin, whereas international commercial law includes domestic law as well. Transnational commercial law is therefore that part of international commercial law which is anational in origin and international in objective.

To summarise the above, international commercial law is a branch of domestic law. It is different from international economic law, which regulates relations between states, as it concerns private contractual relations. It mainly consists of private law, but also includes elements of public law. It can be classified as a branch of commercial law. Each jurisdiction has its own international commercial law. The uniqueness of international commercial law lies in that its objective is international and that it includes international elements as well as domestic law. Those international elements together can be grouped under the name transnational commercial law. These include non-state rules and international conventions. Transnational commercial law is an anational body of law. Elements of this body can be part of domestic international commercial law if these are sources of law in the lex fori. Transnational commercial law is not a supranational law, but it exists in parallel to the nation state. It is intertwined with the state to some extent as it is ultimately dependent on the state for enforcement. Finally, this thesis uses the word anational at times. The reason is that not

[37] Ibid
[38] Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors), *Foundations and Perspectives of International Trade Law*, (Sweet & Maxwell 2000) 10

all sources of transnational commercial law necessarily have an international origin. Some have been developed by trade branch associations for instance. These are not necessarily international organisations. Therefore, the instruments developed by these associations do not have a transnational or international origin even if they do have a transnational objective.

2.3 The Concept of Non-State Rules

2.3.1 Terminology

This section explores the exact meaning of the term non-state rules. This category of sources is also known as soft law. The term soft law is mainly used in public international law which is why it is preferable to use the term non-state rules in the context of international commerce. This is not to say it is perfect, but it is clear and precise. The words non-state can be perceived as a negative terminology as it lays out what non-state rules are not rather than what they are. The reason is that non-state rules have diverse origins. Some non-state rules are spontaneous creations whereas others find their origin in international organisations or trade branch associations. The one thing in respect to their origin they have in common is that it lies outside the realm of the nation state. Therefore, non-state is the common denominator that unifies these rules. Non-state does not necessarily mean that there is no connection at all with the state. A remote connection is possible. Organisations like UNIDROIT are founded and funded by nation states.[39] Even though in their daily functioning they have a great deal of autonomy; their mandate is determined by the funding states. Non-state should be seen in this context as not originating within a domestic legislation or on behalf of one. The word rules is used instead of law as it is neutral and comprehensive enough to apply to all elements, including those whose status as a source of law is more debatable.[40]

[39] UNIDROIT is the International Institution for the Unification of Private Law which was set up in 1926 as an auxiliary organ of the League of Nations and was re-established in 1940 as an international organisation. Its purpose is to harmonise private law, especially in the field of international commerce.
[40] See chapter 3 for further discussion on non-state rules as a source of law.

Although non-state rules are examined as a group in this thesis, this is an artificial grouping as it is not recognised as a group in legislations. Legislations differentiate between different types of non-state rules. As an example, the UCC stipulates that trade usages should be applied even if the parties have not included them in the contract, but it only allows the UNIDROIT Principles of International Commercial Contracts to be applied as contractual rules and only at the request of the parties.[41]

2.3.2 Characteristics of Non-State Rules

So how can it be determined whether something is a non-state rule? The point of departure is the origin, which is somewhere outside of the realm of the domestic legislators. There are other defining characteristics. According to Abbot and Snidal '*The realm of soft law begins once legal arrangements are weakened along one or more of the dimensions of obligation, precision, and delegation.*'[42] This article was written in the context of public international law, but is also pertinent in the context of transnational commercial law.

In international commerce the obligation of non-state rules is not as strong as the obligation that flows from domestic law. This is not to say there cannot be any legal obligation. For instance, general principles of law and trade usages can be legally binding. Moreover, as the contract can be considered the first source of law between the parties, contractual provisions (which may include non-state rules) can cancel variable rules of hard law. It is hence not so that non-state rules never have any obligatory force, but that overall this force is weaker than that of so-called hard law. Non-state rules are cancelled out by international public policy and

[41] See chapter 3 and 5 for further analysis of the differentiation between types of non-state rules.
[42] Kenneth W Abbott and Duncan Snidal, 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421,422

mandatory laws, and can also be cancelled out by other legal provisions depending on the circumstances.[43] This weakens their obligatory force.

The second dimension that Abbott and Snidal mention is precision. Uncodified non-state rules tend to be imprecise and flexible. Their exact content is not easy to pinpoint and changes from place to place and from trade to trade. On the other hand, codified non-state rules, such as restatements of law, can be precise and their content is easy to establish.

The final dimension is delegation. Non-state rules are not initiated by the state. They are either spontaneous creations or they are drafted by (international) organisations and trade branch associations. This does not mean that states never have any role in the creation of non-state rules. International organisations are financed by states and state delegates can be involved in drafting new instruments. Furthermore, states can sometimes push for the creation of new rules.[44] However, the involvement of the state is indirect. The state delegates the creation of the instruments to others.

Concluding, it can be said that Abbott and Snidal's definition of soft law is applicable in transnational commercial law. Non-state rules can be seen as *legal arrangements* that share a

[43] International Public Policy (also called international public order) refers to the cornerstone principles of the legal system that are so fundamental to its functioning, that a court will not enforce any arbitral award or decision from a foreign court that runs contrary to it nor will the court apply those provisions of the applicable foreign law that run contrary to this. The wording international public policy is used to differentiate this from domestic public policy which has a wider scope as this also includes the application of mandatory rules for instance. In the context of this thesis international public policy does not refer to the concept of a policy that is common to multiple states, but rather to the concept of international public policy as explained above.
Mandatory laws are those laws that are seen '*as so essential for the political, social and, economical organisation of the state that they determine their field of application without taking into account the conflicts of law legislation.'* This is the definition by Professor Phocion Francescakis which is also used in the commentary on article 3 of the French civil code and is applicable in French private international law.

[44] An example is the 2012 proposal by Switzerland to UNCITRAL to start work on a new convention in the area of international contract law:
http://daccess-dds ny.un.org/doc/UNDOC/GEN/V12/534/54/PDF/V1253454.pdf?OpenElement
Last accessed 26 February 2016

transnational origin and that are weakened along one or more of the dimensions of *obligation*, *precision*, and *delegation*.

2.4 Defining the (New) Lex Mercatoria

Non-state rules are sometimes referred to as the (new) lex mercatoria whilst others might see the (new) lex mercatoria as a part of non-state rules. Therefore, the notion of the (new) lex mercatoria needs to be examined. First of all, when discussing the lex mercatoria it must be stressed that there are two leges mercatoriae.

The first is the medieval lex mercatoria. This is the ancient lex mercatoria which dates back to at least the early Middle-Ages. Some authors link the origins of the lex mercatoria back to Roman law and the Ius Gentium, and cite examples such as the Sea Law of Rhodes which emerged around 300 BC.[45] Mitchell defines the lex mercatoria as '*a body of rules and principles relating to merchants and mercantile transactions, distinct from the ordinary law of the land. Possessed of a certain uniformity in its essential features, it yet differed on minor points from place to place.*'[46] From the 7th-9th century onwards merchants were considered a distinct class and formed merchant courts on year markets and fairs where they solved their own disputes according to their own rules.[47]

The second lex mercatoria is the new lex mercatoria that emerged in the middle of the 20th century and is considered as a revival or continuation of the medieval lex mercatoria. If the term lex mercatoria is used this could refer to either the old lex mercatoria or the new lex mercatoria. The term lex mercatoria is used interchangeably by many scholars to refer to both

[45] Harold J Berman, The Law of International Commercial Transactions (Lex Mercatoria), (1987) 2 Emory Journal of International Dispute Resolution 235, 238
Although it can also be argued that the ancient shipping rolls should be seen as separate from the medieval lex mercatoria that developed through year markets and fairs as these are just focused on maritime customs.
[46] William Mitchell, *An Essay on the Early History of the Law Merchant* (Cambridge University Press 1904) 10
[47] Ibid, 25

leges mercatoriae. This is often done for practical reasons, but can also be for ideological ones. Using the term lex mercatoria for both emphasises the continuity between the two. Berman argues that although the lex mercatoria was less prominent in the 17th-19th century it did not disappear completely.[48] This would mean there is only one lex mercatoria. This thesis refers to the lex mercatoria to describe the lex mercatoria in general (old and new) and uses the term medieval lex mercatoria when it is necessary to make a distinction between the two.

2.4.1 The Medieval Lex Mercatoria

The medieval lex mercatoria came about because of the rise in year markets and fairs, the revival of (Roman) law study, and the increase of commerce after the fall of the Western Roman Empire.[49] It governed a special class of people (merchants) in a specific place (such as a market/fair/town/port), it was administered by merchant courts, and it was more adept to the needs of international commerce than local laws, which were not as well-developed.[50] The medieval lex mercatoria consisted mainly of the practices of trade guilds, customary law as well as jurisprudential decisions from merchant courts.[51] It was thus customary in origin.

There is a tendency to romanticise the medieval lex mercatoria as a unified body of law which was applied consistently throughout Europe.[52]Although there is consensus that some form of the lex mercatoria existed its coherence and extensiveness is disputed.[53] The

[48] Harold J Berman, The Law of International Commercial Transactions (Lex Mercatoria) (1987) 2 Emory Journal of International Dispute Resolution 235, 299

[49]William Mitchell, *An Essay on the Early History of the Law Merchant* (Cambridge University Press 1904) 22 and
Harold J Berman, The Law of International Commercial Transactions (Lex Mercatoria) (1987) 2 Emory Journal of International Dispute Resolution 235, 240

[50] Ralf Michaels, 'The Re-statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005) 51 Wayne Law Review 1209,1231

[51] Klaus P Berger, 'The New Law Merchant and the Global Market Place' (2000) 4 International Arbitration Law Review 92

[52] Roy Goode, 'Usage and its Reception in Transnational Commercial Law' in Jacob S Ziegel and Shalow Lerner (editors), *New Developments in International Commercial and Consumer Law, proceedings of the 8th Bienal Conference of the International Academy of Commercial and Consumer Law* (Hart Publishing1998) 7

[53] Emily Kadens argues against the existence of a coherent and unified medieval lex mercatoria on the ground that the evidence for such a legal system is very flimsy. Looking at court decisions, texts written on merchants during that period, and other material, Kadens concludes that there most probably

medieval lex mercatoria was not a complete and uniform body of law, but consisted of different sets of rules with strong regional differences.[54] Some describe the medieval lex mercatoria as a North Italian concept which spread from there to the rest of Europe, but never achieved any real unification.[55] However, Mitchell states that in broad lines the different customs were similar and the differences between these customs minor, and that it is thus possible to speak of a common lex mercatoria.[56] The term lex mercatoria is also used historically which means that there was an early awareness of its existence. For instance, one comes across the term lex mercatoria in the 13th century when it is mentioned in the Little Red Book of Bristol.[57]

The lex mercatoria slowly disappeared as stronger and more unified national laws emerged with the rise of the nation state. The lex mercatoria was codified in civil law systems, whereas in England the lex mercatoria became a matter for the courts and was consequently absorbed in the common law.[58] The absorption of the lex mercatoria in national laws made the latter better suited for international commerce, but ultimately contributed to the loss of the universal character of commercial law.[59] The lex mercatoria did not disappear completely

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was not a lex mercatoria in the sense that is understood now. She notes that there was no real reason for the existence of an extensive lex mercatoria because commerce was usually done face to face and thus gave rise to less disputes, merchants used brokers and local agents when travelling to foreign cities who would inform them of local customs and laws, and most cities and localities had well developed choice of law rules *(*Emily Kadens, 'The Myth of the Customary Law Merchant' (2012) 90 Texas Law Review 1153

[54] Roy Goode, 'Usage and its Reception in Transnational Commercial Law' in Jacob S Ziegel and Shalow Lerner (editors), *New Developments in International Commercial and Consumer Law, proceedings of the 8th Bienal Conference of the International Academy of Commercial and Consumer Law* (Hart Publishing1998) 7

[55] William Mitchell, *An Essay on the Early History of the Law Merchant* (Cambridge University Press 1904) 7

[56] Ibid

[57] Little Red Book of Bristol: https://archive.org/details/littleredbookbr02enggoog Last accessed: 26 February 2016

[58] Lord Mansfield in the case of *Pillans and Rose v. van Mierop and Hopkins* [1765] 3 Burr 1663 (QB) '*rules of the law merchant are questions of law to be decided by the courts rather than matters of custom to be proven by the parties and such rules apply to all persons.'*

[59] Harold J Berman, The Law of International Commercial Transactions (Lex Mercatoria) (1987) 2 Emory Journal of International Dispute Resolution 235, 243

after the 18th century, but its presence diminished considerably and interest in the concept was lost.[60]

2.4.2 The New Lex Mercatoria

The concept of the lex mercatoria was revived in the second half of the 20th century. This renewal came through merchants, ship owners, insurers, and bankers who were confronted with more complex legal questions due to the increasing international trade, and who wished for more predictability and harmonisation.[61] This issue generated interest in the scholarly community. The starting point of the concept of the new lex mercatoria is usually traced back to an article by Berthold Goldman in 1956 on the nationality of the Suez Canal Company, in which he argued that the Company was not of a specific nationality due to its organisation and global presence, and that it belonged to a transnational legal order.[62]

This idea was further developed in the 1960s by authors such as Goldstaijn, Fragistas, and Goldman himself in France, and Clive Schmitthoff in the UK and led to a theory of the new lex mercatoria.[63] Per Schmitthoff it can be distinguished from the medieval lex mercatoria because the latter was unwritten, concerned solely transactions between merchants, and was independent of national law. By contrast the new lex mercatoria can incorporate written rules, concerns transactions of a commercial nature independent of who is conducting the transaction, and does not operate independently from the state.[64] The concept of the new lex mercatoria originates in the community of scholars and is based on their observations of

[60]Ibid, 299-300
[61] Ibid,243
[62] This article appeared in the newspaper Le Monde on the 4th of October 1956. An English translation and a scan of the original article can be found at: http://www.trans-lex.org/9/
Last accessed 26 February 2016
[63] Klaus Peter Berger, 'Berthold Goldman and the Dijon School: The rebirth of the Lex Mercatoria' http://www.trans-lex.org/000001
Last accessed 26 February 2016
[64] Clive M Schmitthoff, 'The Unification of the Law of International Trade' (1964 Handelshögskolan Göteburg, Skrifter) reproduced in Chia-Jui Cheng (editor), Clive M Schmitthoff, *Select Essays on International Trade* (1988 Marinus Nijhoff Publishers)170, 171

mercantile practices in the 20th century. The new lex mercatoria should be seen as a spill over effect from globalisation which enforced the concepts of party autonomy and private law making.[65]

Is it possible in today's fragmented world that is divided in nation states for a unified lex mercatoria to exist? The economic disparity in the world can be seen as a reason why the lex mercatoria cannot achieve its potential.[66] If one speaks about the lex mercatoria as a unified customary law this is perhaps not a global law, but is mainly restricted to developed liberal market states. Merchants in states that do not participate to the same extent in international commerce, because of lack of economic development or state restrictions on international trade, are not involved in shaping the lex mercatoria as extensively because of power disparity and less frequent trade. This means that the lex mercatoria might be something which they participate in or have imposed on them, but they are not equal co-creators. The differences in legal culture also make it difficult to have one universal lex mercatoria. Therefore, we cannot speak of a global and unified group of merchants that speak with one voice. Perhaps, it is thus better to speak of the lex mercatoria as a global phenomenon whose precise place, content, and uniformity differs from region to region.

Sceptics of the concept of the lex mercatoria might argue that only the state can create law and thus the lex mercatoria cannot exist.[67] This goes back to fundamental notions of what law is and what the state's role is in creating the law and this would be considered a positivist view. Teubner criticises this (nationalist) thinking as based on 19th century ideas of statehood that are no longer relevant.[68] Teubner's article revolves around the idea that a new global

[65] Ross Cranston, 'A Theory for International Commercial Law?' (2006) http://biblio.juridicas.unam.mx/libros/5/2332/18.pdf 253,261
Last accessed: 26 February 2016
[66] Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (editor), Global Law without a State (1997 Brookfield) 19
[67] Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1999) 102
[68] Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (editor), *Global Law without a State* (1997 Brookfield) 9

commercial law will come from the social peripheries and not from nation states or international institutions.[69] The lex mercatoria is controversial because it breaks two taboos which emerged with the rise of the modern nation state: it suggests that law can be created without authorisation from the state and that law can be valid outside of the state.[70] These taboos might have some validity as currently most judicial power rests with the nation state, but they do not do complete justice to a cosmopolitan and globalised world that consists of fragmented communities and regions.

The state does not have the sole exclusive power to determine whether something is law.[71] The law can have force if people believe it has this force. The legal authority of the lex mercatoria resides where the majority believe it resides. If the majority of merchants treat the lex mercatoria as a law, even when adhering to it goes against their personal interests, this means that the lex mercatoria is real no matter whether it is endorsed by the state or not.[72] Teubner finishes with an optimistic note and states that the lex mercatoria is '*the most successful example of a law without state*.'[73]

2.4.3 Key Issues of the Lex Mercatoria

The first key issue is thus whether the lex mercatoria exists. The second issue is that if it exists it should be determined what the lex mercatoria exactly is. Is the lex mercatoria a distinct legal order or is it part of an existing legal order (domestic or international)? Berger analyses three separate theories on how the lex mercatoria is perceived. The first sees the lex mercatoria as a mass of rules which can be used to supplement the applicable law, the second

[69] Ibid,12
[70] Ibid 10
[71] Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1999) 102
[72] Ibid 106
[73] Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (editor), *Global Law without a State* (1997 Brookfield) 12

defines the lex mercatoria as an autonomous law, and the third view sees the lex mercatoria as an independent legal system.[74]

Gourion et al see the lex mercatoria as a third judicial order next to national law and international law.[75] Louis Marques defines it as: '*the existence of transnational rules made up of usages and principles which would constitute a true juridical order specific to the operators of international commerce.'*[76] Dalhuisen confirms that the lex mercatoria is a complete law and that it can even be considered a legal system.[77] These views thus correspond to the third theory that Berger discusses.

The second theory is that of the lex mercatoria as an autonomous law. Goldman suggests that the lex mercatoria is an independent legal order which is dependent upon national legal orders for its implementation.[78] A major difference between the medieval lex mercatoria and the new lex mercatoria is that the first operated independently of national/regional laws, whereas now national law has final jurisdiction over international commercial transactions.[79] The concepts of state and national law have changed drastically since the Middle Ages. The state entity did not exist in the same form in that period. This has also led to a change in how the lex mercatoria operates. It is an autonomous law, but it is not a completely independent legal system. In 1924 The North Dakota Supreme Court stated that:

'the law merchant is a system of law that does not rest exclusively on the institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established to regulate the dealings of merchants and mariners in all the commercial countries of the civilised world.'[80]

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[74] Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1999) 40
[75] Pierre-Alain Gourion, Georges Peyrard and Nicolas Soubeyrand, *Droit du Commerce International* (Fourth edition, L.G.D.J. Lextenso Editions 2008) 89
[76] Louis Marques, *International Uniform Commercial Law: towards a progressive consciousness (*Ashgate Aldershot 2005) 11
[77] Jan Hendrik Dalhuisen, *On Transnational and Comparative Commercial, Financial and Trade Law* (Third edition, Hart Publishing 2007) 173
[78] Berthold Goldman, 'Lex Mercatoria: Lecture' *Forum Internationale 3,* (Kluwer 1983) 22/23
[79] Clive Schmitthoff, 'The Unification of the Law of International Trade' in Clive Schmitthoff, The *Sources of the Law of International Trade* (Frederick A. Praeger 1964)
[80] *Bank of Conway v. Stary et al* 51 N.D. 399, 200 N.W. 505 (1924)

Twinning classifies the lex mercatoria as a sub branch of transnational commercial law and considers that the lex mercatoria is autonomous, but still part of an existing legal system.[81]

The first view is in line with traditional legal doctrine which would consider the lex mercatoria as *'professional norms, social rules, customs, usages, contractual obligations, intra-organisation or inter-organisational agreements, arbitration awards – but not law.'*[82] This theory emphasises that law is the expression of the will of states.[83] In this theory the absence of a unified and independent merchant community combined with the lack of an opinio iuris make it difficult to justify that the lex mercatoria is (customary) law. [84]

Berger attempts to forge the three approaches together by describing the lex mercatoria as *'the totality of international trade usages which has the character of an independent legal system that derives its justification from the acknowledgement by domestic laws'* [85]A practical conclusion is reached by Bonell: in the end it does not matter whether the lex mercatoria truly is an independent and autonomous legal order, the key issue is how much the state allows it to be applied.[86] Bonell's statement highlights the importance of the position of the state. This combined with the doubts whether a global and uniform merchant community exists, means that it is difficult to consider the lex mercatoria as an independent legal system. It would therefore be more correct to say that the lex mercatoria is a transnational law that develops autonomously and can be applied in so far as this is allowed by domestic law.

[81] William Twinning 'Globalisation and Comparative Law' in Esin Örucü and David Nelken (Editors), *Comparative Law, A Handbook* (Hart Publishing 2007)85
[82] Günther Teubner, 'Breaking Frames: Economic Globalization and the Emergence of *lex mercatoria'* (2002) 5 European Journal of Social Theory 199, 206
[83] Harold J Berman, The Law of International Commercial Transactions (Lex Mercatoria) (1987) 2 Emory Journal of International Dispute Resolution 235, 304
[84] Gunther Teubner, 'Global Bukowina: Legal Pluralism in the World Society' in Gunther Teubner (editor), *Global Law without a State* (Brookfield 1997) 9
[85] Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1999) 40
[86] Michael Joachim Bonell, 'The UNIDROIT Principles and Transnational Law' (2000) 5 Uniform Law Review 199, 199

The next issue is defining the actual substance of the lex mercatoria. There are again three main hypotheses on this subject. In the first the lex mercatoria encompasses the whole of transnational commercial law and even includes aspects of public international law. This view is probably the least popular. One of the main proponents of the broader view is Clive Schmitthoff. Another is Ole Lando who identified 8 elements of the lex mercatoria in his seminal article:

- Public international law aspects
- Uniform laws
- General principles of law
- Rules of international organisations
- Uncodified customs and usages
- Codified customs and usages
- Standard-form contracts
- Reported arbitral awards [87]

This thus means that all transnational commercial rules, public international law, and arbitral awards should be considered lex mercatoria. Dalhuisen is another author who espouses a broad view. He also includes elements of EU law and domestic law in his classification. Following his work, in order of importance, the lex mercatoria consists of:

- Fundamental basic principles like pacta sunt servanda
- Custom and practices of a mandatory nature including proprietary restrictions
- Uniform substantive treaty law of a mandatory nature such as certain EU laws
- Mandatory general principles such as good faith
- Precise contractual terms including the applicable law
- Directory customs and practices
- Uniform treaty rules of a directory nature like the CISG
- Directory general principles of the particular legal structures.[88]

[87] Ole Lando, 'The Lex Mercatoria in International Commercial Arbitration' (1985) 34 International & Comparative Law Quarterly 747, 748

The lex mercatoria would thus consist of most elements of international commercial law and constitute a legal system that can be ordered and hierarchised.

The intermediary view identifies the lex mercatoria as all or most non-state rules. This would include usages and practices, general principles, model contracts, restatements of laws, codified usages, arbitral awards, but not public international law or international conventions.[89] Gourion et all define the primary sources of the lex mercatoria as arbitral decisions and the instruments promulgated by the International Chamber of Commerce (ICC).[90] Amissah identifies as components of the lex mercatoria: customs, usages, codified rules such as the Uniform Customs and Practices (UCP) and the Incoterms, as well as principles of law common to all or most states.[91]

The most restricted definition reduces the lex mercatoria to uncodified non-state rules. Symeonides believes codified non-state rules do not belong in the lex mercatoria: *'none of these norms qualify as lex or even ius, and many of them are not mercatoriae. For example, although the UNIDROIT Principles are limited to international 'commercial' contracts, neither the Principles of European Contract Law nor the credit card association rules are so limited.'*[92] Goode et al are also proponents of this view and restrict the lex mercatoria to: *'what Roman lawyers described as ius non scriptum and thus […] that part of transnational commercial law which consists of the unwritten customs and usages of merchants.'*[93] Goode

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[88] Jan Dalhuisen, *On Transnational and Comparative Commercial, Financial and Trade Law Volume I, - The New Lex Mercatoria and its Sources* (Hart Publishing 2001) 169-171

[89] Roy Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46 International & Comparative Law Quarterly 2

[90] Pierre-Alain Gourion, Georges Peyrard and Nicolas Soubeyrand, *Droit du Commerce International* (Fourth edition, L.G.D.J. Lextenso Editions 2008) 90

[91] Ralph Amissah, 'The Autonomous Contract- Reflecting the Borderless Electronic-Commercial Environment in Contracting'(1997), 14
Available at: http://www.jus.uio.no/lm/the.autonomous.contract.07.10.1997.amissah/portrait.letter.pdf
Last accessed: 26 February 2016

[92] Symeon C Symeonides, 'Party Autonomy and Private-Law Making in Private Law: The Lex Mercatoria that Isn't' published in *Liber Amicorum Konstantinos D Kerameus* (Sakkoulas/Kluwer Press, 2006) 6

[93] Roy Goode, Herbert Kronke, Ewan McKendrick and Jeffrey Wool, *Transnational Commercial Law*: *Text, Cases and Materials* (Oxford University Press 2007) 6

describes the essence of the new lex mercatoria as being *'uncodified, non-statutory, and non-conventional.'*[94]

Within this approach there is also a sub-discussion on whether general principles of (international) law should be included in the lex mercatoria. The lex mercatoria would then be confined to practices, usages, and customs exclusive to transnational commercial practice.[95] Cranston defines the lex mercatoria as consisting of principles such as *'good faith, reasonableness, the duty to negotiate, set-off and the obligation to compensate on expropriation.'*[96] Therefore, he is of the opinion that these general principles are not only included, but that they are the vital part of the lex mercatoria. Ramberg asks whether general principles of law should be seen as part of the lex mercatoria as they vary between jurisdictions as does their interpretation and they are thus not truly uniform.[97]

General principles of law can originate in the international legal order or in the domestic legal order. They do not originate within the merchant community. At the same time, it can be considered that the general principles of the lex mercatoria are different to these. They might start as public international law or domestic law, but they can develop into a concept of common principles applicable to the practice of international commerce. Although there are good arguments on either side of this debate, the practical importance of general principles of international commercial law warrants an inclusion of these in the lex mercatoria.

Goldman writes that in the lex mercatoria not only the object is important (the regulation of international commerce), but also the origin (which should be customary): the lex mercatoria

[94] Roy Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46 International & Comparative Law Quarterly 2

[95] This view is for instance espoused by Goode et all who write that general principles of (international) law should be seen as a separate source within transnational commercial law: Roy Goode, Herbert Kronke, Ewan McKendrick and Jeffrey Wool, *Transnational Commercial Law*: *Text, Cases and Materials* (Oxford University Press 2007) 6 and 50

[96] Ross Cranston, 'Theorizing Transnational Commercial Law' (2006-2007) 42 Texas International Law Journal, 597,598

[97] Jan Ramberg, *International Commercial Transactions* (ICC Kluwer Law International Norstedts Juridik AB 1998) 21

is '*an ensemble of general principles and legal rules growing out of a process of spontaneous, institutional law making.'*[98] Standard contracts and conditions do not have a customary origin, yet Goldman proposes these could be included in the lex mercatoria because they originate within the business community itself. [99] This serves as an illustration that although there might be three broad theories on the contents of the lex mercatoria, within these three there are also different points of view on what should and what should not be included.

2.4.4 The Definition of the Lex Mercatoria

Concluding there are several issues that are important in defining the lex mercatoria. The first is whether or not the lex mercatoria can exist. The second is whether or not it is a distinct legal order. The third issue is what the substance of the lex mercatoria is. There is no consensus on any of these issues. Berger notes that a worldwide survey amongst legal practitioners found that the vast majority would not recommend choosing the lex mercatoria as the applicable law as it is not that well-defined.[100] Defining the lex mercatoria is thus not only of theoretical importance, but also resolves this unpredictability that could prevent its usage. For this purpose, the first two issues seem to be mainly of academic interest whilst the question of the actual content of the lex mercatoria is one which is also of practical interest. Merchants and practitioners will not be as interested in theoretical debates on the existence of the lex mercatoria, and whether or not it should be classified as an autonomous system. They do want to know what they can expect if the lex mercatoria is used and applied, and therefore it is important to come up with a workable definition of its contents.

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[98] Klaus Peter Berger, 'The New Law Merchant and The Global Market Place: a 21st Century View of Transnational Commercial Law' in Klaus Peter Berger (Editor), *The Practice of Transnational Law (*Kluwer Law International, 2001) 6

[99] Berthold Goldman, 'Lex Mercatoria: Lecture', *Forum Internationale 3*, (Kluwer 1983), 5/6

[100] Klaus Peter Berger, 'The New Law Merchant and The Global Market Place: a 21st Century View of Transnational Commercial Law' in Klaus Peter Berger (Editor), *The Practice of Transnational Law (*Kluwer Law International 2001) 6

If one adheres to the wider views of what the lex mercatoria consists of this moves it further away from the medieval lex mercatoria. If the lex mercatoria is equivalent to all transnational commercial law or even to just all non-state rules (including codified) it means that custom is no longer the primary source. It means that the lex mercatoria can be deliberately created by states, NGO's, and other organisations. The content will no longer be determined solely by the merchant community. Thus by adopting the wider approach one changes the nature of the lex mercatoria. Therefore, it would be appropriate to use a more restricted approach to the (new) lex mercatoria.

If one sees the new lex mercatoria as a continuation or revival of the medieval lex mercatoria it would be logical to take the essence of the medieval lex mercatoria as a starting point. Mitchell defines 5 characteristics of the medieval lex mercatoria:

- Transnationality
- Custom as the primary source
- A spirit of equity
- Self-administered by merchants
- Speedy and informal procedures.[101]

If one would define the lex mercatoria according to the above criteria the closest definition is that of an unwritten law which is spontaneously created and is formed by the customs, trade usages and practices of merchants, as well as by the general principles of transnational commercial law.

A final note should be made. Twigg-Flesner distinguishes between the new lex mercatoria, which encompasses the whole of transnational commercial law, and the lex mercatoria, which

[101] William Mitchell, *An Essay on the Early History of the Law Merchant* (Cambridge University Press 1904) 13 and further
Also quoted in Harold J Berman, The Law of International Commercial Transactions (Lex Mercatoria) (1987) 2 Emory Journal of International Dispute Resolution 235, 240

concerns just (international) trade usages.[102] Other authors seem to use these terms interchangeably and do not make a distinction between the two. In the interest of clearness this thesis uses the term lex mercatoria to refer to uncodified non-state rules, but uses the term transnational commercial law to refer to the ensemble of non-state rules and international conventions.

2.5 The Place of Non-State Rules in Transnational Commercial Law

2.5.1 The Effects of Diverging Legal Systems

The natural effect of commerce is to create a mutual need between states: one state has the need to buy and the other has the need to sell.[103] It also creates a mutual need between businesses. One business wants to buy and the other wants to sell. Businesses strive to grow and at some point will wish to expand their trade beyond the borders of their state. Doing commerce abroad can be risky. There is an element of legal insecurity. Merchants have to operate in an environment where they cannot predict the legal consequences of their actions as well as they could in their own legal system. Especially for SME, which for financial reasons have less access to legal expertise, this unpredictability can be a deterrent to conducting business abroad.

The contract is drawn up to counter this unpredictability as best as possible. If the contract could cover every possible situation, then there would be the need for only one rule: *pacta*

[102] Christian Twigg-Flesner,'Standard Terms in International Commercial Law – the Example of Documentary Credits' (2007) 11
Available at: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1349711
Last accessed: 27 February 2016

[103] Charles-Louis de Secondat Montesquieu, *De l'Esprit des Lois Livre XX, Chapitre 2, De l'Esprit du Commerce*
http://classiques.uqac.ca/classiques/montesquieu/de_esprit_des_lois/partie_4/de_esprit_des_lois_4.html 24
Last accessed 27 February 2016

sunt servanda.[104] It is of course not possible to have a self-contained contract as not every possible situation can be foreseen beforehand. Therefore, there is the need to attach the contract to a law and a forum. In an international contract there are several possible laws that the contract could be attached to. One of the possibilities would be the domestic law of either party. This has the advantage of being familiar to one of the parties and if the execution of the contract (partly) takes place in that legal system it can be hoped the law will provide adequate solutions. There are also disadvantages. One of the parties will have to put in additional monies and time to become familiar with the law. This party might introduce a handcuffs clause to counter this. This clause makes the contract the primary source of law for the parties. There is however, no way of knowing how this clause will be interpreted by the court and the contract cannot foresee every possible problem. Therefore, parties might be reluctant to give the other party the advantage of using their domestic law. If the parties have equal bargaining power this can lead to an impasse. In the case of unequal bargaining power, the stronger party can impose his choice of law and (potentially) leave the other party at a disadvantage. It will also not do much to promote goodwill between the parties.

The other option would be to choose the law of a third country. Choosing a neutral law places both parties on equal footing regarding familiarity with the law. Given that neither party is likely to have an attachment to the law of a specific country other than their own, the parties can choose the law that is most suited to their contract. Unfamiliarity with the law is a disadvantage as there might be aspects of the law which neither party knew or understood, and this could have unwanted consequences. Thus, the outcome might be different than the original intentions of the parties and this creates additional legal insecurity.

Choosing the applicable law is thus not always straightforward. Time being of the essence in commerce, it is not an option for the parties to engage in a complete comparative study to

[104] Konrad Zweigert and Heinz Kötz, *An introduction to comparative law* (Tony Weir tr, third edition, Oxford University Press 1998) 327

find the most appropriate law for their transaction. So the parties will choose a law they are familiar with. Usually this will be the domestic law of one the parties or the law of a neutral third country such as the UK, the US, or Switzerland. If the parties cannot agree on a choice of law this is sometimes omitted from the contract. This also happens if the parties were not aware of the need to choose a law. This leads to additional legal uncertainty as then the forum will apply its private international law to decide what the applicable law to the contract is.

If the applicable law is not the lex fori there are additional disadvantages. Applying and interpreting a foreign law can prove challenging for the court. The rules can be subject to debate in their jurisdiction of origin, and there might be multiple valid interpretations.[105] Lack of experience with applying and interpreting foreign law can be problematic. Justice Blackmun in his dissenting opinion: *'... Although transnational litigation is increasing, relatively few judges are experienced in the area and the procedures of foreign legal systems are often poorly understood...'* [106]

A unified private international law can help to reduce legal uncertainty with regards to the applicable law. Among proponents of transnational commercial law the private international law solution is usually met with criticism. It is seen as inadequate as the results are not determined by what is in the best interests of the parties, but rather by the principles of conflicts of law legislation where the centre of interest is the state and not the parties.[107] If increased attention were given to the needs of the parties the judge would decide in each individual case which law best fits the transaction. This would create additional uncertainty as the parties could not know the applicable law in advance. [108] This would not be a suitable approach to private international law because of the added insecurity it would cause. Private

[105] Chiara Giovannucci Orlandi, 'Procedural Law Issues and Uniform Law Conventions' (2000) 5 Uniform Law Review 23, 28
[106] *Société Nationale Industrielle Aerospatiale v. United States District Court*, 482 U.S., 553 (1987)
[107] Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (Kluwer Law International 1999) 10-14
[108] Ibid 21

international law solutions are not always fitting to the needs of international contracting parties that require certainty, as well as solutions specific to their situation. Through a unified private international law parties can know the applicable law in advance, but the problems with the unfamiliarity of the content remain.

In 1949 Mario Matteucci, the then Secretary General of UNIDROIT, wrote that private international law is not sufficient to solve problems coming out of the differences between legal systems and that '*unification of private international law and international unification of private law'* are both needed.[109] Thus, the key to securing international commercial relations could be to harmonise international commercial law: '*International trade needs a real jus commune mercatorum, a material law that can govern international relations.'* [110] This is more suited to the needs of merchants than transposing national law solutions to an international context.[111]

Domestic commercial law is tailored to transactions that take place within the legal framework of that state and might not meet the demands of international commerce. For instance, under the UCC there is a perfect tender rule.[112] This is feasible within the context of one nation, even if it is the size of the US. This is much less practical in the international context. If the merchandise does not meet the perfect tender criterion and the buyer sends it back to the seller this could cause logistic problems. Not only would the merchandise have to be taken through customs again with all the associated costs and delays, but the journey is likely to be a long one; often over sea or over land through different countries. It would lead to substantial additional costs, risks, and time. Therefore, the CISG has no perfect tender rule

[109] Mario Matteucci, 'Prospects of International Unification of Law from a European Viewpoint' (1949) 10 Louisiana Law Review 15, 16

110 Klaus Peter Berger, 'Lex Mercatoria doctrine and the UNIDROIT principles of international commercial contracts' (1997) 28 Law and Policy in International Business 943 958
Quoting from: *Progressive Codification of the Law of International Trade* United Nations Documents A/CN.9/L.19 (1970)

[111] Loukas Mistelis, 'Is Harmonisation a Necessary Evil The Future of Harmonisation and New Sources of International Trade' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors) *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2000) 20

[112] UCC § 2-601Buyer's Rights on Improper Delivery.

and the buyer can only refuse the merchandise if there is a fundamental breach (but he can claim damages for non-conformity).[113] This pragmatism, which can be found throughout the CISG, is more suited to the realities of international commerce.

The need for a truly transnational commercial law has been expressed by many scholars. In 1979 Schmitthoff wrote

> 'No branch of law suffers as much from the division of the world into many national legal systems as commercial law. That division is a serious obstacle to the international exchange of goods and services. On the international level – as in the home market - businessmen want to supply goods to their customers and make sure that they receive the purchase price, they want to build factories and installations, establish a proper distribution network for their goods or services, in brief, they want to get on with the business. But they do not wish to get entangled in legal snares, such as those created by the diversity of national laws.'*[114]*

Dalhuisen writes: '*At least in the area of professional dealings the formation and operation of transnational law may be considered the national and unavoidable consequence of the internationalisation of the flow of goods, persons, services, knowledge, capital, payments and assets*.'[115] Orlandi starts her article by stating that '*foreign traders often fear municipal laws as they can hide dangerous traps for the success of their businesses*.'[116] The legal problems associated with international business transactions are affirmed by Bortolotti who writes that harmonisation is the answer to these.[117] Michael Kabik mentions that: *'International trade has been hindered by a myriad of distinct domestic laws governing the sale of goods.'* [118] This is confirmed by Franco Ferrari who states that more intense international trade leads to a further need for harmonised law.[119] Eleanor Fox writes that *'Disharmonies of law and*

[113] CISG Article 46 (2) and 74
[114] Clive M Schmitthoff, 'American and European Commercial Law' (1979) 6 Journal of Legislation 44, 44
[115] Jan Hendrik Dalhuisen, *On Transnational and Comparative Commercial, Financial and Trade Law* (Third edition, Hart Publishing 2007) 5
[116] Chiara Giovannucci Orlandi, 'Procedural Law Issues and Uniform Law Conventions' (2000) 5 Uniform Law Review 23, 23
[117] Fabio Bortolotti, 'The UNIDROIT Principles and the Arbitral Tribunals' (2000) 5 Uniform Law Review 141, 141/142
[118] Michael Kabik, 'Through the Looking-Glass: International Trade in the 'Wonderland' of the United Nations Conventions of the International Sales of Goods' (1992) 9 International Tax and Business Lawyer 408, 409
[119] Franco Ferrari, 'Le Champ d'Application des << Principes pour les Contrats Commerciaux Internationaux>> élaborés par UNIDROIT'(1995) 47 Revue Internationale de Droit Comparé 985, 986/987

procedure are costly and bothersome.'[120] These are only a few examples of scholars that have signalled a need for a harmonised and unified international commercial law.

A critical note should be put here. Although, as can be seen from the above, many scholars express the need for a harmonised law the question is whether diverging laws really do hamper international trade. According to Smits the only way this can be measured is by conducting wide-scale empirical research on the effects of harmonisation on trade.[121] In the absence of such research there is no real conclusive evidence. Yet, Smits does confirm that higher transaction costs lead to higher prices and the economy is affected that way.[122] The European Commission states that the insecurity of doing business abroad can be a deterrent, especially for SME, and that this can harm the economy.[123] Interestingly enough in a survey Koehler and Yujun conducted most respondents expressed that they did not see a legal advantage to using either the CISG or using a national law.[124] There is thus an assumption that a harmonised international commercial law is needed, but perhaps not a great deal of empirical evidence that supports this claim. Whilst the following sections discuss how the law could be harmonised and unified it is opportune to keep in mind that the question of whether this is necessary is not (yet) answered definitively.

[120] Eleanor M Fox 'Harmonization of Law and Procedures in a Globalized world' (1991) 60 Antitrust Law Journal 593, 593

[121] Jan M Smits, 'European Private Law: A Plea for a Spontaneous Legal Order' in Deirdre M Curtin, Jan M Smits and others (editors) *European Integration and Law: Four Contributions to Celebrate the 25th Anniversary of Maastricht University's Faculty of Law* (Antwerp-Oxford 2006) 70

[122] Ibid

[123] Jan M Smits, 'Convergence of Private Law in Europe', in Esin Örucü and David Nelken (Editors), *Comparative Law, A Handbook* (Hart Publishing 2007) 222

[124] Martin F Koehler and Guo Yujun, 'The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems' (2008) 20 Pace International Law Review 45, 54
Around 60% of the respondents answered they did not see any advantage to using the CISG over national law. Around 30% saw the national law as being more advantageous and less than 10% saw the CISG as more advantageous. Although these responses indicate that there is no need for a uniform law one of the main reasons cited by the respondents was that they were unfamiliar with the CISG. Perhaps if the familiarity was higher the percentages would be different.

2.5.2 The Need for a Harmonised Commercial Law

Not all parties in international commerce would have the same need for a harmonised law. Professor Schwenzer has identified three distinct groups that might or might not need a uniform commercial law.[125]

Group 1:

- Parties are from different countries but share the same language
- Parties have similar legal systems (common law countries, France/French speaking Africa)
- The parties will choose either the law of one of their own countries, or will opt for a third country with a similar legal system
- The outcome in court would be predictable for both parties and they will not feel the need for a unified law. They are sufficiently at ease in both systems to make either law a viable option.

Group 2

- One of the parties has overwhelming bargaining power
- The choice of law will be determined by the stronger party. If the stronger party allows the weaker party to determine the applicable law for strategic reasons, such as a view to long term cooperation, it still maintains agency.
- Litigation outcome is predictable for the stronger party and this party would thus not feel the need for a uniform law
- Uniform law could be beneficial for the weaker party. Even when the law is imposed they could in that case be reasonably sure of the outcome. A uniform commercial law would increase predictability and legal certainty for both parties.

[125] Ingeborg Schwenzer, Presentation MAA Peter Slechtriem CISG Conference Vienna 21 March 2012 See also Ingeborg Schwenzer, 'Who Needs a Uniform Contract Law, and why?' (2013) 58 Villanova Law Review 723, 723-725

Group 3

- Parties come from countries with different legal systems and languages and have equal bargaining power.
- The preferred choice is the law of a third country – a neutral law
- This choice leads to several problems such as linguistic issues (parties already do not share the same language and the third country law is in another language) and a weak knowledge of the law which could potential disadvantage one or both of the parties.
- This leads to additional costs for legal experts and translators.
- The outcome is unpredictable for both parties.
- For this group there is a strong need for a harmonised and uniform law.

2.5.3 Harmonisation or Unification

The terms harmonisation and unification have both come up in this chapter. Unification could be seen as the goal and harmonisation as the method to achieve this goal: the laws are harmonised to make them uniform. According to Schmitthoff unification and harmonisation function differently. Unification means that a unified law replaces national laws, whereas harmonisation is aimed at harmonising the underlying principles of national laws.[126] UNCITRAL describes harmonisation as '*the process through which domestic laws may be modified to enhance predictability in cross-border commercial transactions* and unification as '*the adoption by states of a common legal standard governing particular aspects of international business transactions.'*[127] UNCITRAL gives model laws as an example of harmonisation and international conventions as an example of unification whilst acknowledging that the two concepts are closely related in practice. [128]

[126] Clive M Schmitthoff, 'American and European Commercial Law' (1979) 6 Journal of Legislation 44, 45
[127] http://www.uncitral.org/uncitral/en/about/origin_faq.html
Last accessed 18 February 2016
[128] http://www.uncitral.org/uncitral/en/about/origin_faq.html
Last accessed :18 February 2016

Baasch Andersen defines the concepts of uniformity and uniform laws:

'Uniformity: the varying degree of similar effects on a phenomenon across boundaries of different jurisdictions resulting from the application of deliberate efforts to create specific shared rules in some form.' [129]

'Uniform law: specific legal rules or instruments of some form deliberately designed to be voluntarily shared across boundaries of different jurisdictions which, when applied, result in varying degrees of similar effects on a legal phenomenon.'[130]

Uniformity can refer to uniformity of sources (the laws are the same) and uniformity of results (the laws are applied in the same way). The latter would be difficult to achieve as the courts that apply these laws are domestic courts that belong to different jurisdictions. Even within a single jurisdiction there is no total uniformity of result. As there are no supranational courts in international commerce uniformity of sources is the only type of uniformity that can be achieved.

Baasch Andersen points out that there are varying types of uniformity and that it is difficult to find a detailed definition without focussing on one specific instrument as uniformity is an obscure concept.[131] A law can still be called uniform when there is no total uniformity. Uniform must not be seen as absolute because the application is the work of humans who have different perspectives and come from different legal systems.[132] Baasch Andersen cites professor Sundberg that '*a margin of imperfection is not a defect with regards to uniformity as long as it does not encourage forum shopping.*'[133] This creates a benchmark for when a law can still be called uniform. When talking about harmonisation of international commercial law it should therefore not be expected that a law would be a 100% uniform in application and in interpretation.

[129] Camilla Baasch Andersen, *Uniform Application of the International Sales Law/Understanding Uniformity, the global jurisconsultorium and Examination and Notification Provisions of the CISG* (Wolters Kluwer 2007) 7
[130] Ibid
[131] Ibid
[132] Camilla Baasch Andersen, 'Uniformity in the CISG in the First Decade of its Application' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors) *Foundations and Perspectives of International Trade Law,* (Sweet & Maxwell 2000) 291
[133] Ibid

It should be kept in mind that the terms unification and harmonisation are frequently used interchangeably. Both have a common goal: facilitating international commerce by making this more secure and more predictable. The concepts also work together, for instance, if an international convention (unification) is ratified it will in turn influence domestic law as it will now be applied within the national legal system (harmonisation). If a model law is adopted (harmonisation) this will also create a uniformity of laws (unification). There is thus no need to make a strict distinction between the two concepts.

2.6 Harmonisation of Law and Non-State Rules

2.6.1 Unification through International Conventions

After having defined the concepts the next step would be to look at how harmonisation and unification can be accomplished. One way is through the creation of binding legal measures in the form of international conventions. Countries send delegates to draft a convention under the auspices of an international organisation. This convention is then ratified by states and enters into force when a sufficient amount of ratifications has been reached. The parties to an international contract no longer have to face legal uncertainty because the law would be the same across participating jurisdictions. It does not matter which participating state's law is applicable because substantively the laws would be the same. The instrument has been drafted specifically for the needs of international commerce. Conventions are binding and can counter mandatory laws and international public policy which leads to certainty and predictability.

There are also drawbacks to this method of unification. According to Zweigert & Kotz conventions are *'very difficult to achieve and rather clumsy in operation.'*[134] A convention takes considerable time to draft. It involves different stakeholders. Negotiations can take a

[134]Konrad Zweigert and Heinz Kötz, *An introduction to comparative law* (*Tony* Weir tr, third edition, Oxford University Press 1998) 25

long time. It is consequently an expensive process. States are sometimes reluctant to engage in the process because of this expenditure of time and money.[135] The results might also not be as strong as could be wished for. Peter Hall identifies three types of policy changes:

- First order: characteristics of incrementalism
- Second order: strategic changes
- Third order: a paradigm shift.[136]

International conventions could theoretically belong to any of these categories, yet in practice are more likely to be changes of the first order. Conventions are usually drafted along the lines of lowest common denominator policy; that is to say the bottom line on which the stakeholders can find agreement. Most countries will prefer international policy to resemble their national policy as much as possible. They would thus strive towards changes of the first order even if changes of the second or third order would be more effective in accomplishing uniformity. Amissah refers to this as *'state contracted international law.'*[137]

The draft convention is defined by the prior law as there is a need to accommodate existing domestic rules.[138] The convention does not start as a tabula rasa, but builds on these existing laws to reach some compromises that the drafters can agree on. In order to maximise the chances of the convention being ratified controversial issues are left out or the drafters will opt for minimal and generalist provisions. The final text is often an uneasy compromise between the different solutions proposed by states that seek to impose rules that resemble

[135] Mario Matteucci, 'Prospects of International Unification of Law from a European Viewpoint' (1949) 10 Louisiana Law Review 15, 20
[136] Peter A Hall, 'Policy Paradigms, Social Learning, and the State: The Case of Economic Policy Making in Britain' (1993) 25 Comparative Politics 275, 279
[137] Ralph Amissah, 'Revisiting the Autonomous Contract – Transnational Contract Law Trends and Supportive Structure' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors), *Foundations and Perspectives of International Trade Law*, (Sweet & Maxwell 2000) 327
[138] Henry Deeb Gabriel, 'The Advantages of Soft Law in International Commercial Law: the role of UNIDROIT, UNCITRAL, and The Hague Conference' (2008) 34 Brooke Journal of International Law 655,661/662

their own laws.[139] The amount of uniformity that is achieved could be smaller than desirable. Thus, whilst a change of the second or third order might be needed to attain uniformity to the degree that is needed or desirable, the result will often not surpass a change of the first order. This means that the investment of time and money into drafting a convention might be disproportionate in comparison to the results in uniformity that are achieved.

Conventions are not a comprehensive legal framework. Conventions are selective and fragmentary.[140] They are not complete. Conventions cover a small area in the field of international commercial law. Yet, even within that small area they leave gaps. For instance, the CISG concerns the international sale of goods, but excludes certain types of sales such, sales by auction, sales on execution, sales of stocks, shares, investment securities, negotiable instruments, money, ships, vessels, and electricity.[141] Drafters have a vested interest to present a workable final document within a reasonable timeframe, which can lead them to skip certain issues if agreement is difficult or impossible to achieve. This also leads to vague and general articles of which the specific particulars will need to be filled in by the courts on application, because it was too difficult to come to agreement on something more concrete. Courts are left with considerable room to interpret the document which leads to legal uncertainty as different fori will interpret the convention differently. Thus, the application of the convention will lack uniformity. This all leads to a finished convention which is not the most optimised, but the best that could be achieved under the circumstances.

Once a convention has been drafted it needs to be ratified by enough states to enter into force. This process can take a long time. It can take years before a convention has gained sufficient momentum to get the required number of signatures. Sometimes this momentum is never achieved and a convention fails to enter into force. Even if a state has been an active

[139] Marco Torsello, 'Reservations to International Uniform Commercial Law Conventions' (2000) 5 Uniform Law Review 85, 86
[140] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 12
[141] CISG Article 2

participant in the drafting process it does not necessarily mean that they will ratify it.[142] Basedow notes that when the convention is drafted by a large number of stakeholders this makes the (state) delegates less likely to develop personal ties with one another or to form an attachment to the resulting convention. The delegates feel less involved and will not push for ratification by their state to the same extent as they would if they did feel that personal attachment to the success or failure of that convention.[143]

Examples of conventions in commercial law that have failed to enter into force are for example:

The 1983 Convention on Agency in the International Sales of Goods: five ratifications.[144]

The 1986 Convention on the Law Applicable to Contracts for the International Sale of Goods: two ratifications.[145]

*The 1988 United Nations Convention on International Bills of Exchange and International Promissory Note*s: five ratifications.[146]

The 2001 United Nations Conventions on the Assignment of Receivables in International Trade: one ratification.[147]

These conventions could still enter into force, but especially for the older ones this is unlikely as new developments have outdated some of the provisions and the momentum for ratification has passed.

Other conventions enter into force, but only receive a few ratifications. If an instrument is only in vigour in a small number of states, its contribution to establishing security and predictability for merchants globally is limited although it may do so for merchants who are

[142] An example is the Inter-American Convention on the Law Applicable to International Contracts (1994). The United States were actively involved in drafting the document, but they never ratified it.
[143] Jürgen Basedow, 'Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts' (2000) 5 Uniform Law Review 129,129
[144] http://www.unidroit.org/fr/lo-marchandises/ol-agency-en-2
[145] http://www.hcch.net/index_en.php?act=conventions.text&cid=61
[146] http://www.uncitral.org/uncitral/en/uncitral_texts/payments/1988Convention_bills_promissory.html
[147] http://www.uncitral.org/uncitral/en/uncitral_texts/security/2001Convention_receivables.html

from contracting states when they are contracting with merchants from other contracting states. Examples are:

The 1964 Convention Relating to a Uniform Law on the International Sales of Goods (ULIS) (entered into force in 1972): currently in force in three countries.[148]

The 1964 Convention relating to a Uniform Law on the Formation of Contracts for the International Sales of Goods (ULFIS) (entered into force in 1972): currently in force in two countries.[149]

The 1970 International Convention on Travel Contracts (entered into force in 1976): currently in force in seven countries.[150]

The 1971 Convention on the Recognition and Enforcement of Foreign Judgments in Civil and Commercial Matters (entered into force in 1979*):* currently in force in four countries.[151]

The 1978 Convention on the Law Applicable to Agencies (entered into force in 1992): currently in force in four states.[152]

The 1985 Convention on the Law Applicable to Trusts and their Recognition (entered into force in 1992): currently in force in five countries.[153]

The 1994 Inter-American Convention on the Law Applicable to International Contracts two ratifications.[154]

This is not to say that conventions cannot be successful. Some conventions have attracted a large number of signatories. Some examples:

The 1958 New York Convention on the Recognition of Foreign Arbitral Awards (entered into force in 1958): 152 ratifications.[155]

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[148] http://www.unidroit.org/instruments/international-sales/international-sales-ulis-1964
[149] http://www.unidroit.org/status-ulfc-1964
[150] http://www.unidroit.org/instruments/transport/ccv
[151] http://www.hcch.net/index_en.php?act=conventions.text&cid=78
[152] http://www.hcch.net/index_en.php?act=conventions.text&cid=89
[153] http://www.hcch.net/index_en.php?act=conventions.text&cid=59
[154] http://www.oas.org/juridico/english/treaties/b-56.html
[155] http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

The 1974 Convention on the Limitation Period in International Sale of Goods (as amended by the protocol of 1980): 22 ratifications.[156]

The 1980 Convention on the Contracts for the International Sale of Goods (entered into force in 1988): 85 ratifications.[157]

The 2001 Cape Town Convention on International Interests in Mobile Equipment (entered into force in 2006): 61 ratifications.[158]

These examples show that it is possible to successfully accomplish an important level of unification through international conventions.

A final drawback is that once a convention has entered into force it can ossify. The provisions could become outdated. Once a convention has been drafted, ratified, and has entered into force amending it is not easy, even if changing circumstances make this desirable. Amending the provisions requires the same process of ratification that the original convention did. It is not certain all participating states will ratify the protocol with the new provisions. The 1924 Brussels convention on carriage of goods by sea was amended in 1968 and in 1979 with additional protocols.[159] Some of the countries that signed the 1924 convention did not sign both or either of the additional protocols. This means that there are diverging rules in force, whereby in some states the 1924 convention is applicable without the protocols and in other states the 1924 convention is applicable along with the 1968 protocol and/or the 1979 protocol.

In 2012 Switzerland suggested to UNCITRAL to start work on a new international contract convention as the CISG is no longer completely adequate for commerce in the 21st century.

[156] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html
[157] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html
[158] http://www.unidroit.org/instruments/security-interests/cape-town-convention
Additional protocols specific to certain types of mobile equipment were also introduced: aircraft equipment (2001), railway equipment (2007) and space assets (2012). The aircraft protocol is ratified by 47 states whereas the railway equipment and space assets protocol have not met the minimum number required for entry into force.
[159] The 1924 International Convention for the Unification of Certain Rules of Law relating to Bills of Lading amended by the 1968 Visby Protocol and the 1979 Special Drawing Rights Protocol are collectively known as The Hague-Visby Rules.

The CISG does not cover certain issues that are central to contracting such as validity of the contract, it was drafted before the amount of trade grew exponentially, it does not take into account the reality of complex contracts which include both services and sales components, and it does not cover electronic communications.[160] If other states take up this proposal (and so far they have not) and encourage UNCITRAL to put in the time and monies to get such an effort off the ground, it will be an elaborate process which likely would not see the light of day for several years. Given that the Swiss government made this proposal more than three years ago, and so far, there has not been a real uptake; this demonstrates that the time involved in drafting a convention is considerable.

States are only willing to engage in the process of creating binding international law if they are convinced uniform legislation is needed in this area and if they have sufficient influence with other states to convince them to join this attempt.[161] From the above it can be understood that international conventions are not always the best type of instrument to accomplish unification. It might thus be opportune to explore other ways of harmonising and unifying international commercial law.

2.6.2 Harmonisation through Non-State Rules

Edlund differentiates between three types of harmonisation:

- Direct approach (purposeful legislation designed and enforced by legislators)
- Indirect approach (Harmonisation is the intended goal or it can be a by-product)

[160] Proposal by Switzerland on possible future work by UNCITRAL in the area of international contract law
http://daccess-dds-ny.un.org/doc/UNDOC/GEN/V12/534/54/PDF/V1253454.pdf?OpenElement
Last accessed: 25 March 2016

[161] Gregory C Schaffer and Mark A Pollack, 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review 706, 789

- Party-autonomy approach (bottom-up approach, the parties themselves agree to use transnational rules)[162]

Harmonisation can thus be top down or bottom up. The direct approach is reflected in international conventions. They are designed on purpose and they are enforced by states. The second approach occurs with for example arbitral case law, creation of standard terms and conditions, and through legal research. The third approach originates in the merchant community. Harmonisation through non-state rules could occur through the indirect approach (arbitral case law and standard terms) and the party autonomy approach (the rules are used by merchants, arbitrators, and legal professionals.)

The advantage of harmonisation through non-state rules is that these are not drafted to be ratified by a state. This leaves the drafters free to come up with the 'best' solution instead of the 'most acceptable' solution. The risks of lowest common denominator policy and minimum harmonisation are more easily avoided. Non-state rules are less expensive to draft. There is no need to organise any plenary sessions and there is less lobbying involved, before and after the document is finished. Non-state rules are flexible and can accommodate different legal traditions more easily.[163]

There are instances when non-state rules are more effective in achieving harmonisation. UNCITRAL developed a convention for the use of electronic communications in international contracts.[164] This entered into force in 2013 and has been ratified by seven states so far. UNCITRAL also developed model laws on Electronic Commerce[165] and Electronic

[162] Hans H Edlund, 'The Concept of Unification and Harmonization' in Morten M Fogt (editor), *Unification and Harmonization of International Commercial Law: Interaction or Deharmonization?* (Wolters Kluwer Law & Business 2012) 11
[163] Henry Deeb Gabriel, 'The UNIDROIT Principles of International Commercial Contracts: An American Perspective on the Principles and Their Use' (2012) 17 Uniform Law Review 507, 526
[164] United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005)
For full text see:
http://www.uncitral.org/pdf/english/texts/electcom/06-57452_Ebook.pdf
[165] For full text see:
http://www.uncitral.org/pdf/english/texts/electcom/05-89450_Ebook.pdf

Signatures.[166] These model laws have been adopted by respectively 64 and 32 jurisdictions. The scope of the instruments differs, but the convention builds upon the model laws (which were published earlier) and provides updates to these.[167] Therefore, the three instruments are closely intertwined, yet the model laws have been more successful at attracting state support than the convention. This example shows that in some cases non-state rules can be more effective at achieving harmonisation than binding instruments can be. This view is supported by Matteucci who states that uniform laws are a better working model for harmonisation and points to the success of these in the US and Scandinavia where they are used frequently.[168]

This is not to say that a choice for harmonisation through non-state rules should be absolute. Schmitthoff is a proponent of unification through non-state rules, but he also sees an important place for conventions as these can override mandatory laws which non-state rules cannot do.[169] Kronke concurs that in some areas, like property law, that require absolute certainty, conventions would be the better method of achieving unification, whereas in other areas, which are deeply rooted in national traditions, the chances of a convention being successful are minimal and other methods of unification should be used.[170] Lord Mustill makes the point that it is easier to harmonise substantive law than procedural law as the latter has more underlying principles and there is a greater cultural attachment to it.[171] It would thus

[166] For full text see:
http://www.uncitral.org/pdf/english/texts/electcom/ml-elecsig-e.pdf
[167] United Nations Convention on the Use of Electronic Communications in International Contracts (New York, 2005) – background information:
'The Convention is intended to strengthen the harmonization of the rules regarding electronic commerce and foster uniformity in the domestic enactment of UNCITRAL model laws relating to electronic commerce, as well as to update and complement certain provisions of those model laws in light of recent practice.'
http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2005Convention.html
[168] Mario Matteucci 'Prospects of International Unification of Law from a European Viewpoint' (1949) 10 Louisiana Law Review 15, 20
[169] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1986) 17 International & Comparative Law Quarterly 551, 569
[170] Herbert Kronke, 'International Uniform Commercial Law Conventions: advantages, disadvantages, criteria for choice' (2000) 5 Uniform Law Review 13, 20
[171] Lord Justice Mustill, 'Contemporary Problems in International Commercial Arbitration: A Response' (1989) 17 International Business Lawyer 161,161

depend on the area of law which type of harmonisation measures would be the most successful at attaining uniformity.

Different types of non-state rules contribute to harmonisation in different ways. Model laws are adopted by states and thus focus on the state to bring harmonisation. Model contracts, trade usages, restatements of law, guidelines, and standard terms and conditions focus on merchants, legal professionals, and courts. Through their usage they become a bridge between different countries and different legal systems. Lord Mustill emphasises that harmonisation of law and the lex mercatoria are unrelated: harmonisation is the drawing together of state laws whereas the lex mercatoria is a separate legal system which applies to international commerce.[172] If one sees the lex mercatoria as an independent legal system, then this would exist independently of any national laws, and would thus have no influence on these. The lex mercatoria might be a law, but it is not a legal system as it is dependent on states to enforce it at the end of the day. Therein lies the possibility for the lex mercatoria to contribute to the harmonisation of law. If a lex mercatoria exists and is regularly used by merchants and enforced by state courts, then this creates a link between national law and this transnational body of law. They would start to influence one another. In the long term this could lead to harmonisation of underlying principles of international commercial law. This can create a more similar mind-set between states, courts, legal professionals, merchants, and legal scholars which in turn could lead to more similarity between national laws.

2.6.3 The Relationship between Non-State Rules and International Conventions

There are different theories on how the relations between non-state rules and conventional law can be classified. Schaffer and Pollack divide these into three main groups. [173] They use

[172] Ibid, 162
[173] Gregory C Schaffer and Mark A Pollack, 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review 706, 707

the terminology hard law and soft law as their article is written from a public international law perspective. These theories are:

- Legal positivist view: hard law and soft law co-exist next to each other. Hard law has a binding nature and is preferable. Soft law is not formally binding, but can lead to hard law.
- Rationalist view: soft law and hard law are chosen for different situations. The preference is not always for hard law. Hard law and soft law can work together.
- Constructivist approach: interests are created by interaction which is facilitated by law. Soft law can work better to build up these links because it has a more bottom up approach.[174]

The legal positivist approach is the view of those that favour international conventions as the primary means of harmonisation and see non-state rules as complimentary at best, but not as a full viable alternative to hard law. Domestic (and conventional) law is binding and non-state rules could form an inspiration or a first step for developing hard law. This is, for instance, the case with model laws. Model laws are soft law, but they are used to develop domestic law which is binding.

The rational approach sees binding legislation and non-state rules as two alternatives. There are situations when one would favour one, and situations where one would favour the other. This approach would support the interaction of hard law and soft law where one could serve as building stone for the other and vice versa. An example of this would be the CISG. The convention itself is hard law. The CISG Advisory Council is a private initiative and drafts opinions on how the CISG should be interpreted in order to achieve more uniformity.[175] These opinions are not binding. Soft law thus builds on existing hard law. Travaux préparatoires, guidelines, and practices are soft law and build on existing hard law or precede

[174] Ibid
[175] See: http://www.cisgac.com/

this hard law. Conventions should leave room for the development of custom which can fill in the gaps of the instrument.[176] This customary law can be declared binding by courts.[177] In turn it will inspire the drafters of future legal instruments who incorporate existing customs in their work.

The constructivist approach is the most bottom-up approach (whereas the legal positivist view is the most top down) and would favour building a common legal culture in international commerce through the use of non-state rules by the business community. This common legal culture would then create principles of international commercial law which could further the harmonisation of domestic laws. This influence could happen when new laws are drafted or when courts apply and interpret existing laws.

Schaffer and Pollack advance the theory that hard law and soft law can be antagonistic.[178] They do not always work together. An example of this would be if a non-state agency develops an instrument not to complement existing (hard) law, but rather out of dissatisfaction with this existing law. The new instrument would cover the same area of law, but would not necessarily be compatible with this as the existing provisions were not taken into account when the new rules were created. There is a level of competition between laws and between organisations. This can create healthy competition (the market decides which is the most acceptable solution), but it can also be counterproductive. More instruments can lead to more confusion, less predictability, and ultimately less harmonisation.

[176] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1986) 17 International & Comparative Law Quarterly 551, 569
[177] Kenneth W Abbott and Duncan Snidal 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421, 426-430:
The ICJ has stated that non-binding instruments do not become binding through usage because there is no opinio iuris, but that repetition can form the beginning of an evolution towards an opinio iuris.
[178] Gregory C Schaffer and Mark A Pollack, 'Hard vs Soft Law: Alternatives, Complements and Antagonists in International Governance' (2010) 94 Minnesota Law Review 706, 709

Schaffer and Pollack contend that the relationship between hard law and soft law is always varying and that the interaction between the two mainly depends on the interaction between the power and interests of the actors.[179] In international commerce these actors would include the state, the business community, legal researchers, arbitrators, and legal professionals. Although the state undoubtedly has the most power it does not necessarily has the most vested interest, and is therefore content to leave considerable agency to the other actors. States can facilitate the use of soft law by allowing for its usage (whether out of lack of interest or for other reasons) and merchants can use their agency to choose soft law if they believe this represents a better option for their transaction. Arbitrators can apply soft law if they deem this more suitable than a hard law. Legal researchers and legal professionals can propagate the use of soft law or hard law, depending on the circumstances.

Soft law or non-state rules can play an important part in the harmonisation of international commercial law. There are occasions when the unification of law is better served by non-state rules than by binding legal measures and vice versa. Both are therefore necessary. In drafting new instruments (soft law or hard law) consideration should be given to existing conventions and non-state rules, and room should be left for both to build further on the finished product.

2.7 Conclusion

This chapter served to introduce several key concepts as well as to examine where non-state rules fit in the landscape of international commercial law. The first part analysed the key terms that this thesis discusses. This part concluded that international commercial law is a domestic law with an international objective. International commercial law is composed of domestic law and incorporates transnational elements. These transnational elements include international conventions ratified by the state, but also include non-state rules if these have been recognised in the national legal order. Transnational commercial law is not bound to a particular jurisdiction and is composed of those elements which are international in origin

[179] Ibid, 799

and in objective: international conventions and non-state rules. Transnational commercial law exists in parallel to the state. Some elements of transnational commercial law can be part of domestic international commercial law.

There are multiple theories on what the (new) lex mercatoria is. The most appropriate theory is to define the lex mercatoria along the same characteristics as the medieval lex mercatoria. This means that the lex mercatoria is unwritten and consists of those usages, practices, and principles developed within the merchant community. The lex mercatoria develops independently of any state, but is dependent to a certain extent on the state for its application. The lex mercatoria can be seen as a law, but not as an independent legal system.

The concept of non-state rules is wider than the lex mercatoria. The lex mercatoria consists of non-state rules, but cannot be equated with this. Non-state rules also contain codified rules. Non-state rules are those legal norms that have been weakened along one or more of the dimensions of obligation, precision, and delegation following Abbot and Snidal's theory.[180] They have an anational origin and a transnational objective. They aim to regulate private law relations between international merchants.

The second part of the chapter analysed the harmonisation and unification of international commercial law. Although harmonisation of law is not the focus in this thesis it is nevertheless important to have an understanding of this concept as it helps to understand the nature of non-state rules which contributes to understanding their legal authority. Edlund writes that trying to define harmonisation and unification precisely is perhaps nearly impossible.[181] These terms are often used interchangeably. Harmonisation of international commercial law should lead to more legal security in international commerce. The need for

[180] Kenneth W Abbott and Duncan Snidal 'Hard and Soft Law in International Governance' (2000) 54 International Organization 421

[181] Hans H Edlund, 'The Concept of Unification and Harmonization' in Morten M Fogt (editor), *Unification and Harmonization of International Commercial Law: Interaction or Deharmonization?* (Wolters Kluwer Law & Business 2012) 7

this in practice has been questioned as there is a lack of empirical evidence that diverging laws hamper international trade however, many governments, scholars, and international organisations are convinced of this necessity.

Harmonisation can be accomplished through international conventions which are binding, but have as drawbacks that they are expensive to draft, cannot be amended easily, and are often drawn up in accordance with lowest common denominator policy. Nevertheless, for certain areas of law they are the most adequate solution as they can countermand mandatory laws and international public policy and thus lead to more uniformity than non-state rules do. In other instances, harmonisation through non-state rules is a more flexible and achievable solution. Harmonisation through non-state rules is a bottom-up type of harmonisation. The international business community (including traders, merchants, arbitrators) use non-state rules to regulate business relations when these are considered the most appropriate solution for the transaction. Through regular usage of non-state rules greater uniformity is achieved.

This chapter defined what non-state rules are, what their purpose is, and what their place is in the international commercial landscape. Understanding these elements is necessary before examining the legal authority of non-state rules further. The next chapter focuses on this legal authority and discusses whether non-state rules can be considered as (sources of) law.

Chapter 3: Non-State Rules as Sources of Law

3.1 Introductory Notes

The preceding chapter analysed the concept of non-state rules and their place in international commercial law. The current chapter focuses on the legal authority of non-state rules and their status as sources of law. This chapter has two goals. The first goal is to understand how non-state rules can be classified. The second goal is to analyse whether non-state rules can be considered as sources of law and how their legal authority can be measured. This chapter provides some benchmarks against which this legal authority can be measured and together with the previous chapter gives a full overview of what non-state rules are.

The first part of this chapter examines the concept of sources of law in the context of non-state rules. The second part explores different types of non-state rules in order to ascertain whether these can be considered as sources of law. This part is divided into three sections. The first section discusses international conventions. The second section explores uncodified non-state rules and studies trade usages and general principles of law. It could be said that the lex mercatoria is a source of uncodified non-state rules and should have a separate entry. The lex mercatoria is a law which encompasses certain elements (general principles of law, trade usages), as defined in chapter 2.4. As the elements of the lex mercatoria are already analysed in this chapter an exploration of the lex mercatoria itself as a source of law would be superfluous. The third section considers the place of codified non-state rules as sources of law. The final part establishes how the legal authority of non-state rules can be measured, based on the analyses in this chapter and the previous one.

3.2 Definition and Hierarchy of Sources of Law

3.2.1 Establishing a Source of Law

To establish whether something can be considered as a source of transnational commercial law it would be opportune to define first what a source of law is. This question is deceptively simple. National legislations often do not define what a source of law is.[182] De Cruz quotes Rene David that the confusion about what a source of law is comes from a lack of consensus on what law actually is.[183] The question of what a source of law is thus touches on the very foundations of the concept of law itself. According to Amselek the notion of a source of law is: '*an idea which is dangerous and illuminating at the same time.*'[184] It is dangerous because there are different ways in which the idea can be interpreted. There is the danger of not being able to distinguish whether something can be considered law from the reason why this norm exists. It is illuminating because knowing why something is a source of law helps to understand the nature of law. This thus goes back to what David said whereby the concept of a source of law is entwined with the concept of law itself.

Julien Bonnecase defines a source of law as: '*the imposed and predetermined forms that borrow concepts of behaviour from society to impose themselves as the rule of law.'* [185] Society is thus the origin of the law. Mistelis describes a source of law as being '*the sovereign authority by which a legal rule is applied and the origin of such rules'* as well as '*the manifestation and substance of the principles and rules of law.' [186]* Thus a source of law is both the origin (where it comes from) as well as the result (that which was created). Oppetit

[182] Peter De Cruz, *Comparative Law in a Changing World* (Third edition, Routledge- Cavendish 2007) 29
[183] Ibid,28
[184] Paul Amselek, 'Brèves réflexions sur la notion de source du droit' (1982) 27 Archives de Philosophie du Droit 251
[185] As quoted in G Legrand, 'La Notion de Droit en France au 19eme siècle' (1921) 23 Revue Néo-Scolastique de Philosophie 436
[186] Loukas Mistelis, 'Is Harmonisation a Necessary Evil? The Future of Harmonisation and New Sources of International Trade' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors), *Foundations and Perspectives of International Trade Law*, (Sweet & Maxwell 2000) 10

clarifies that there are two types of sources: formal (statutory law and case law) and material (doctrine).[187] Formal sources are a technical process through which law is created whereas material sources affect what law is created and how the law is created.

Combing these reflections, it emerges that a source of law is the origin (where it comes from), the technique (how it became law), the reason (why it became law), and the end result (the substance of the law). Thus, if as an example one takes (international) trade usages their origin is their spontaneous creation in private (international) commercial relations by the merchant community, the technique is their regular and consistent usage by that merchant community and the consequent enforcement in courts, the reason is to facilitate (international) commerce, and the end result is the actual content of these trade usages. This is of course simplifying it somewhat, but it serves as an adequate example.

3.2.2 Non-State Rules as Law

If the origin of a source of law is the state, then the authority which designates this norm as law comes from the state. The state has legislative and executive authority. When discussing non-state rules as a source of law the key notion is that their origin is anational. They do not emerge from the nation state and they exist in parallel with the state. The state (or its courts) can give legitimacy to non-state rules by sanctioning their usage or by incorporating them in domestic law. This does not imply that a rule or norm that emerges outside of the realm of the

[187] Bruno Oppetit, 'Le Droit International Privé, Droit Savant' (1992) 234 Droit Savant recueil Cours de l'académie de DIP de la Haye 331
Doctrine should be seen in the context of French law. Doctrine in French law (and civil law) and refers to legal scholarship. It refers to the writing of legal scholars which together form a framework on how the law is seen and interpreted. Doctrine can be found in treatises, répetoires, and case notes for instance. In French law there is a debate on whether doctrine can be considered as a source of law and if so to what extent. Doctrine becomes more important if there is less statutory law available. It is quoted regularly in court cases, especially in areas like administrative law and private international law which are less codified.
Legal doctrine in the common law refers to a fundamental set of principles underlying the law. It proceeds more from case law than from legal scholarship. Although there are similarities it needs to be kept in mind that civil law and common law have a different approach to doctrine.
As this thesis refers to French law, American law, and English law extensively it cannot be helped that both concepts are used here.

state or which is not sanctioned by the state cannot be considered law. Juenger writes that the notion that law can only be called law if its source is a sovereign is ahistorical as there have always been sources of law that do not meet this criterion.[188]

Thus the origin of the source does not have to be the state for a norm or a rule to be recognised as law. The recognition or sanction of the state is not necessary for an element to be a source of law. A rule or a norm cannot be excluded as being law '*purely on the ground that on the basis of a theory the sources of law are exhaustive and thus conclusive, and any other instance does not have the necessary competence to legislate*.'[189]

It appears inappropriate to disallow the qualification of a rule as law on the ground that non-state rules are not the law of the land. Foreign law is not the law of the land and yet its inherent quality as law would not be questioned, regardless of whether it is applicable or not.[190] Whether something qualifies as law under particular circumstances does not determine whether something qualifies as law in general. It cannot be said that without sanction or incorporation in domestic law non-state rules cannot be considered as law in general, but it could hold true that they do not qualify as a source of law in a particular jurisdiction or that they are not applicable in certain jurisdictions or situations.

Trade usages are a good example of how this works. Trade usages are applicable within a certain locality or trade. Trade usages can hold obligatory force (see chapter 5.2.1 for further discussion on this). Yet for a trader in grain only the usages of this particular branch are applicable. The usages of the diamond trade hold no obligatory force for him even when on occasion he buys diamonds. This does not mean that these usages have no legal authority at all. It only means that they do not hold any legal authority for a trader in another branch.

[188] Friedrich K Juenger, 'American Conflicts Scholarship and the New Law Merchant' (1995) 28 Vanderbilt Journal of Transnational Law 487, 490
[189] David Oser, *The Unidroit Principles of International Commercial Contracts: a Governing Law* (Martinus Nijhoff 2008) 123
[190] Ibid, 122

Therefore, the legal authority of trade usages in general is recognised, but which specific usages are applicable changes and is dependent on the position of the parties. Their legal nature remains the same, but it is the applicability which changes.

In France the lex mercatoria was recognised as law in the context of an appeal to an arbitral award.[191]This means that the lex mercatoria is recognised as having legal authority, but it does not mean that the lex mercatoria would now be a permissible choice of law in the context of court litigation. There is consequently not one sole reality when it comes to establishing whether something is (a source of) law.[192] The status of a source of law depends on the jurisdiction, the applicable law, and the specific facts of the case. The status could shift between different situations.

Within the state there is a hierarchy whereby the higher rules (the constitution) provide legitimacy for the lower ones which makes it easier to understand where the legal authority comes from.[193] Ultimately, the state (the people) decides this legitimacy. Foreign law originates in another state. Therefore, the source of the authority is that state. If the law receives its legitimacy from the forum which initiated or sanctioned it, then the same would hold true for non-state rules. Non-state rules are anational in origin. Their origin lies in international organisations, trade associations, and practices between merchants. These same entities that originated the rules can also affirm their legitimacy as sources of law. How this legitimacy can be affirmed and how this affects their legal authority is explored in the remainder of this chapter.

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[191] *Valenciana de Cementos Portland SA v. Primary Coal Inc* (1991) Cour de Cassation Civile, 1991 Bulletin Civil 1 No. 1354
The arbitral award was challenged on the grounds that the arbitrator overstepped his mission by acting as amiable compositeur without the authority to do so through usage of the lex mercatoria. The court of cassation denied the appeal on the grounds that the lex mercatoria is law, and therefore the arbitrator had not acted as amiable compositeur.

[192] Ralf Michaels, 'The Re-statement of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism' (2005)*51 Wayne Law Review* 1209, 1238

[193] Günther Teubner, 'Breaking Frames: Economic Globalization and the Emergence of lex mercatoria' (2002) 5 European Journal of Social Theory 199, 206

3.2.3 Classifying Sources of International and Transnational Commercial Law

Goode discusses that the traditional hierarchy of sources of transnational commercial law would most likely be international conventions first, then trade usages, and in the last place restatements of law.[194] However, this hierarchy is more diffuse in practice: for instance when a ratified convention is expressly excluded from the contract whereas a restatement of law is incorporated the latter would take precedence over the first.[195] Where sources of law fit in the hierarchy also depends on the jurisdiction. In common law jurisdictions and in France for instance scholarly contributions are secondary sources of law (if sources at all) whereas in Germany they are primary sources of law.[196]Therefore enumerating sources of international commercial law should not be done in a strict hierarchical manner as the practice is more dynamic and differs depending on the jurisdiction and on the contract.

Although a hierarchy of sources would not be beneficial, classifying sources of international commercial law is useful to understand the place and legal nature of non-state rules. There are different ideas on what this classification should be.

Van Houtte identifies three groups of sources:

1. International
    1. Treaties
    2. Customary Law
    3. Other sources (such as the UNIDROIT Principles)
    4. Economic sanctions and boycott

[194] Roy Goode, 'Usage and its Reception in Transnational Commercial Law' in Jacob S Ziegel and Shalow Lerner (editors), *New Developments in International Commercial and Consumer Law, proceedings of the 8th Bienal Conference of the International Academy of Commercial and Consumer Law* (Hart Publishing1998) 6
[195] Ibid
[196] Larry A DiMatteo, 'The Scholarly Response to the Harmonization of International Sales Law' (2012) 30 Journal of Law & Commerce 1,3

2. National Law
    1. Public law
    2. Private law (including private international law)
3. Lex Mercatoria.[197]

In his work Van Houtte does not distinguish between international trade law and international commercial law which differs from the more traditional binary division between these two subjects. In his division non-state rules would be found in groups 1 and 3. In this grouping restatements of law are seen as international sources whereas the lex mercatoria is in its own category. This division is encompassing and includes transnational commercial law, international economic law, and international commercial law, which helps to comprehend where non-state rules fit in the general landscape of international trade law.

Most authors hold that international commercial law and international trade law are distinct subjects and only include international commercial law sources in their classification. De Ly distinguishes between national and transnational sources and states that transnational sources include general conditions, general principles of law, custom, trade usages, arbitral case law, and international conventions.[198] Conventions would be sources of domestic law once they are ratified.[199] Cranston distinguishes between international conventions on the one hand, and general principles and model laws on the other hand.[200] Model laws and international conventions are both aimed at the state. Yet despite this common purpose their functioning is different. A model law is adopted by a state without the state making any commitments to the model law itself. Through ratification of a convention a state pledges itself to carry out certain obligations. Following this distinction between domestic law, transnational law, and international conventions, a further classification of non-state rules can be made.

[197] Hans van Houtte, *The Laws of International Trade* (Sweet & Maxwell 1995) 1
[198] Filip de Ly, *International Business Law and Lex Mercatoria, (*T.M.C Asser Instituut 1992) 319
[199] Ibid
[200] Ross Cranston, 'Theorizing Transnational Commercial Law' (2006-2007) 42 Texas International Law Journal 597

Kronke classifies non-state rules as follows:

- Model laws
- Contractual rules
- Restatements and principles
- Guides (legislative guides, best practice guides)
- Conventions.[201]

Conventions can be considered non-state rules if they are not ratified and have not entered into force. Kronke does not include arbitral awards as a category of non-state rules. As only a fraction of arbitral awards are published and the case law is thus incomplete, it would indeed be questionable to include these as a separate category.

Even after discussing just a few distinguished authors it is evident that there is no overarching agreement on how sources of international commercial law should be categorised. Synthesising the above, the following first classification of international commercial law can be made:

- Domestic law (domestic legislation, case law, international conventions once ratified and entered into force, legal doctrine/scholarship)
- Non-state rules (custom, trade usages and practices, general principles of law, restatements of law, model laws, model contracts, standard terms and conditions, arbitral case law (eventually), international conventions (when not ratified), and legal doctrine/scholarship)

The first type of sources has the state as origin, as enactor, or as supporter. These sources might have been developed at a national, transnational, anational, or international level. Even if the state was not involved in making the rule, the state will need to ratify the legislation

[201] Herbert Kronke 'International Uniform Commercial Law Conventions: advantages, disadvantages, criteria for choice' (2000) 5 Uniform Law Review 13, 13-20

before it becomes part of domestic law. The second type of sources has an anational or a transnational origin. This type represents a bottom-up approach of legislation whereas the first category represents a top-down approach. They can be qualified as material sources rather than formal sources if one follows Oppetit's definition as explained in section 3.2.1.

After this initial classification non-state rules can be categorised further. Busseuil distinguishes between 'sources négociées' (international conventions), spontaneous sources (such as trade usages), and 'sources réflechies' (such as the UPICC and PECL). [202] He thus divides non-state rules into three categories: international conventions, uncodified non-state rules, and codified non-state rules. This division seems pertinent for the purpose of this thesis and therefore the second part of this chapter follows this categorisation of non-state rules.

According to Oser the established canon of sources of law is the least pertinent for asserting the legal character of rules in the international commercial context.[203] Yet, asserting this character is important. Günther writes:

> 'When the distinction between law and other social norms disappears, when every social actor who is creating social norms and who has the power to execute them is treated as a legislator, when the validity of positive law goes side by side with other types of legitimate validity (for example, factual acceptance by a majority), and, finally, when negotiating processes between various social actors make valid law – then it makes no more sense to speak of 'the law', and one has to give up the principles of equal adjudication and of the democratic legitimacy of legislation.'[204]

An attempt should thus be made to distinguish between law and social norms. The first can be enforced. The second cannot be. In order to define the legal authority of non-state rules it is hence necessary to analyse the different types of non-state rules in order to ascertain under which circumstances these can be considered as sources of law.

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[202] Guillaume Busseuil, 'L'Avenir des Principes Unidroit Relatifs aux Contrats de Commerce International et des Principes Européens du Droit du Contrat : du Droit Mou ou Droit Dur ?' [2004] Centre de Droit Civil des Affaires et du Contentieux Economique 1 http://www.glose.org/CEDCACE4.pdf Last accessed: 27 February 2016

[203] David Oser, *The Unidroit Principles of International Commercial Contracts: a Governing Law* (Martinus Nijhoff 2008) 123

[204] Klaus Günther, 'Legal Pluralism or Uniform Concept of Law: Globalisation as a Problem of Legal Theory' [2008] http://www.helsinki.fi/nofo/NoFo5Gunther.pdf 13 Last accessed: 18 February 2016

3.3 International Conventions

International conventions can be a source of domestic legislation as well as a source of non-state rules. Conventions are usually drafted under the auspices of an international organisation. Although states send delegates to elaborate the convention its genius is the organisation. Therefore, in origin international conventions are non-state rules. A convention becomes binding when a state ratifies it or accedes to it and it enters into force. The convention then becomes part of the domestic law in that particular state. In any state which has not ratified it, the convention would still be a non-state rule.

International Conventions are not supranational law; at least not if supranational law is defined as law issued by a (legislative) body above the state level. They do not impose any direct duties on national courts and there are no independent overseeing bodies.[205] Their application and interpretation is a matter for national courts. Courts tend to be parochial in their interpretation of international conventions. Baasch Andersen comments that of the 500 cases she read that concerned the application of the CISG only two referred to international case law.[206]

There are two types of international commercial law conventions. The first type harmonises procedural law; mainly private international law. The second type harmonises substantive commercial law. Substantive law conventions can be divided in different categories. Most fall in the categories of international sales, carriage of goods, or international financing. There are

[205] Camilla Baasch Andersen, *Uniform Application of the International Sales Law/Understanding Uniformity, the global jurisconsultorium and Examination and Notification Provisions of the CISG* (Wolters Kluwer 2007) 48

[206] Camilla Baasch Andersen, 'Uniformity in the CISG in the First Decade of its Application' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors) *Foundations and Perspectives of International Trade Law,* (Sweet & Maxwell 2000) 296

more conventions harmonising substantive law than procedural law in international commerce.[207]

Conventions that harmonise conflicts of law are often promulgated by The Hague Conference of Private International Law (HCCH). The HCCH's main focus is on family law, but they have also elaborated conventions applicable to international commerce. An example is the Convention on the Law Applicable to the International Sale of Goods of 1955.[208] On a regional level the EU has done significant work around private international law. The results are the Brussels Convention on the Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (which harmonised conflicts of jurisdiction) and the Rome Convention on the Law Applicable to Contractual Obligations (which harmonised conflicts of law).[209] These have largely been replaced by the corresponding Brussels I Regulation and Rome I Regulation.[210] In 1988 the Lugano Convention was signed. This was the analogue of the Brussels Convention and extended the regime to EFTA member states. A new updated

[207] This is because procedural law has deeper underlying principles in national law (See for this: Lord Justice Mustill, 'Contemporary Problems in International Commercial Arbitration: A Response' (1989) 17 International Business Lawyer 161)

[208]The Hague Convention of 15 June 1955 on the Law Applicable to International Sales of Goods
Official text: http://www.hcch.net/index_en.php?act=conventions.text&cid=31
(only available in French)
Another example is: The Hague Convention of 30 June 2005 on Choice of Court Agreements
Official text: https://www.hcch.net/en/instruments/conventions/full-text/?cid=98

[209]Convention on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters of 27 September 1968 (Brussels Convention)
http://www.consilium.europa.eu/en/documents-publications/agreements-conventions/agreement/?aid=1968001
Convention on the Law Applicable to Contractual Obligations of 19 June 1980 (Rome Convention)
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=uriserv:l33109

[210]Council Regulation (EC) No 44/2001 of 22 December 2000 on Jurisdiction, recognition and enforcement of judgments in civil and commercial matters (Brussels I)
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33054
And the updated version: Regulation (EU) No 1215/2012 of the European Parliament and of the Council of 12 December 2012 on jurisdiction and the recognition and enforcement of judgments in civil and commercial matters (Brussels I recast)
http://eur-lex.europa.eu/legal-content/EN/TXT/HTML/?uri=CELEX:32012R1215&from=EN
Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I)
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=CELEX:32008R0593
The Brussels Convention and the Rome Convention are still applicable in the overseas territories of the European Union member states and in Denmark which has not enacted the Rome I and Brussels I Regulations because of its opt-in status in the area of freedom, security and justice

Lugano Convention was signed by the EU, Iceland, Switzerland, and Norway in 2007.[211] Together these instruments mean that the EU has a largely unified private international law.

In this category should be mentioned the Convention on the Recognition and Enforcement of Foreign Arbitral Awards.[212] This convention, which is more commonly known as the New York Convention, has 156 members.[213] This makes it one of the most successful international conventions. The recognition and enforcement of arbitral awards on the basis of non-state rules is discussed further on in chapter 6.2.

The second category is that of substantive commercial law conventions. The first type of substantive law convention regulates international sales. The before mentioned Convention for the International Sale of Goods (CISG) of 11 April 1980 is the most ratified and successful one in this area. In January 2016 it had 83 members.[214] These include important trading nations such as the USA, France, Australia, Russia, and China. Notable absentees are the United Kingdom and India. [215] New countries keep acceding to the CISG. Brazil did so in 2014 and Azerbaijan in 2016. Vietnam is acceding in 2017.[216] The CISG affected approximately 66% of global commerce in 2005.[217] In 2009 this was 70%-80%.[218]The 'sister

[211] Strengthening cooperation with Switzerland, Norway, and Iceland: The Lugano Convention (2007) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l16029
[212] For the full text in English see: http://www.newyorkconvention.org/english
[213]For a full list of contracting states see: http://www.newyorkconvention.org/countries
[214] For a full list of members please see: http://www.cisg.law.pace.edu/cisg/countries/cntries.html Last accessed: 10 February 2016
[215] On why the UK is not a member see for instance: Sally Moss, 'Why the United Kingdom Has Not Ratified the CISG' (2005) 25 Journal of Law and Commerce 483
[216] See for instance
http://mutrap.org.vn/index.php/en/newss/mutraps-news/246-workshop--viet-nams-accession-to-united-nations-convention-on-contracts-for-the-international-sale-of-goods-cisg
Last accessed: 14 March 2016
and
http://www.vietnambreakingnews.com/2013/11/cisg-legal-platform-for-vietnamese-companies-in-international-trade/
Last accessed: 14 March 2016
[217] Franco Ferrari, *Le Contrat de Vente International, Applicabilité et Application de la Convention de Vienne sur les Contrats de Vente Internationale de Marchandises* (second edition, Helling & Lichtenhahn 2000)
[218] Ingeborg Schwenzer and Pascal Hachem, 'The CISG- Successes and Pitfalls' (2009) 57 American Journal of Comparative Law 457,457

convention' of the CISG is the 1974 Convention on the Limitation Period in the International Sale of Goods.[219] It has 29 ratifications as of January 2016.[220]

The CISG received a positive reception as evidenced by the number of ratifications. According to Louis Marques *'some people view the CISG as a cornerstone for the creation of an international private law.'*[221] Marques cites Thomas Kuhn who said that the CISG represents a paradigm shift for international commercial transactions.[222] The CISG is a '*gem of a future amalgamation of all sales law.'*[223] Zweigert & Kotz call it *'the greatest achievement of UNCITRAL.'*[224] DiMatteo states that the adoption of the CISG is *'the most profound evidence of the move towards the unification of contract law.'*[225]

Despite this positive disposition criticism has also been levelled against the CISG. It is considered too general and thus gives too much room for different interpretations.[226] Consequently there is no uniform interpretation.[227] Nicholas quotes Justice Hobbs that the CISG takes elements from different legal systems and is therefore not coherent and consistent.[228] The CISG is also not comprehensive because it leaves out certain types of sales and some legal issues are excluded.[229] Although all of these criticisms are true they are not

[219] For the full text see:
http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html
Last accessed 14 January 2016
[220] http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1974Convention_status.html
Last accessed 14 January 2016
[221] Louis Marques, International *Uniform Commercial Law: towards a progressive consciousness (*Ashgate, Aldershot 2005) 2
[222] Ibid
[223] Ibid
[224] Konrad Zweigert and Heinz Kötz, *An introduction to comparative law* (Tony Weir tr, third edition, Oxford University Press 1998) 27
[225] Larry A DiMatteo, *International Contracting: Law and Practice* (Wolter Kluwer Law & Business 2013) 235
[226] Jan M Smits, 'Convergence of Private Law in Europe' in Esin Örucü and David Nelken (Editors) *Comparative Law, A Handbook* (Hart Publishing 2007) 224
[227] Camilla Baasch Andersen, *Uniform Application of the International Sales Law/Understanding Uniformity, the global jurisconsultorium and Examination and Notification Provisions of the CISG* (Wolters Kluwer 2007)38
[228] Barry Nicholas, 'The United Kingdom and the Vienna Sales Convention: Another Case of Splendid Isolation?' [1993] http://www.cisg.law.pace.edu/cisg/biblio/nicholas3.html
Last accessed: 27 February 2016
[229] CISG Article 2 discusses which sales are excluded from the scope of the convention

unique to the CISG as these are inherent risks to international conventions in general as was discussed in chapter 2 6.1.

Another type of substantive convention regulates the carriage of goods contract. For carriage of goods by sea the relevant conventions are The Hague-Visby Rules, the Hamburg Convention of 1978, and the Rotterdam Rules of 2010. The Hague-Visby rules are the most prominent and most ratified. The Hague-Visby Rules find their origin in the International Convention for the Unification of Certain Rules of Law Relating to Bills of Lading drafted by the Comité Maritime International (CMI).[230]

These so-called Hague Rules were amended in 1968 with a first protocol (Visby) and in 1979 with a second protocol (regarding special drawing rights). As the title of the convention suggests The Hague-Visby Rules cover only carriages of goods under a bill of lading. The Rules have been widely adopted although not all contracting states have adopted the protocols.[231] Participating states include France, USA, UK, Turkey, Japan, and Italy. The Hague-Visby rules are mandatory. They cannot be avoided by including a choice of law clause for a non-contracting state. In the UK for instance the Carriage of Goods by Sea Act of 1971 gives article X of The Hague-Visby Rules the quality of mandatory law.[232] The Hague-Visby rules are applicable if the bill of lading has been emitted in a contracting state or if the

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For an analysis on legal issues which are excluded from the CISG see:
Stefan Kröll, 'Selected Problems Concerning the CISG's Scope of Application' (2005-2006) 25 Journal of Law and Commerce 39
These include pre-contractual negotiations and capacity.

[230] The 1924 Bills of Lading Convention and its1968 and 1979 Protocols (Hague-Visby Rules)
http://www.comitemaritime.org/The-1924-Bills-of-Lading-Convention-and-its-1968-and-1979-Protocols-Hague-Visby-Rules/0,2799,19932,00.html

[231] For a full list of countries and their accession to carriage of goods by sea conventions:
Hill Dickinson, *Cargo Conventions: Comparing Hague, Hague/Visby, and Hamburg Rules, Shipping at a Glance Guide 1*
http://www.hilldickinson.com/pdf/Cargo%20conventions.pdf
Last accessed: 27 February 2016

[232] Carriage of Goods by Sea Act 1971 and Carriage of Goods by Sea Act 1992
5(5): The preceding provisions of this Act shall have effect without prejudice to the application, in relation to any case, of the rules (The Hague-Visby Rules) which for the time being have the force of law by virtue of section 1 of the Carriage of Goods by Sea Act 1971

transport begins in a contracting state. They can also be contracted into by including a paramount clause in the contract. [233]

The United Nations Convention on the Carriage of Goods by Sea (Hamburg Rules) has not enjoyed the same success as The Hague-Visby rules.[234] They have not been signed by the larger ship owner economies that play an important role in carriage of goods by seas. The reason is that the Hamburg Rules are deemed as more favourable to the owner of the goods and slightly less so to the carrier. They have attracted 34 ratifications from mainly countries in the global south.[235]

The Rotterdam Rules are to establish a uniform, updated, and comprehensive regime.[236] They are so far only ratified by three states (Spain, Togo, and the Republic of the Congo (Brazzaville)) and will not enter into force until ratified by at least 20 countries.[237] Those countries that ratify the convention should renounce The Hague-Visby Rules and Hamburg rules if they are signatory to either when the Rotterdam Rules come into force. The hope is that the Rotterdam rules will become the leading convention on carriage of goods by sea and will contribute to further harmonisation. Whether it will do so is dependent on the number of ratifications the convention will manage to attract.

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[233] See for the full text of The Hague-Visby Rules:
http://www.jus.uio.no/lm/sea.carriage.hague.visby.rules.1968/doc.html
Article X:
The provisions of these Rules shall apply to every bill of lading relating to the carriage of goods between ports in two different States if
(a) the bill of lading is issued in a contracting State, or
(b) the carriage is from a port in a contracting State, or
(c) the contract contained in or evidenced by the bill of lading provides that these Rules or legislation of any State giving effect to them are to govern the contract

[234] United Nations Convention on the Carriage of Goods by Sea (The Hamburg Rules) 30 March 1978
http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_rules.html

[235] http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/Hamburg_status.html
Last accessed 14 January 2016

[236] The United Nations Convention on Contracts for the International Carriage of Goods Wholly or Partly by Sea of 11 December 2008 (Rotterdam Rules)
http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/2008rotterdam_rules.html

[237] For the current status of the Rotterdam Rules:
http://www.uncitral.org/uncitral/en/uncitral_texts/transport_goods/rotterdam_status.html
Last accessed: 5 November 2015

There are also numerous conventions for carriage of goods by other means of transportation. These include the Budapest Convention on carriage of goods by rivers,[238] the Convention concerning International Carriage by Rail supplemented by the Vilnius Rules, [239] the Warsaw Convention on carriage of goods by air,[240] the Montreal Convention on carriage of goods by air,[241] and the Geneva Convention on transportation of goods by road.[242] The United Nations Convention on International Multimodal Transport of Goods of 1980 has not entered into

[238] Budapest Convention on the Contract for the Carriage of Goods by Inland Waterway (CMNI) 22 June 2001
This is a regional convention for the European Continent and has so far been ratified by 15 states and entered into force on 1 April 2005
Full text: http://www.unece.org/fileadmin/DAM/trans/main/sc3/cmniconf/cmni.pdf

[239] Convention concerning International Carriage by Rail (COTIF) of 9 May 1980, as amended by the Vilnius Protocol of 3 June 1999
This convention is applicable in Europe, the Maghreb, and Middle East between states that have ratified the convention
The Intergovernmental Organisation for International Carriage by Rail (OTIF) was set up to establish international rail carriage legislation through uniform laws.
Full text of the convention: http://www.otif.org/en/about-otif/conventions-cotif.html

[240] The Convention for the Unification of Certain Rules Relating to International Carriage by Air of 12 October 1929 (Warsaw Convention.) This convention is applicable to both carriages of goods and persons. It was amended by The Hague Protocol of 1955. The Warsaw convention has been ratified by 152 states and The Hague protocol by 137 states. This was followed by the Guadalajara Convention in 1961 (84 contracting states), Guatemala Protocol of 1971 which has never entered into force and the Montreal Protocols 1, 2, 3 4, in 1975. Of these protocols 1,2 and 4 have entered into force (respectively with 48, 49, and 53 members)
For the full list of ratifications see:
http://www.icao.int/secretariat/legal/List%20of%20Parties/WC-HP_EN.pdf
Last accessed: 27 February 2016
For the full text in English see: http://www.vayama.com/pdf/warsawConvention.pdf

[241] Convention for the Unification of Certain Rules for International Carriage by Air of 28 May 1999 (Montreal Convention)
The development of the Montreal Convention occurred for much the same reasons as the recent Rotterdam Rules on carriage of goods by sea. It was felt that the Warsaw Convention and subsequent amendments needed to be modernised and unified. The Montreal Convention draws upon the Warsaw Conventions and its protocols and unifies these into a new instrument. The Convention has been successful with 119 contracting states.
For a full list of ratifications:
http://www.icao.int/secretariat/legal/List%20of%20Parties/Mtl99_EN.pdf
Last accessed: 27 February 2016
Currently the Warsaw Convention (+ protocols) and the Montreal Conventions co-exist and are both important instruments. The Montreal Convention takes precedence between contracting states if both have been ratified.
For full text see: http://www.jus.uio.no/lm/air.carriage.unification.convention.montreal.1999/

[242] Convention on the Contract for the International Carriage of Goods by Road of 19 May 1956(CMR) (Geneva Convention) this has been ratified by 55 (mainly European) states.
For the full list of ratifications see:
https://treaties.un.org/Pages/ViewDetails.aspx?src=TREATY&mtdsg_no=XI-B-11&chapter=11&lang=en
Last accessed: 27 February 2016
For the full text see:
http://www.jus.uio.no/lm/un.cmr.road.carriage.contract.convention.1956.amended.protocol.1978/doc.html

force.[243] Conventions that regulate carriage of goods are perhaps the most successful category of international conventions. The need for unification has been felt earlier and stronger in this area than in others. This has especially been the case for carriage of goods by sea and air. The countries in the European continent are strongly represented in carriage of goods by rivers and terrestrial transports. This is explained by the geography of the European continent: many small countries combined with a highly-developed economy, which means transportation of a high volume of goods and peoples across borders.

A third category of conventions regulates international financing. Examples are the UNIDROIT Convention on International Factoring and the UNIDROIT Convention on International Financial Leasing of 1988. [244] The number of ratifications is modest. These are in force in respectively 9 and 10 countries. UNIDROIT also drafted the Convention on International Interests in Mobile Equipment of 2001 known as the Cape Town Convention which has 69 contracting states per 2015.[245]

The above are the most prominent examples of conventions in international commerce although they are not the only ones.[246] Conventions becoming binding after ratification and

[243] For the full text of the convention see:
http://www.jus.uio.no/lm/un.multimodal.transport.1980/doc.html
It will enter into force upon ratification by 30 states
[244] UNIDROIT Convention on International Factoring of 1988
http://www.unidroit.org/instruments/factoring
UNIDROIT Convention on International Financial Leasing of 1988
http://www.unidroit.org/fr/leasing-ol-2/leasing-anglais
[245] Convention on International Interests in Mobile Equipment of 2001
http://www.unidroit.org/instruments/security-interests/cape-town-convention
Three additional protocols were also promulgated. The Aircraft protocol, which has 60 contracting states, is in force. The Rail Protocol and the Space Protocol are not yet in force.
[246] Some other examples
The United Nations Convention on the Use of Electronic Communications in International Contracts (2005)- entered into force in 2013 and has 7 parties
The United Nations Convention on the Assignment of Receivables in International Trade (2001) – has one ratification and has not entered into force
The United Nations Convention on International Bills of Exchange and International Promissory Notes (1988) – has 5 parties and has not entered into force
The United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995) – entered into force in 2000 and has 8 parties
The United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991) – has 4 parties and has not entered into force

entry into force. If a convention meets these criteria it is thus a source of binding domestic law.[247] If conventions are not in force or they are not in force in a particular state, they are not a source of binding law. In those cases, they can be considered as non-state rules. Although one would not primarily think of international conventions as non-state rules there is no reason why these should not be classified thus when they are not part of domestic law. They would meet the criteria as set out in chapter 2: their origin is transnational, their substance regulates international private relations between merchants, and they are weakened along the lines of obligation and delegation. They would in that scenario have the same legal authority as a restatement of law as defined in section 3.5.3.

3.4 Uncodified Non-State Rules

Uncodified non-state rules are characterised by their spontaneous creation, anational origin, and flexibility. Their content can be hard to ascertain as they are not codified and are subject to change over time and space.

3.4.1 Custom, Usages and Practices

Three different types of non-state rules that are closely grouped together are custom, trade usages, and practices. The differences between the three are not always clear in theory and in practice.[248] Goode observes that in modern commercial law literature the terms are used interchangeably whereas in practice there is a tendency towards using the term trade usage.[249] In contractual relations custom, trade usages, and practices can assume different roles:

- *to define jargon, clarify ambiguities and explain technical terms*

UNIDROIT Convention on Agency in the International Sale of Goods (1983) – 4 ratifications and has not entered into force

[247] Filip de Ly, *International Business Law and Lex Mercatoria* (T.M.C Asser Instituut 1992) 205

[248] In line with current commercial practice this thesis mostly uses the term 'trade usages' unless it is important distinguish this from the other concepts.

[249] Roy Goode, 'Usage and its Reception in Transnational Commercial Law' in Jacob S Ziegel and Shalow Lerner (editors), *New Developments in International Commercial and Consumer Law, proceedings of the 8th Bienal Conference of the International Academy of Commercial and Consumer Law* (Hart Publishing1998) 9

- *to add terms to the contract*
- *to allow commercial meanings to control contrary lay definitions* [250]

Although often used interchangeably they are three distinct concepts. Berman discusses that a satisfying answer to what custom exactly is has not been found: '*the traditional search for custom has proved as futile as Sir Lancelot's quest for the Holy Grail.*'[251] Although as in the end the Holy Grail was found by the son of Sir Lancelot, Sir Galahad, perhaps the search for the meaning of custom is not entirely futile. Custom can be seen as the practice of an authority whereas usages are the practice of a trade.[252] Another explanation is that a usage is a pattern of behaviour and custom is the application of that pattern.[253] Under this definition usage is thus what the parties do and custom is what the parties are obliged to do. This ties in with custom being the practice of an authority (the court). The ICJ states that for custom to be recognised there are two elements: the repeated and consistent practice and the opinio iuris.[254] The common law test is that for a custom to be recognised it needs to be legal, notorious, certain, reasonable, universal, obligatory, and ancient or immemorial.[255] The threshold for custom to be recognised is thus high.

Trade usages are a more recent phenomenon than custom and date back to the idea that a contract should be interpreted within the context of commerce. This idea first appeared in the 18th century whereas custom has far deeper historical roots and dates back a further 500 years

[250] Harold J Berman, 'Towards an Integrative Jurisprudence: Politics, Morality, History' (1988) 76 California Law Review 779, 784
[251] Ibid,805
Citing John C Gray, *The Nature and Sources of the Law* (2nd edition, Colombia University Press 1921) 285
[252] Roy Goode, 'Usage and its Reception in Transnational Commercial Law' in Jacob S Ziegel and Shalow Lerner (editors), *New Developments in International Commercial and Consumer Law, proceedings of the 8th Bienal Conference of the International Academy of Commercial and Consumer Law* (Hart Publishing1998) 9
[253] Ibid
[254] *The Republic of Nicaragua v. The United States of America* (1986) International Court of Justice
[255] Jim C Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Texas International Journal 91, 98

at least.[256] Custom is normative: parties believe it should be followed and therefore they follow it. Without this sense of obligation, it cannot be considered custom. This is not the same with trade usages. Parties do not need to believe that the usage is legally binding for it to be enforceable.

The UCC states that *'a usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to the transaction in question.'*[257] It does not state that a sense of obligation is necessary. This was also the reasoning in *Chase Manhattan Bank v. May* where the court stated that usages do not need to meet the standard of custom.[258] This is why trade usages are favoured in modern legislation as there is no need to prove a sense of obligation, but only to prove the actual practice itself. It can be difficult to distinguish between a usage followed out of courtesy or out of a sense of legal obligation.[259] So if there is no need to prove this sense of obligation it lessens the burden of proof. A trade usage thus has binding force whether the parties recognise this or not. Non-respect of a trade usage is seen as non-respect of a contractual term. [260] Trade usages are applicable in a specific locality, a trade, or a certain professional group and they go beyond the individual contractual relationship.

Practices have a weaker obligation than trade usages. Practices can be associated with the individual contract. In that case practices are seen as course of dealing. If that is the case, they can be binding within the specific contractual relationship. Another explanation is that a practice is a beginning trade usage. The pattern is emerging, but is not yet firmly established.

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[256] Joseph H Levie, 'Trade Usage and Custom under the Common Law and the Uniform Commercial Code' (1965) 40 New York University Law Review 1101, 1103
[257] UCC § 1-303. Course of Performance, Course of Dealing, and Usage of Trade
[258] *Chase Manhattan Bank v. Milton May* (1962) 311 F.2d 117 (3d Cir.)
[259] Roy Goode, 'Usage and its Reception in Transnational Commercial Law' in Jacob S Ziegel and Shalow Lerner (editors), *New Developments in International Commercial and Consumer Law, proceedings of the 8th Bienal Conference of the International Academy of Commercial and Consumer Law* (Hart Publishing1998) 11
[260] Alejandro M Garro 'Rule-Setting by Private Organisations, Standardisation of Contracts and the Harmonisation of International Sales Law' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors), *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2000) 314

Goode explains that a trade usage is a repeated practice which has acquired normative force.[261] Under that definition a practice would not (yet) create any legal obligations to the parties.

Schmitthoff synthesises these differences by describing a gradual process whereby custom is started as practices that are followed by a few businesses which then become general usages within that trade or locality, and which over time may develop into custom.[262] Trade usages and practices are more restricted in time and space than custom, which is more universal and has deeper historical roots, as evidenced by the common law test. It should be kept in mind that these three terms are often used interchangeably in theoretical writing as well as in practice.[263] This thesis uses the term trade usages to denominate this grouping unless it is necessary to make a distinction between the three.

Domestic law can recognise trade usages (custom, practices…) as a source of law.[264] Every legal system has its own rules whether and when these are considered legally binding. How wide spread the acceptance of the trade usage is '*determines its legitimacy as a source of law.*'[265] The length of time it has existed also contributes to this legitimacy.

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[261] Roy Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46 International & Comparative Law Quarterly 4,4

[262] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1986) 17 International & Comparative Law Quarterly 551, 554

[263] *Hellbusch v. Rheinholdt* 550 P.2d 1199 (1976): *'the terms `usage' and `custom' are commonly used interchangeably, though there is a recognized distinction in the meaning of the two words.'*
(Quoting from Samuel Williston, Law of Contracts 1-4, § 648 (3rd edition Jaeger 1961)

[264] See for instance the Uniform Commercial Code which recognises trade usages as a source of law in all 50 states of the USA.
See Section 346 of the German Code of Commerce which obliges courts to take into consideration trade usages
Some states emphasise the importance of usages especially in the context of arbitration. In France the civil procedural code in article 1496 imposes that an arbiter has to take into account the usages of international commerce when deciding a case, irrespective of the applicable law.

[265] Alejandro M Garro 'Rule-Setting by Private Organisations, Standardisation of Contracts and the Harmonisation of International Sales Law' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors) *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2000) 314

Trade usages depend on the capacity of the merchant community to self-organise and select those usages which are beneficial to the community: '*when a usage has become uniform in an active commercial community that should warrant enough for supposing that it answers the needs of those who are dealing upon the faith of it.*'[266] There are instances when a usage develops that is not beneficial although this is rare. An example of this can be found in carriage of goods by sea. As speed is of the essence the captain of the ship is asked to sign a clear bill of lading, even when he has not been given the opportunity to inspect the goods. The captain is then given a letter of indemnity in case the goods do not conform to the description in the bill of lading. This practice is widespread, yet it is not only fraudulent, but also counterproductive as it diminishes the value of the bill of lading. In front of the courts it has been argued that this is a trade usage and should thus be enforced. In a famous English case this was accepted by the trial court and by the court of appeal, but it was struck down by the House of Lords.[267] The House of Lords stated that trust is the foundation of trade and that if doubt arises about the trustworthiness of a clean bill of lading this would be damaging for international trade as a whole. Unreasonable trade usages are the exception as most trade usages work for the benefit of international commerce. This is easily explained as the goals that merchants have are to increase trade and profit over time, which align with the policies of states to encourage economic growth. If an unreasonable trade usage develops this is usually when a short term goal of individual merchants (make sure the current transaction works out, make a quick profit) conflicts with these longer term goals.

A trade usage does not gain its legitimacy from being enforced by the courts. Goode identifies two views: the first is that as long as a usage has not been recognised by a court it cannot be considered as having legal authority. The second view is that a ruling by a court is merely declaratory and cannot be considered the source of the legal authority.[268] Goode

[266] Judge Learned Hand in *Kunglig Jarnvagsstyrelsen v Dexter and Carpenter* 299 F. 991 (S.D.N.Y. 1924)
[267] *Brown Jenkinson & Co v Percy Dalton* [1957] 2 Lloyd's List L. R.1 (C.A.)
[268] Roy Goode, 'Usage and its Reception in Transnational Commercial Law' in

points to the paradox that the first view causes: if the usage is only law after it has been affirmed, then it should not pose any obligation upon the parties given that before the judicial decision was made the trade usage did not exist.[269] In that case only trade usages which have been affirmed in previous decisions would be legally binding. This would lead to the court confirming that a specific usage is binding, yet not enforcing it in the case at hand as it did not exist prior to the decision. It is therefore more reasonable to assume that a court recognises a trade usage, but that the legal authority does not come from this decision. That legitimacy comes from its usage by the merchant community. The authority of trade usages can thus come from domestic law (if trade usages are a source of law), from the lex mercatoria (of which they are a source), the business community (which uses them and from where they originate), and the courts (which apply them.)

3.4.2 General Principles of Law

General principles of law are those principles which are common to all or most legal systems. Precisely because of this commonality general principles of law are abstract. Their exact content is difficult to establish. Examples of general principles of law that could be applicable in international commerce are 'pacta sunt servanda' or 'clausula rebis sic stantibus.' These are vague terms. They are well-known, but it can be a struggle to establish exactly what they mean. General principles of law can be found in decisions of national and international courts. Article 38 of the ICJ specifically recognises general principles as a source of law.[270]

Jacob S Ziegel and Shalow Lerner (editors), *New Developments in International Commercial and Consumer Law, proceedings of the 8th Bienal Conference of the International Academy of Commercial and Consumer Law* (Hart Publishing 1998) 12

[269] Ibid

[270] Statute of the International Court of Justice Article 38: The Court, whose function is to decide in accordance with international law such disputes as are submitted to it, shall apply:
a. international conventions, whether general or particular, establishing rules expressly recognized by the contesting states;
b. international custom, as evidence of a general practice accepted as law;
c. the general principles of law recognized by civilized nations;
d. subject to the provisions of Article 59, judicial decisions and the teachings of the most highly qualified publicists of the various nations, as subsidiary means for the determination of rules of law.

The place of general principles of law in transnational commercial law is controversial. According to Lord Mustill they are useless because they are too general and thus have no practical application in international commerce.[271] Moreover, general principles are not always that general. An example is good faith in the pre-contractual phase which is not known as a general principle in common law, but is one in civil law systems.[272]

General principles of law are often cited as a source of the lex mercatoria but this is subject to debate.[273] This was also discussed in chapter 2.4.3. It could be argued that as general principles of law are a source of public international law they should not be included in international private law. This is not only because they are abstract, but also because they cannot be enforced. General principles as meant by article 38 exist for state to state relations.[274] A private party cannot be found liable for violation of general principles of law as meant by article 38.[275] Cordero-Moss cites the example of the *Nuclear Tests Case* from which a good faith principle can be drawn.[276] Yet, if this principle does not exist in domestic law, then it is not applicable to private contracts even if it is recognised by the ICJ.[277]

Despite this criticism phrases like 'general principles of law', 'principles of commercial law' and similar are found in choice of law clauses. They are applied by arbitral tribunals, especially in state-foreign company contracts.[278] It can be difficult to translate abstract

[271] Michael Mustill, 'The New Lex Mercatoria: The First Twenty-Five Years' (1998) 4 Arbitration International 86,92
[272]Ibid
[273] Berthold Goldman, 'The Applicable Law: general Principles of Law- the lex mercatoria' in J D M Lew (Editor) *Contemporary Problems in International Arbitration* (Springer 1987) 113
[274] Jean-Flavien Lalive, 'Contracts between a State or a State Agency and a Foreign Company' (1964) 13 International and Comparative Law Quarterly 987, 1000-1002
[275] Giudetta Cordero-Moss, 'The Transnational Law of Contracts: What It Can and What It Cannot Achieve' in Todd Weiler and Freya Baetens (editors), *New Directions in International Economic Law: In Memoriam Thomas Wälde*, (Martinus Nijhoff 2011), 61-63
[276] *Nuclear Tests (Australia v France)*, International Court of Justice, 20 December 1974
The part Cordero-Moss refers to is where a unilateral declaration is found binding by the ICJ
[277] Giudetta Cordero-Moss, 'The Transnational Law of Contracts: What it Can and What it Cannot Achieve' in Todd Weiler and Freya Baetens (editors), *New Directions in International Economic Law: In Memoriam Thomas Wälde*, (Martinus Nijhoff 2011) 61-63
[278]Ibid, 2001

general principles of law to concrete rules that can be applied to the dispute. This is especially so if general principles of law are associated with those recognised by article 38 which means that they would need to be adapted to fit international private law.

General principles of law can be a source of law in domestic law. These are not necessarily the same general principles of law as those meant in article 38. They are the general principles underlying the national law. It is important to realise that there are thus different types of general principles. The first is general principles of law as common to most nations, the second general principles of domestic law.[279]A third type would be general principles of EU law as recognised by the European Court of Justice.[280]

This difficulty of assimilating public international law and international private law has led to distinguishing general principles of commercial law from general principles of law as meant by article 38. These general principles of (transnational) commercial law are a hybrid of principles that are derived from public international law and domestic laws and which are applicable in international commerce

There are different theories on whether general principles should be seen as a source of international commercial law.[281] They could be seen as a way of ordering the legal system or as guidance to understanding similar concepts in different laws.[282] In that case they would not be sources of law. They can also be seen as sources of law for gap filling purposes or to

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See also: Olugbenga Bamodu, 'Exploring the Interrelationships of Transnational Commercial Law. 'the New Lex Mercatoria' and International Commercial Arbitration' (1998) 1 African Journal of International and Comparative Law 37
Jean-Flavien Lalive, 'Contracts between a State or a State Agency and a Foreign Company' (1964) 13 International and Comparative Law Quarterly 987

[279] There are also the general principles of international law which also fall under article 38. These general principles of international law have the internationality of the principle as focus. These would include principles on the sovereignty of nations. It would be difficult to see how these could apply in an international commercial law context.

[280] See for instance the webpage of the European Union:
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l14533
Last accessed: 21 November 2015

[281] Filip de Ly, *International Business Law and Lex Mercatoria (*T.M.C Asser Instituut 1992) 193

[282] Ibid

interpret the law.[283] It would depend on the jurisdiction as well. De Ly analyses that in the Netherlands and Belgium general principles are applied regularly and are recognised as a source of law. In France they are applied less frequently, but they are a formal source of law, and in Germany they are recognised as a way to help interpret the law, but are not seen as a source of law.[284] De Ly notes that in civil law countries general principles are used to fill gaps in the legal system in the same way that case law is used in common law jurisdictions.[285] This gap-filling method can also be found in the CISG which states that for matters covered by the convention, but not explicitly discussed in it, decisions should be based on the underlying general principles of the convention.[286]

Concluding it can be said that general principles of law as defined by article 38 are sources of international law. General principles are also a source of domestic law. They can thus derive their legal authority from domestic law or from public international law. General principles of commercial law pose a conundrum. If they are reduced to those principles which are truly common to most nations, they become so abstract as to lose their practical importance for international commerce. If on the other hand general principles of law are defined in a more concrete way they are of practical use, but can no longer be considered as truly general. The more specified they are the more they will be restricted in time and space. They will be restricted to specific legal systems or specific jurisdictions. If they are concrete rules, they will lose some of their universality. Furthermore, they are applied in state courts which means that domestic law influences heavily which principles are applied and how these principles are applied. Therefore, general principles of commercial law are on the juxtaposition of public international law and domestic law which means that defining and interpreting them varies between different jurisdictions.

[283] Ibid, 194
[284] Ibid, 194-199
[285] Ibid, 199
[286] CISG Article 7 (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private -international law.

3.5 Codified Non- State Rules

Codified non-state rules are purposefully created by international organisations or trade branch associations. There are several different kinds of codified non-state rules. The first is model laws. Model laws are drafted by international organisations and they are directed at national legislators with the objective to harmonise law. The second are model contracts and standard contract clauses. These are created by international organisations and trade branch associations. They are aimed at merchants with the goal to facilitate international contracting. The third are restatements of laws. They are constructed like a model law, but are aimed at private operators and purpose to offer a possible choice of law. The fourth kind can be grouped under the name guides and opinions. These include best practice guides, legal opinions, advisory opinions, and other documents written by international organisations, trade associations, or (groups of) individual(s). Goode observes that codified non-state rules represent the commitment of the scholars and that of the institutions promulgating these rules.[287]

The previous section noted that uncodified non-state rules can be sources of domestic law. This is not the case for codified non-state rules. They have no direct standing in domestic law as a source of law. Their legal authority in domestic law would thus have to be defined in other ways. Within the national legal system, they could have legal authority if they are assimilated or equated with sources of domestic law. This could be the case if they are considered as trade usages, general principles of law, legal scholarship (doctrine in the civil law sense), or contractual rules. All of these have legal value in domestic law (although the precise value depends on the jurisdiction) and codified non-state rules can gain legal authority through their equation with these.

[287] Roy Goode, 'Usage and Its Reception in Transnational Commercial Law' (1997) 46 International & Comparative Law Quarterly 3

3.5.1 Model Laws

Model laws are developed by international organisations and they are adopted by national legislations so as to further the harmonisation of law. Once they are drafted they are made available to states, usually accompanied by guidance on how they could be implemented. States can adapt them as they see fit. This makes model laws different from conventions which have to be ratified as they are and usually only permit a small number of reservations to be made. States could of course use a convention in the same way as a model law, but they would not be a party to the convention in that case.[288]

A successful example is the Model Law on International Arbitration. Legislation based on this model law has been adopted by 70 states.[289] Other successful model laws are the UNCITRAL Model Law on Electronic Commerce,[290] the UNCITRAL Model Law on Electronic Signatures,[291] the UNCITRAL Model Law on Cross-Border Insolvency, [292] and the UNIDROIT model law on leasing.[293] Other model laws have been less successful. For instance, legislation based on the UNCITRAL Model Law on Public Procurement has been adopted by 14 states. The numbers demonstrate that model laws can be an efficient instrument in harmonising law. Even when not enacted a model law can serve as a guide for legal drafters to reflect on existing laws and bring new ideas to the table.

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[288] This happens in practice as well. China for instance used the CISG as a model when they updated their domestic sales law. China also ratified the CISG.
See this: Shiyuan Han, 'The CISG and Modernisation of Chinese Contract Law'17 Comparative Law Journal of the Pacific 67
Available online
http://www.victoria.ac.nz/law/nzacl/PDFS/SPECIAL%20ISSUES/HORS%20SERIE%20VOL%20XVII/06%20Han.pdf
Last accessed: 9 November 2015

[289] For full list of states see:
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
Last accessed: 15 March 2016

[290] Legislation based on this model law has been adopted by 64 states.
http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/1996Model_status.html

[291] Legislation based on this model law has been adopted by 32 states.
http://www.uncitral.org/uncitral/en/uncitral_texts/electronic_commerce/2001Model_status.html

[292] Legislation based on this model law has been adopted by 40 states
http://www.uncitral.org/uncitral/en/uncitral_texts/insolvency/1997Model_status.html

[293] http://www.unidroit.org/instruments/leasing/model-law

Model laws also exist within (federal) jurisdictions. In the United States the NCCUSL/ULC promotes increased legal uniformity through the development of model laws. The UCC is the most prominent example of their work. Another example is the Uniform Electronic Transactions Act which was adopted by 47 US states. That is not to say that all of their work is successful. For example, the Uniform Franchise and Business Opportunities Act was not adopted by one single state.

Model laws are non-state rules. Upon adoption (and eventual adaption) they become part of domestic law. If a model law is adopted by a state, the newly adopted law is a source of domestic law. The original model law continues to exist in parallel to the state. The question is whether the model law itself can be considered as a valid source of law. Model laws are aimed at legislators. This makes the provisions less suitable as contractual rules, but this is not an intrinsic reason why private parties could not make reference to a model law in their contract.

Could they have any legal authority beyond contractual rules? Could model laws also come to be seen as custom, trade usages, or general principles? Or as authoritative legal scholarship/doctrine? There is no intrinsic reason why a provision of a model law could not be equated with these. The institution that promulgated it could have a large influence on the general acceptance of the model law by states and therefore on its likely usage. If the model law has been adopted by many legislations this could increase the persuasive value of the model law in general. Neither of these would inherently qualify nor disqualify a provision of a model law to be applied as a trade usage, a general principle of law, or as doctrine. This could only be determined by frequent and consistent usage. As the provisions are not aimed at businesses this would be less likely in practice. The implementation and interpretation guides to a model law could have persuasive value as legal scholarship/doctrine in jurisdictions that have adopted the model law.

3.5.2 Model Contracts, Clauses, and Standard Terms

Model contracts are elaborated by international organisations or by trade branch associations and they are aimed at businesses. Model contracts are also called standard contracts although this name can cause confusion with standard adhesion contracts. The first is drafted by an outside source whereas the second type is drafted in-house and contains the standard terms and conditions of a particular company.[294] The standard contract discussed here is the model contract. Model contracts extent to the whole contract, part of the contract, or individual contractual terms.[295] Parties can adopt model contracts as they are or they can adapt them to fit their specific needs.

The most well-known international organisations that design model contracts are UNCITRAL and the ICC. The ICC has a specialised commission dedicated to the development of model contracts.[296] The goal of these organisations is to develop contracts which are favourable to the needs of international commerce and balance the rights of the parties equally. Examples include contracts on commercial agency, franchising, mergers, sale of goods, licencing, and turnkey transactions.

Trade associations are important players in this area. These associations draft contracts specifically for their branch. An example of such an organisation is the ISDA (International Swaps and Derivatives Association) which creates legal definitions of contractual terms and model contracts.[297] Other examples are FIDIC (International Federation of Consulting Engineers) which designs model contracts for civil engineers, the JCT (Joint Contracts Tribunal) which drafts model building contracts, and BIMCO (Baltic and International

[294] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1986) 17 International & Comparative Law Quarterly 551, 551
[295] Ibid, 556
[296] The ICC Commission on Commercial Law and Practice (CLP)
[297] ISDA http://www2.isda.org/

Maritime Council) which creates model charter-parties.[298] Model contracts elaborated by trade associations can be biased towards the seller or service provider who is usually a member of the association.[299] The members are the main stakeholders of the trade association and they wish to protect their interests as best as possible.

Model contracts can be seen as '*as quasi-formal sources of a constantly evolving lex mercatoria.'* [300] This would hold if one includes written sources under the lex mercatoria. In the definition used in this thesis which holds the lex mercatoria to exclusively consist of uncodified non-state rules the lex mercatoria would not include model contracts. Model contracts and terms serve as contractual rules and derive their legal authority from the contract. They apply to those who have entered into the contract.

Schmitthoff discusses that they could be considered as trade practices which could eventually develop into usages.[301] It is unlikely that a whole model contract would be equated to a trade usage, but individual clauses can develop into this. A standard clause can be considered as a trade usage if used with consistency and regularity, and then it could take on a legal value beyond that of a contractual rule. They would then be applicable independently of whether they were included in the contract. This would not work for every type of model contract clause. For instance, UNIDROIT designed model clauses for those wishing to incorporate the UPICC in their contract.[302] These are not substantive legal clauses and it is difficult to see how these could be considered as trade usages.

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[298] BIMCO: https://www.bimco.org/
FIDIC: http://fidic.org/

[299] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1986) 17 International & Comparative Law Quarterly 551,553

[300] Alejandro M Garro 'Rule-Setting by Private Organisations, Standardisation of Contracts and the Harmonisation of International Sales Law' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors) *Foundations and Perspectives of International Trade Law* (Sweet & Maxwell 2000) 310

[301] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1986) 17 International & Comparative Law Quarterly 551,554

[302]Model Clauses for Use by Parties of the UNIDROIT Principles of International Commercial Contracts
http://www.unidroit.org/instruments/commercial-contracts/upicc-model-clauses

3.5.2.1 Incoterms

The Incoterms (an acronym for International Commercial Terms) have been developed by the ICC on the basis of existing trade terms. They are standard contract terms. The Incoterms are updated frequently. The latest update stems from 2010.With these updates new terms can appear whereas others might be struck off because they are no longer used as frequently.[303] In 1923 the first set was published under the name trade terms. This consisted of a comparative study of the interpretation of trade terms between several countries.

The ICC did not invent these trade terms. When including them in the contract it should be specified that one is referring to the Incoterms specifically and not to the generic trade term.[304] Trade terms can be interpreted differently depending on the port and the legislation.[305] In the US the UCC definitions of trade terms are used in absence of a clear indication that the parties wished to submit their contract to the Incoterms; especially if the law of an American state is the applicable law.[306] Because of the different interpretations the ICC developed the Incoterms. The ICC chose the most prevalent meaning and this can differ from local interpretations.[307] Throughout the years the ICC has developed new additional trade terms, either based on existing ones or on the observation of a perceived need for these in international commerce.[308]

[303] Incoterms that were omitted in the latest update were DES (Delivery Ex Ship) and DDU (Delivery Duty Unpaid). It would of course still be possible to include these terms in a contract, but the parties would need to make sure to refer to the earlier version so that they are interpreted in accordance with the parties' wishes.

[304] William F Fox, *International Commercial Agreements: A Primer on Drafting, Negotiation and Resolving Disputes* (Third edition, Kluwer Law International 1998) 159
As the Incoterms are updated regularly it makes sense to reference the version of the Incoterms in the contract. If the parties omit doing so the court most likely will decide that the most recent version is the applicable one

[305] Hans van Houtte, *The Laws of International Trade* (Sweet & Maxwell 1995),149

[306] Ibit

[307] Ibid, 150

[308] Other organisations have also developed interpretation guides to trade terms. An example is the Warsaw-Oxford Rules on CIF contracts as formed by the International Law Association.

Trade terms divide the responsibilities between the buyer and the seller with regards to transportation and transfer of risk.[309] Each trade term is shortened to three letters. The Incoterms are divided in three or four categories (the first two are often placed together) that represent increasing responsibilities for the seller:

- Ex- works (place of delivery). The buyer collects the goods at the named place and arranges for transport from there. The obligation of the seller is to make the goods available at the place of delivery, which is usually the premise of the seller.
- F terms: FCA (Free Carrier place of delivery) FAS (Free Alongside Ship), and FOB (Free on Board). The seller delivers the goods to the first carrier at the named place (FCA), to the dock alongside the named ship (FAS), or on board the ship (FOB)
- C terms: CFR (Cost and Freight), CIF (Cost, Insurance and Freight), CPT (Carriage Paid To), and CIP (Carriage and Insurance Paid To). Under these C terms the seller is responsible for shipping the goods to the named destination. The seller assumes the costs associated with the carriage of goods. Under CIF and CIP, the seller also assumes the responsibility and the costs for insuring the goods.
- D terms: DAT (Delivery At Terminal), DAP (Delivery At Place), and DDP (Delivery Duty Paid). The seller takes responsibility to deliver the goods at either the terminal (DAT), at the named place (DAP), or to the named place including all imports/duties paid for (DDP). In the last term the buyer is only responsible for unloading the goods.[310]

Some of these trade terms are relatively new creations whilst others, such as FOB and CIF, pre-date the codification of the ICC. Usage of the Incoterms is widespread. The support for

[309] In their contracts parties can of course add any additional conditions on the interpretation of the Incoterm that they wish.
[310] There are other trade terms as well but these do not fall under the ICC Incoterms. An example is FIS (Free In Store) where the seller assumes all costs and responsibilities including unloading the goods at the premise of the buyer.

the Incoterms by institutions such as UNCITRAL has contributed to their acceptance worldwide.[311]

The legal status of the Incoterms is less straightforward. They are first of all contractual rules. They will apply when contracted into. They are considered by some as trade usages.[312] In 1968 Schmitthoff considered them as usages which have to be contracted in to.[313] In 1980 Ramberg described the Incoterms as usages.[314] Gourion et all write that the Incoterms are part of the lex mercatoria, but they do not give any reason why this is so.[315] De Ly concludes that there are differing views with some court cases confirming the Incoterms as trade usages and others confirming them as contractual rules.[316] The majority opinion is that the Incoterms are contractual rules.[317]

Some Incoterms are recent creations and therefore would not be considered usages whereas some of the more established terms could be considered so.[318] Whether the trade term itself is the usage or the Incoterm is another question. Incoterms could be seen as usages when parties include a trade term such as CIF in their contract without any specific reference to the Incoterms and the court decides that the trade term should be interpreted in accordance with the Incoterms. The Incoterms are in that case the standard for interpreting trade terms and take on the role of trade usages. They can also be considered usages if the parties describe the

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[311] Maria Cattaui, Livanos, 'Harmonising Commercial Law: Keeping Pace with Business' in Ian F Fletcher, Loukas Mistelis and Marise Cremona (editors) *Foundations and Perspectives of International Trade Law*, (Sweet & Maxwell 2000)
[312] Filip de Ly, *International Business Law and Lex Mercatoria* (T.M.C Asser Instituut 1992) 173
[313] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1986) 17 International & Comparative Law Quarterly 551,554
[314] Jan Ramberg, 'Incoterms 1980' in Norbert Horn and Clive M Schmitthoff (editors), *The Transnational Law of International Commercial Transactions* (Kluwer 1982) 151
[315] Pierre-Alain Gourion, Georges Peyrard and Nicolas Soubeyrand, *Droit du Commerce International* (Fourth edition, L.G.D.J. Lextenso Editions 2008) 197
[316] Filip de Ly, *International Business Law and Lex Mercatoria (*T.M.C Asser Instituut 1992) 173
[317] Ibid, 174
and
Anne-Katherine Drettmann, 'Would English law on trade usages benefit from adopting a more formal approach such as seen in other jurisdictions as well as in international conventions?' (2009) http://www.cisg.law.pace.edu/cisg/biblio/drettmann.html
Last accessed: 15 March 2016
[318] Filip de Ly, *International Business Law and Lex Mercatoria (*T.M.C Asser Instituut 1992) 175

transfer of risk in their contract without reference to a trade term, but the court interprets this transfer of risk clause in accordance with the corresponding Incoterm.

3.5.3 Restatements of Law

Restatements of law are drafted by international organisations. They are codified non-state rules that offer principles and rules for contractual relations. They put in mind a model law in their design, but instead of aimed at states they are aimed at the contracting partners.

The term restatement of law can be slightly confusing because it puts in mind the Restatements of Law of the ALI. The Restatements of the ALI are aimed at courts and not at the contracting parties. Nevertheless, it remains the most adequate term to define this type of instrument as it consists of principles and rules that restate existing law to a certain extent. The number of instruments that can be considered restatements is small although their impact has been significant as will become clear throughout this thesis. The most prominent ones are the UNIDROIT Principles of International Commercial Contracts (UPICC) and the Principles of European Contract Law (PECL). The third could be the Uniform Credits and Practices (UCP). The last could also be included under model contracts, clauses, and standard terms.

3.5.3.1 The UNIDROIT Principles of International Commercial Contracts

The UPICC are designed to create a neutral contract law for international business transactions.[319] The first edition was published in 1994, the second edition in 1998, and the third in 2010. Each edition expands on the previous one and includes new topics. They were drafted without any involvement from government advisers and were not formally approved by the UNIDROIT council. This was done because they are not intended for adoption or ratification by states. The UPICC consist of specific rules as well as general principles of

[319] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 2

contract law.[320] They were inspired mainly by the UCC, the CISG, the Dutch Civil Code, the Civil Code of Québec, and the Restatement (Second) of the Law of Contracts as well as by trade usages and general principles of commercial law.[321] There was cooperation with UNCITRAL to ensure that the UPICC were compatible with the CISG.[322] The Principles do not refer back to their sources unless the rules have been taken directly from the CISG.[323]

In the words of MJ Bonell the UPICC are *'intended to enunciate rules which are common to (most of) the existing legal systems and at the same time to select the solutions which seem best adapted to the special requirements of international trade*.'[324] The authors wished to restate existing international contract law and not invent a 'new' law, but there can be a discrepancy between the most common denominator and the UPICC.[325] The Principles innovate on the existing principles and rules, and do not necessarily represent the majoritarian approach in every single case.[326] The drafters determined the most appropriate solution in the light of promoting the smooth running of international commerce and innovated on this solution when deemed necessary.

They are contractual rules. Their legal authority beyond that is less certain. The UPICC do not fit any of the established categories of sources of law.[327] The UPICC could develop into trade usages and thus achieve legal authority that way: '*Some of the specific rules may [..] gain the status of law by becoming trade usages […] but this would not be the case for all of*

[320] Michael Joachim Bonell, 'The Unidroit Principles of International Commercial Contracts: towards a new lex mercatoria?' [1997] International Business Law Journal 145, 148
[321] Louis Marques, *International Uniform Commercial Law: Towards a Progressive Consciousness (*Ashgate, Aldershot 2005) 3
[322] Stefan Eberhard, *Les Sanctions de L'Inexécution du Contrat et les Principes Unidroit* (Cedidac UNIL Centre du Droit Lausanne 2005) 7
[323] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 7
[324] Michael Joachim Bonell, 'The Unidroit Principles of International Commercial Contracts: towards a new lex mercatoria?' [1997] International Business Law Journal 145,146
[325] Ibid,147
[326] Ibid,147
[327] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 120
Jürgen Basedow, 'Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts' (2000) 5 Uniform Law Review 129

the UNIDROIT Principles'[328] Others take the view that as the UPICC are not binding their legal status is not important.[329] The Principles could thus be seen as contractual rules or eventually as trade usages or custom.[330]

The UPICC can develop into international commercial law doctrine of which the value could be on par with domestic legal doctrine contributions.[331] They would be the standard international commercial practice and form a point of reference for the contracting partners, legal counsel, and adjudicators. Kessedijian describes the Principles as *'closer to an intellectual study than to the work proper to an intergovernmental organisation.'*[332] A lot of the discussion surrounding the UPICC has focussed on whether the UPICC should be considered as a valid choice of law in international contracts.[333] This issue is examined more thoroughly in chapter 4.

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[328] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008), 120

[329] Ralf Michaels, 'Non-State Law in The Hague Principles of Choice of Law in International Contracts' (2014) 5 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386186

[330] Lena Gannagé, 'Le Contrat Sans Loi en Droit International Privé' (2007) 11 Electronic Journal of Comparative Law 1, 11

[331] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 158
Doctrine meant in the civil law sense of the term

[332] Louis Marques, International *Uniform Commercial Law: towards a progressive consciousness (*Ashgate, Aldershot 2005) 11

[333] Authors that are critical of the UNIDROIT Principles as a valid choice of law:
Catherine Kessedijian, 'Un exercice de rénovation des sources de droit des contrats du commerce international : les Principes proposés par UNIDROIT' (1995) 6 Revue Critique du Droit International Privé
Franco Ferrari 'Defining the Sphere of Application of the 1994 UNIDROIT Principles of International Commercial Contracts' (1994) 69 Tulane Law Review 1225
Maurice V Polak 'Principles en IPR: Geen Broodnodigen Pasklaar Alternatief Recht', (1996) 127 Weekblad voor Privaatrecht, Notariaat en Registratie 391
Ulrich Drobnig, 'The UNIDROIT Principles in the Conflicts of Law' (1998) 3 Uniform Law Review 385
Authors that favour the UNIDROIT Principles as a valid choice of law:
Ole Lando, 'Some Issues Relating to the Law Applicable to Contractual Obligations' (1996) 7 King's College Law Journal 55
Michael Joachim Bonell, 'The UNIDROIT Principles and Transnational Law' (2000) 5 Uniform Law Review 199
David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 157

Besides establishing the legal authority of the UPICC there is an extensive discussion about whether they could be considered part of the lex mercatoria.[334] For Berger there is '*at least an indirect connection with the lex mercatoria.*'[335] Oser writes that the Principles can be used to describe the current state of certain parts of the lex mercatoria.[336] They would thus be a reflection of the lex mercatoria. Van Houtte advises caution '*It is not up to the Principles to advance themselves as general principles of law or as lex mercatoria[...] The* UNIDROIT *standards will only be part of the lex mercatoria if they are recognised as such by the business community and its arbitrators.*'[337] The ultimate proof of the UPICC as lex mercatoria or as trade usages will be when they are applied without any explicit/implicit reference to them in the contract.[338] Suffice to say opinions differ, from cautiously optimistic to negative. This negativity does not necessarily need be connected with a negative view on the inherent qualities of the UPICC. This can be connected with an approach to the lex mercatoria that does not include codified non-state rules. How one sees the role of the UPICC in the lex mercatoria is closely connected with how one defines the lex mercatoria.

Concluding it can be said that the UPICC have no direct standing as a source of law. They are contractual rules. They also have a place as international commercial law doctrine or at the very least they could develop into this. They could also gain legal authority from being considered trade usages or custom. [339] Bonell writes that it is not whether the Principles are applicable in theory which should determine their legitimacy, but whether they are applied in practice.[340] As they are indeed applied this should be proof enough of their legal authority.[341]

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[334] Jan Ramberg, *International Commercial Transactions* (ICC Kluwer Law International Norstedts Juridik AB, 1998) 21
[335] Klaus Peter Berger, The Creeping Codification of the Lex Mercatoria (Kluwer Law International 1999) 4
[336] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 47
[337] Hans van Houtte, *The Laws of International Trade* (Sweet & Maxwell 1995) 184
[338] Jan Ramberg, *International Commercial Transactions* (ICC Kluwer Law International Norstedts Juridik AB 1998) 21
[339] The relationship between the UNIDROIT Principles and the lex mercatoria is further explored in chapter 6.
[340] Michael Joachim Bonell, 'The UNIDROIT Principles and Transnational Law' (2000) 5 Uniform Law Review, 199,200

That being said the application of the UPICC in state courts has been limited, but they are applied more frequently in arbitration.[342]

3.5.3.2 Uniform Customs and Practice

The Uniform Customs and Practices (UCP) have been developed by the ICC. They were first published in 1933. They are a set of contractual terms aimed at standardising letters of credits worldwide. They are revised regularly by the ICC Banking Commission.[343] The UCP 600 is the latest version and was published in 2007. The UCP are *'technical, complete, regularly updated and lead to diverging jurisprudence.'*[344] The latter is because they are applied in different jurisdictions. The UCP are not comprehensive and certain issues are regulated by the applicable law.[345] The UCP are divided in 39 articles.

The UCP were developed out of existing practices in documentary credit. Their basis is thus customary. Their acceptance was not immediately widespread because the first version of the UCP did not consider the laws and practices of for instance the UK and the US where the bankers consequently continued to use their own practices.[346] Subsequent versions of the UCP remedied this and the UCP have achieved world-wide acceptance.[347] In name they are voluntary, in practice they are not because of the high level of acceptance that the UCP have

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[341] Ibid
[342] See chapter 6 for a further analysis of this issue
[343]The ICC Banking Commission also issues guides to interpretation of the UCP and supplements to the UCP. Among these are the International Standard Banking Practice (ISBP) and the eUCP.
The ISBP are *'a checklist of back practices worldwide for checking documents under the UCP'* according to the ICC (http://www.iccwbo.org/About-ICC/Policy-Commissions/Banking/Task-forces/International-Standard-Banking-Practice-(ISBP)/)
In 2002 the ICC Banking Commission developed the eUCP: The Uniform Customs and Practice for Documentary Credits for Electronic Presentation. They refer back to the UCP and are not intended as a standalone instrument. They merely facilitate the electronic presentation of the documents for the documentary credit. They should thus be used in conjunction with the UCP. The eUCP declare in article 2e: '*a Credit subject to the eUCP ("eUCP credit") is also subject to the UCP without express incorporation of the UCP.'*
[344] Pierre-Alain Gourion, Georges Peyrard and Nicolas Soubeyrand, *Droit du Commerce International* (Fourth edition, L.G.D.J. Lextenso Editions 2008) 94
[345] Hans van Houtte, *The Laws of International Trade* (Sweet & Maxwell 1995) 266
[346] Ibid, 265
[347] Ibid,266

among banks. To get a documentary credit with an established bank is almost impossible without using the UCP.

The question is what this says about the legal authority of the UCP as a source of law. Dalhuisen believes the UCP to be customary law.[348] Already in 1968 Schmitthoff saw the UCP as being in a transitional stage from usage to custom.[349] In that view they are more than contractual rules. On the other hand, Norbert Horn argues that the UCP cannot be seen as custom because the provisions tend to be biased in favour of the bank.[350]Although merchants use them frequently they do this because they cannot get a documentary credit without them and not because they feel any moral obligation about adhering to the UCP.[351] They could thus not be custom as a sense of obligation is required for this. Could they be trade usages? They are used consistently and regularly, so based on observation it could be concluded that they are trade usages. De Ly argues that the UCP are more binding than the Incoterms because they are applied more consistently.[352] Yet, it might be asked whether merchants would adhere to them if they were not in the contract. Trade usages are generally followed, regardless of whether they are mentioned explicitly in the contract. The UCP are only followed because they are in the contract.

Van Houtte did comparative research and found that in France and Germany they are considered as trade usages and need to be excluded expressly from the contract whereas in the Netherlands and Belgium they are contractual rules.[353] The Supreme Court of the Netherlands has refused to review cases based on the UCP reasoning that it can only review

[348] Jan H Dalhuisen, *On Transnational and Comparative Commercial, Financial and Trade Law Volume I, - The New Lex Mercatoria and its Sources* (Hart Publishing 2001) 160
[349] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1986) 17 International & Comparative Law Quarterly 551,554
[350] Norbert Horn, 'The Use of Transnational Law in the Contract Law of International Trade and Finance' in Klaus Peter Berger (Editor), *The Practice of Transnational Law (*Kluwer Law International 2001) 79
[351] Ibid
[352] Filip de Ly, *International Business Law and Lex Mercatoria (*T.M.C Asser Instituut 1992) 182
[353] Hans van Houtte, *The Laws of International Trade* (Sweet & Maxwell 1995) 267

cases for violation of formal sources of law which the UCP are not.[354] In England Lord Mustill confirmed that the UCP should be incorporated in the contract to have legal effect.[355] The UCC has its own article on letters of credits which is constructed to be consistent with the UCP.[356] Thus the UCC anticipates that the UCP will be included in the contract. Nonetheless, they would have no effect if they were not in the contract.

The UCP are thus in most jurisdictions considered as contractual terms.[357] This is confirmed by the UCP themselves: the first article states that they are applicable when they are included in the contract.[358] Although their usage is pervasive the unequal relationship between the bank and the merchant would prevent them from being considered customary law. It is also questionable whether they are trade usages. They could be considered as trade usages between banks which use them voluntary and who have considerable influence on their development. Whether they can be seen as trade usages between banks and third parties is more questionable. These third parties have not sanctioned the UCP by spontaneous usage. For this reason, the UCP are rightly described as contractual rules.

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[354] Filip de Ly, *International Business Law and Lex Mercatoria (*T.M.C Asser Instituut 1992) 182

[355] Royal Bank of Scotland v Cassa di Risparmio delle Province Lombard [1992] WL 895017, CA
'Undeniably the UCP have an important role in the conduct of international trade. They expound technical terms; they promote consistency; and they enable the parties to express their intention briefly, without the need to negotiate and set out all the terms of the relationship at length. Nevertheless, whilst not belittling the utility of the UCP, it must be recognized that their terms do not constitute a statutory code, as their title makes clear they contain a formulation of customs and practice, which the parties to a letter of credit can incorporate into their contract by reference.'

[356] For a thorough expose on this see: Kerry Lynn Mackintosh, 'Liberty, Trade, and the Uniform Commercial Code, When Should Default Rules Be Based on Business Practices?' (1996) 38 William & Mary Law Review 1465
The drafters stated that: *'to facilitate its [article 5] usefulness it is essential that US law be in harmony with international rules and practices.'* and
'*They [the rules] need to be substantively and procedurally consistent with international practices.'* (American Law Institute, UCC Revised Article 5, Final Draft)

[357] Olugbenga Bamodu, 'Extra-national Legal Principles in the Global Village: a Conceptual Examination of Transnational Law', (2001) 4 International Arbitration Law Review 6,14

[358]UCP 600 –Article 1: Application of UCP
The Uniform Customs and Practice for Documentary Credits, 2007 Revision, ICC Publication no. 600 ("UCP") are rules that apply to any documentary credit ("credit") (including, to the extent to which they may be applicable, any standby letter of credit) when the text of the credit expressly indicates that it is subject these rules. They are binding on all parties thereto unless expressly modified or excluded by the credit

3.5.4 Restatements of Law and the European Union

The Principles of European Contract Law (PECL) were developed by the Commission on European Contract Law (commonly referred to as the Lando Commission after its president Ole Lando) with the aim to enunciate the rules of contract law which are common to European states. This commission was a private initiative. The work was done independently of the EU institutions although the European Commission showed some interest during the initial stages of the project.[359] The work started in 1982 and the PECL were published between 1995 and 2003.[360] The PECL, unlike the UNIDROIT Principles, are annotated with a list of comparative references. The aim of the PECL is to create general principles and rules that could someday replace contract law in the member states.[361] As with the UPICC the authors did not merely use the most commonplace solution, but they made choices and innovated on existing solutions. The PECL are intended for international and domestic contracts. They are intended for consumer contracts as well as for commercial contracts.

The PECL have five functions according to the pre-amble. First of all, they can be used as the choice of law in a contract, secondly they can be used as an inspiration for courts, thirdly they can be used as a basis for harmonisation of contract law, fourthly they represent a modern formulation of the lex mercatoria, and fifthly they are a foundation for European legislation.[362] It is especially in this last function that the PECL are used. The practical applicability of the PECL has been limited for several reasons. The Lando Commission no longer exists which means that there is no structural framework to update the PECL, although

[359] Ole Lando, 'The Common Core of European Private Law and the Principles of European Contract Law' (1998) 21 Hastings International and Comparative Law Review 809, 819

[360] Part I, dealing with performance, non-performance and remedies, was published in 1995. A revised version of Part I alongside Part II was published in 1998. Part III deals with issues of assignment, assumption, statutes of limitation, procedural issues, capitalisation of interest and the effects of illegality and was published in 2003. Part III is published separately whereas Part I and II are integrated into one document.

[361] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 3

[362] Jan M Smits, 'Convergence of Private Law in Europe 'in Esin Örucü and David Nelken (Editors), *Comparative Law, A Handbook* (Hart Publishing 2007) 233

a working group has published some revisions.[363] In contrast the UPICC, which were first published a year before the PECL, have already been updated twice. Another reason is that the PECL have become a basis for further projects in European legal harmonisation and have been absorbed by these in a way.[364]

What is the legal standing of the PECL? They could be used as contractual rules and derive their authority from the contract. Their value beyond that is subject to debate. The PECL were not prepared under the umbrella of an organisation, but that is in itself not a reason to disqualify the PECL as a source of law.[365] Smits argues that their main utility is found in academic research where they can help with the study of legal systems and being a '*language of communication among students and scholars from different countries.*'[366] Smits does not comment on their value as a source of law but he sees both the PECL and the UPICC as having more academic than practical importance. In that case the PECL could be a legal doctrine/opinion/scholarship for contract law in the EU.

On the other hand, Zimmerman questions whether the PECL represent an adequate picture of European contract law: they venture beyond this and cover parts of the general law of obligations, they are not specific enough, and they do not take the Acquis Communautaire into account sufficiently.[367] As they have been published in three parts an overlap between these can be observed and they are therefore not consistent.[368] These arguments put into question whether the PECL could qualify as a European contractual doctrine.

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[363] Principes Contractuels Communs – Projet de Cadre Commun de Référence (Association Henri Capitant des Amis de la Culture Juridique Française & Société de Législation Comparé, 2008). These revisions were made by several members of the Study Group towards a European Civil Code, but this was done independently from this group.
[364] Michael Joachim Bonell, 'The CISG, European Contract Law and the Development of a World Contract Law' (2008) 56 American Journal of Comparative Law 1, 11/12
[365] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 122
[366] Jan M Smits, 'Convergence of Private Law in Europe' in Esin Örucü and David Nelken (Editors), *Comparative Law, A Handbook* (Hart Publishing 2007) 233
[367] Reinhard Zimmerman, 'The Present State of European Private Law' (2009) 57 American Journal of Comparative Law 479, 482
[368] Ibid

The PECL became one of the foundations for the (Draft) Common Frame of Reference ((D)CFR). In the early 2000s the European Commission published several reports that included reflections on the PECL and these formed the starting point of the CFR.[369] The Research Group on EC Private Law (Acquis Group) researched and published the Principles of Existing EC Contract Law (Acquis Principles) as a preliminary to the CFR.[370] The CFR was published in 2009 by the Study Group on a European Civil Code and the Acquis Group. Like the Lando Commission, these are private groups consisting of individuals who were not appointed by their governments. There is an overlap in membership between the three groups. The scope of the CFR is much wider than just contract law as it is meant as a basis for an eventual European civil code. It is a guide for legislators and courts and if a European Civil Code is not feasible, then it would serve as a basis for (optional) contract law instruments.[371] It encompasses several other areas of private law in addition to contract law. The PECL have in some way become absorbed by the CFR even though they still exist as a standalone instrument. The changes to the PECL made in the CFR are not always for the better according to Zimmerman: they are inconsistent and *'appear to be somewhat haphazard.'*[372]

In turn the CFR was used to develop the proposal for a Regulation of the European Parliament and the Council on a Common European Sales Law (CESL).[373] This proposal was published in October 2011. This instrument was intended to cover sale contracts. The CESL covered some areas which have not been included in the CISG (such as pre-contractual information duties, defects of consent, unfair contract terms, and electronic contracts). CESL

[369] Communication to the European Parliament and the Council – A more coherent European contract law- An action plan (COM (2003)68 of 12 February 2003
Communication from the Commission to the Council and the European Parliament on European contract law [COM (2001) 398 - Official Journal C 255 of 13.9.2001
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33158
Last accessed: 9 April 2016
[370] http://www.acquis-group.org/
[371] Geraint Howells, European Contract Law Reform and European Consumer Law -- Two Related but Distinct Regimes (2011) 7 European Review of Contract Law 173, 176
[372] Reinhard Zimmerman, 'The Present State of European Private Law' (2009) 57 American Journal of Comparative Law 479,491
[373] CESL: http://eur-lex.europa.eu/legal-content/en/ALL/?uri=CELEX:52011DC0636

was meant for consumer contracts and for business contracts if one of the contracting parties is a SME. It was to be an opt-in instrument. It had strong support from the European Parliament, but the backing from the business community, consumer organisations, and national parliaments was weaker.[374] The ICC issued a statement expressing concern about the lack of harmony between the CISG and the CESL.[375] And with the ICC one can wonder why not more consideration was given to the CISG as it has been signed by the vast majority of EU states.[376]

In 2014 the European Commission presented its Work Programme for 2015 and withdrew the proposal for the CESL.[377] The Commission stated that the reason for withdrawal is the modification of the proposal towards a new instrument on e-commerce.[378] In June 2015 the European Commission began a public consultation for the development of this instrument which cumulated into a proposal for two new directives on ecommerce in December 2015.[379]

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[374] For some news articles on this issue see:
Common European Sales Law faces rocky reception
http://www.euractiv.com/sections/innovation-enterprise/common-european-sales-law-faces-rocky-reception-301090
Last accessed: 27 February 2016
The Common European Sales Law – advantage or trap for consumers?
http://www.consumatoridirittimercato.it/diritti-e-giustizia/the-common-european-sales-law-advantage-or-trap-for-consumers/
Last accessed: 27 February 2016
EU sales law is against the interest of consumers and online traders
http://www.euractiv.com/health/meps-opportunity-opt-optional-co-analysis-533757
Last accessed: 27 February 2016

[375] ICC Position on the EC Proposal for Common European Sales Law:
http://www.iccwbo.org/Advocacy-Codes-and-Rules/Document-centre/2012/ICC-Position-on-the-EC-proposal-for-a-Common-European-Sales-Law/
Last accessed: 16 March 2016

[376] The United Kingdom, Malta, Ireland and Portugal have not ratified the CISG

[377] See: http://www.epln.law.ed.ac.uk/2015/01/07/proposal-for-a-common-european-sales-law-withdrawn/
Last accessed 12 November 2015

[378] http://www.europarl.europa.eu/EPRS/EPRS-Briefing-545732-Commissions-2015-work-programme-FINAL.pdf Last accessed: 12 November 2015

[379] Public consultation on contract rules for online purchases of digital content and tangible goods
http://ec.europa.eu/justice/newsroom/contract/opinion/150609_en.htm
Last accessed 15 November 2015
In December 2015 the Commission adopted two proposals for directives: one on the supply of digital content and one on the online sales of goods.
http://europa.eu/rapid/press-release_IP-15-6264_en.htm
Last accessed: 19 February 2016

There are several other harmonisation initiatives in Europe such as the Trento Common Core Project that charts existing law in the member states to find a common core [380] and the Preliminary Draft for a European Code by the Academy of European Private Lawyers under the guidance of professor Gandolfi.[381] These are private initiatives. Currently there are no concrete plans to draw up a mandatory European contract law. The plans for this, along with the more ambitious plans for a European Civil Code, have been under discussion going back as far as 1989 when the European Parliament initiated a study on this subject.[382] This idea resurfaced on several occasions, yet there are severe questions about the feasibility and whether this falls within the competences of the EU.[383] One of the core areas of this eventual European Civil Code would most likely be contract law as most experts are in agreement that more sensitive areas such as family law should be left out. This discussion falls beyond the scope of this thesis. [384]

Restatements of law in the context of the European Union are mainly used as scholarly exercises that could in future lead to more binding measures. The example of the CESL which has culminated into two new directives shows this. The PECL are more political than the UPICC as they are intended to facilitate the Europeanisation of contract law. They thus have a goal beyond simply serving as contractual rules. They can develop (alongside the CFR and the other initiatives) into a legal doctrine for European contract law. It would be difficult

[380] http://www.common-core.org/
[381] http://www.eurcontrats.eu/site2/
[382] The Private Law Systems in the EU: Discrimination on Grounds of Nationality and the Need for a European Civil Code, Working Paper, Directorate General for Research, p3 http://www.europarl.europa.eu/workingpapers/juri/pdf/103_en.pdf
[383] The question whether or not the EU has the legal competence to unify contract law falls outside of the scope of this thesis. For a debate on this please see for instance: Esther van Schagen, 'The Proposal for a Common European Sales Law: How its Drafting Process Might Affect the Optional Instrument's Added Value for Contract Parties and its Success' in A Keirse and M Loos (editors), *Alternative Ways to Ius Commune* (Intersentia 2012)
[384] For a further discussion of this please see:
Jan M Smits, 'European Private Law: A Plea for a Spontaneous Legal Order' in Deirdre M Curtin, Jan M Smits and others (editors), *European Integration and Law: Four Contributions to Celebrate the 25th Anniversary of Maastricht University's Faculty of Law* (Antwerp-Oxford 2006)
Pierre Legrand, 'Against a European Civil Code' (1997) 60 Modern Law Review 44
Hugh Collins, *The European Civil Code: The Way Forward* (Cambridge University Press 2008)
Geraint Howells, European Contract Law Reform and European Consumer Law -- Two Related but Distinct Regimes (2011) 7 European Review of Contract Law 173, 176

to consider the PECL as trade usages or as custom at this time. This is not because it is a regional instrument (trade usages can be restricted to a specific geographical area), but because their usage in practice so far has been limited.

3.5.5 Guides and Opinions

Guides and legal opinions are a fourth category of codified non-state rules. This category of non-state rules consists of different types of materials. These include practice guides, interpretation advise, arbitral case law digests, legal opinions, and other similar type documents. As a category, it serves to unite the remaining codified non-state rules whose legal status is more questionable and who have weaker legal authority. The origins of these documents are international organisations, trade branch associations, study groups, think thanks, and other private initiatives.

An example is the CISG Advisory Council. This is an independent group that publishes legal opinions on the application of the CISG.[385] These opinions have no direct legal standing, but could gain persuasive authority if applied by courts to interpret the CISG. The ICC has done considerable work in this area as they publish handbooks, best practice guides, and other similar type instruments.[386] UNCITRAL also publishes these type of documents as well as for instance case law digests.[387] UNIDROIT publishes instruments in this category as well.[388] Trade associations engage in producing legal opinions and best practice guides.[389]

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[385] CISG Advisory Council: http://www.cisgac.com/
An example of a CISG best practice guide would be: John P McMahon, *Applying the CISG: Guides for Business Managers and Counsel*, (May 2010)
http://www.cisg.law.pace.edu/cisg/guides.html
Last accessed: 31 March 2016

[386] Examples are:
Policy and Business Practices: Developing Neutral Legal Standards for International Contracts
http://store.iccwbo.org/content/uploaded/pdf/Developing_Neutral_Legal_Standards_Int_Contracts.pdf
ICC Principles to Facilitate Commercial Negotiation
http://store.iccwbo.org/t/ICC-Principles-to-Facilitate-Commercial-Negotiation
Last accessed: 31 March 2016

[387] Examples are:
UNCITRAL Legal Guide on International Countertrade Transactions (1992)

Guides and opinions are aimed at legislators, legal professionals, and the business community. Some of these can be used during contractual negotiations as guidelines. Others could be used as contractual rules. And others could be used by courts to help interpret international commercial law. They can be considered as legal doctrine or scholarship if they are cited frequently by courts, legislators, and policy makers. Whether they would be considered so would depend on who authored the document, with what intent it was written, and what persuasive value it carries. It would stand to reason that documents of respected organisations would carry a greater value than those of lesser known groups or commercial associations. Furthermore, it would depend what the document is based upon. For instance, the UNCITRAL case law digests are based on actual case law. This might be foreign case law or arbitral awards and thus not a source of law in the forum, but it would carry persuasive value when applying the CISG nonetheless. A best practice guide that reflects only the author's opinion would have less persuasive value. If that best practice guide is based on long standing commercial practices, then it might be used as evidence of these practices and would have a stronger position. The dissimilar origins and authors make it difficult to pinpoint the legal authority of this category of codified non-state rules exactly.

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http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1992Guide_countertrade.html
Promoting confidence in electronic commerce: legal issues on international use of electronic authentication and signature methods (2007)
http://www.uncitral.org/pdf/english/texts/electcom/08-55698_Ebook.pdf
UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods (2012)
http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf
UNCITRAL 2012 Digest of Case Law on the Model Law on International Commercial Arbitration
http://www.uncitral.org/uncitral/en/case_law/digests/mal2012.html
Last accessed: 31 March 2016

[388] Examples are:
Contract Farming Legal Guide
http://www.unidroit.org/instruments/contract-farming/legal-guide
Guide to International Master Franchise Arrangements (Second Edition 2007)
http://www.unidroit.org/guide-to-international-master-franchise-second-edition
Last accessed: 31 March 2016

[389] Examples are:
ISDA: opinions, and other documentation materials:
http://www2.isda.org/functional-areas/legal-and-documentation/
GAFTA: Guidelines for Appropriations, letters of credits, insurance terms
http://www.gafta.com/Contracts-2016
Last accessed: 31 March 2016

3.6 Conclusion

This chapter examined different types of non-state rules in order to ascertain their place within transnational commercial law and to understand their legal authority. It would now be opportune to summarize the specific points that need to be taken into consideration to determinate the benchmarks against which this legal authority can be measured. Non-state rules can have legal authority in two spheres: in domestic law and in transnational law.[390] Legal authority in both spheres is determined differently and is not necessarily similar.

The legal authority of non-state rules in domestic law is the easier to ascertain. A convention that is ratified and has entered into force is part of domestic law. Trade usages and general principles of law can be sources of domestic law. Legal 'doctrine' can be recognised as a (subsidiary) source in domestic law or at least carry persuasive value. The domestic legal authority of non-state rules thus comes from their direct standing in positive law. Conventions, trade usages, general principles of law, and legal 'doctrine' can be recognised as sources of law. Codified non-state rules are not sources of domestic law. They have no direct standing. They can have legal authority in domestic law if they are equated or assimilated with sources of domestic law. That is to say, if they are seen and applied as trade usages, general principles of law, or legal 'doctrine' they are used as sources of domestic law. They can thus have indirect standing as a source of law in the national legal system. To measure whether codified non-state rules have this standing in domestic law their application in state courts needs to be analysed. As the contract, can be seen as a source of law non-state rules can also acquire legal authority through their usage as contractual rules. That legal authority would be restricted to the specific contractual relationship.

[390] As well as in public international law, but that falls beyond the remit of this thesis

Measuring legal authority in transnational commercial law and the international business community is more diffuse. Non-state rules are not ratified or incorporated in this sphere. The international business community consists of different stakeholders such as merchants, legal professionals, and arbitrators. There is no ultimate authority. Different factors help measure the legal authority of non-state rules in transnational commercial law.

Non-state rules are characterised by their transnational origin. They have been created by international organisations and trade associations, or they are created through spontaneous usage. The standing of the organisation could help determine the legitimacy of the rule. Some institutions like UNIDROIT are supported (and paid for) by a large number of states.[391] Others, like the trans-lex database, are private initiatives.[392] Other instruments have been designed and promulgated by trade associations. These associations have support in the business community. Even if these organisations are less prestigious their support among traders should carry some weight. The origin of the instrument is a starting point that can help define legal authority in the international community.

A second way to measure legal authority is to analyse the content of the instrument. It should not be the origin of the rule which characterizes its legal value, but its substance.[393] Research contributes to establish this. Courts can refer to the resulting analyses to help determine the legal status of the non-state rule. It would be difficult to decide whose opinions should carry the most value in this determination. Arbitrators? Judges? Professionals? Scholars? Merchants? This is ambiguous. Although content is thus a factor to determine legal authority in the international community it is not the deciding factor.

[391] UNIDROIT currently has 63 member states http://www.unidroit.org/about-unidroit/membership Last accessed 19 February 2016
[392] http://www.trans-lex.org/ Last accessed 13 November 2015
[393] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 120

It is not just the intrinsic quality of a norm that defines whether something is law, but the perception by the community at which it is aimed.[394]According to Schultz law has a *'generally perceived legitimate authority,'* by which is meant what the average citizens believes to be law and what he adheres to because he believes this to be morally right.[395] Law resides where those who follow it believe it resides. Thus, if non-state rules are perceived to have authority then they have that authority. The legal authority of non-state rules in the international community can be measured by looking at the support these have. A way to gauge this support would be to look at spontaneous adherence by the merchant community and the inclusion of non-state rules in international contracts as either terms of the contract or the law governing the contract. This could be gauged through studying their application in state courts and arbitral tribunals.

Support of non-state rules can also be measured by studying the mutual recognition of instruments by organisations. For instance, the International Trade Centre's Model Contract for the International Commercial Sale of Goods states that: *'Questions relating to this contract that are not settled by the provisions contained in the contract shall be governed by the United Nations Convention on Contracts for the International Sale of Goods (…). Questions not covered by the CISG shall be governed by the UNIDROIT Principles of International Commercial Contracts (….)'*[396] The ITC thus values these two instruments. UNCITRAL lists a number of instruments on their website which they did not elaborate, but

[394] Thomas Schultz, *Transnational Legality: Stateless Law and International Arbitration* (Oxford University Press 2014) 16/17
[395] Ibid,30
[396]The International Trade Centre is a subsidiary organisation of the WTO and UNCTAD (United Nations Conference on Trade and Development). Its mission is to '*to foster inclusive and sustainable growth and development through trade and international business development*.'
http://www.intracen.org/itc/about/mission-and-objectives/
International Trade Centre, Model Contracts for Small Firms, Model Contract for International Commercial Sales of Goods,
http://www.intracen.org/uploadedFiles/intracenorg/Content/Exporters/Exporting_Better/Templates_of_contracts/3%20International%20Commercial%20Sale%20of%20Goods.pdf
Last accessed: 19 November 2015

which they do endorse.[397] Model contracts developed by trade associations sometimes deliberately exclude international conventions like the CISG.[398] This can be perceived as lack of support for the instrument by the trade association and through this its members.

The fourth factor builds on this. This would be to look at the application of non-state rules in courts. Arbitration can measure the support and perception of non-state rules in the international community. The application of non-state rules in state courts can measure their legal authority in domestic law and in transnational law. If non-state rules are applied at the request of the parties, this helps to understand the level of support these rules have among the international business community. If non-state rules are applied without inclusion in the contract this contributes to understanding their legal value beyond contractual rules.

Non-state rules, as discussed in chapter 2, represent a bottom-up, party autonomy approach to harmonisation. Harmonisation is accomplished through usage of the rules by the merchant community. Therefore, support and application would constitute the two most important factors in determining the legal authority of non-state rules as these factors tie in directly with the fundamental nature of non-state rules and their transnational origin.

In chapter 3.2.1 it was discussed that if domestic law derives authority from its originator (the state) the same holds true for non-state rules: they derive their authority from their originators (the merchant community, and international organisations). To gauge their legal authority one could thus study whether they are supported by their originators. This can be done by looking at spontaneous usage, support by other organisations, and inclusion in the contract. The most

[397] Examples are The Hague Principles on Choice of Law, the UNIDROIT Principles in International Commercial Contracts, UCP, Incoterms, and the International Standby Practices.
http://www.uncitral.org/uncitral/en/other_organizations_texts.html
Last accessed: 31 March 2016
[398] See for example
GAFTA model contract, clause 28
http://www.gafta.com/write/MediaUploads/Contracts/2016/1_2016.pdf
NAEGA model contract, clause 27
http://naega.org/images/naegacontract.pdf

comprehensive way to examine this would be to study their application. Studying the application in state courts helps to know the support non-state rules have in the international community as well as in domestic law. The latter would be especially important for codified non-state rules which have no direct standing in domestic law as sources of law. Their legal value could not be understood by studying domestic legislation if they are not recognised as a source of law in this.

This chapter established what the different types of non-state rules are and how these can be classified. It also ascertained whether non-state rules can be considered as sources of law and against which benchmarks their legal authority can be measured. Together with the previous chapter this chapter thus answers the question of what non-state rules are. Understanding what non-state rules are, what their place is in international commercial law, and how their legal status can be asserted are the first steps to understanding this legal authority.

It was established in this chapter that the legal authority of non-state rules in the international community can be established by looking at their origin, substance, support (perception), and application. Furthermore, the most important way that their legal authority can be established is by examining their application in state courts. This can measure the support and perception of non-state rules in the international community as well as their place in domestic law. The next part of the thesis thus focuses on the application of non-state rules. The first issue that should be considered is what agency the parties have to use non-state rules. Chapter 4 critically analyses party autonomy and non-state rules and answers the question of when non-state rules can be applied.

Chapter 4: Party Autonomy and Non-State Rules

4.1 Introductory Observations

The previous chapter analysed and classified the different categories of non-state rules in order to create the benchmarks against which their legal authority can be measured. It was concluded that the principal way to understand this legal authority is to look at the application of non-state rules in courts. Therefore, this second half of the thesis concentrates on this application. This chapter 4 focuses on the interaction between private international law and non-state rules through an exploration of party autonomy. The goal of this chapter is to understand under which circumstances non-state rules can be chosen as the law of the contract and what place non-state rules occupy in private international law. Comprehending the agency parties have to use non-state rules answers the question of when non-state rules can be applied. This chapter hence contributes towards understanding the application of non-state rules which in turn leads to a more thorough understanding of the legal authority of non-state rules.

This chapter is divided in three parts. The first part explores the general concept of party autonomy.[399] Given the vast amount of material written on this topic this is only a basic exploration. The goal of this part is to understand the theory behind party autonomy and its interaction with non-state rules.

[399] Party autonomy is only explored with regards to choice of law. Choice of jurisdiction is not as pertinent to the discussion here and is therefore not included in this chapter. Therefore, the comments here should strictly be read in light of choice of law.

Saumier divides the approaches that legislations have towards party autonomy into three categories:

- Party autonomy is not allowed
- Party autonomy is allowed as long as there is an objective link between the contract and the chosen law.
- Party autonomy is allowed without the need for an objective link.[400]

Following Saumier's division the second part of this chapter uses these three approaches to analyse party autonomy further. The first section focuses on instances where party autonomy is restricted. The main example used in this section is Brazil. The second section examines the US where an objective link between the contract and the chosen law is (mostly) required. The third section studies the legislation of the EU which does not require this link. The focus in these three sections is on whether a choice of law for non-state rules would be possible and if so under which circumstances. The final part of this section focuses on international legislation, and more specifically on The Hague Principles on Choice of Law in International Commercial Contracts.

The third part of this chapter analyses the objections used against extending party autonomy to non-state rules in order to consider whether these hold any merit. The conclusion finally draws from the analyses made in this chapter to conclude on what agency parties have to use non-state rules. It should be kept in mind that party autonomy is studied here in the context of international commercial contracts. This chapter is not concerned with other contracts, such as B2C contracts and employment contracts, for which different rules might apply.

[400] Geneviève Saumier, 'Designating the UNIDROIT Principles in International Dispute Resolution' (2012) 17 Uniform Law Review 533, 535

4.2 The Concept of Party Autonomy

Party autonomy allows the parties to an international contract to choose the applicable law to their contract and the forum to which they bring their dispute. This chapter does not deal with choice of jurisdiction, but concentrates on choice of law as this is the pertinent issue in the analysis of the application of non-state rules. Freedom to choose the applicable law facilitates international economic transactions according to international business leaders.[401] Parties can have certainty of knowing the applicable law in advance which enhances predictability and they can choose the law they prefer which enhances security.

Party autonomy is not a novel concept. A long historical overview falls beyond the remit of this chapter so a couple of points will suffice.[402] One of the earliest references to party autonomy can be found in France in the 16th century where the parliamentary lawyer Charles Dumoulin was consulted by Mr and Mrs de Ganay who wished to know their matrimonial regime. The couple possessed property in both Paris and in the Bourgogne which had different laws at the time. Dumoulin stated that marriage is a contract and that the matrimonial regime is found by looking at the intentions of the parties. The parties make a tacit choice for the applicable law. This law can be deducted by looking at the first marital residence. Therefore, Dumoulin advanced the theory that a contract can be submitted to another law than the law of the place where the contract was concluded, and that the intentions of the parties (explicit or tacit) should be the point of departure to find the

[401] Mo Zhang, 'Party Autonomy and Beyond: An International Perspective of Contractual Choice of Law' (2006) 20 Emory International Law Review 511, 512

[402] For a more thorough historical exposé see for instance:
Veronique Ranouil, *L'Autonomie de la Volonté : Naissance et Evolution d'un Concept* (Presses Universitaires de France 1980)
Matthias Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41 Vanderbilt Journal of Transnational Law 381
Hessel E Yntema, 'Autonomy' in Choice of Law' (1952) 1 The American Journal of Comparative Law 341
Henri Battifol, *Les Conflits de Lois en Matière des Contrats* (Librairie du Recueil Sirey 1938)
Eric Agostini, *Droit International Privé* (Association Sciences Economiques Pessac 1983)

applicable law.[403] The Parisian parliament agreed with this hypothesis, and consequently the custom of Paris where the couple established themselves upon marriage was held to be the applicable law.

In the common law party autonomy was considered and accepted by Lord Mansfield in the 18th century. Lord Mansfield stated: '*The general rule established ex comitate et jure gentium is, that the place where the contract is made, and not where the action is brought, is to be considered in expounding and enforcing the contract.* ***But this rule admits of an exception where the parties (at the time of making the contract) had a view to a different kingdom***. '[404] The general rule that Lord Mansfield discusses is what has become known as the vested rights theory: that a state should have say over all that takes place on its territory. Therefore, the lex loci contractus should be the applicable law. The second point is that parties can select a different law if they wish to do so. In the US, in the case of *Wayman v Southard*, the Supreme Court expressed in 1825 that *'in every forum a contract is governed by the law with a view to which it was made.[405]'*

Party autonomy was not uncontested, but in France, England, and the US there was a clear tendency towards allowing it.[406] Differences of opinion could be observed in the US where Joseph Beale wrote: '*the applicable law is a matter of state sovereignty and [...] it is thus beyond reach of the parties.*'[407] Yet, in *Pritchard v Norton* the Supreme Court expressed

[403] See for more on this case for instance : Georges R Delaume, 'L'Autonomie de la Volonté en Droit International Privé' (1950) 39 Revue Critique de Droit International Privé 321
[404] *Robinson v. Bland* W. B1. 234, 96 E.R. 129 (1760)
[405] *Wayman v. Southard* 10 Wheat. (23 U.S.) 1 (1825)
'in every forum a contract is governed by the law with a view to which it was made'
And later confirming this: *Pritchard v Norton* 106 U.S. 1224 (1882)
[406] Mathias Reimann, 'Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century' (1998-1999) 39 Virginia Journal of International Law 571, 575
[407] Joseph H Beale, *A Treatise on the Conflicts of Laws Volume 2: Choice of Law* (Baker, Voorhis & Co 1935) 1079/1080
See also Joseph H Beale, 'What Law Governs the Validity of a Contract?' (1910) 23 Harvard Law Review 260 for a further treatment of this issue
Joseph Beale was a proponent of the vested rights doctrine: namely that a state should have say over every action that takes places on its territory. He also noted that allowing for party autonomy would

that: *'the laws we are in search of… is that which the parties have, either expressly or presumptively, incorporated into their contract as constituting its obligation.'*[408] The gap between courts (which generally acknowledged choice of law clauses) and scholars (who were more doubtful of party autonomy) led to the Restatement (First) of the Conflicts of Law (1934) being silent on this issue.[409] This can, at least partly, be ascribed to the influence of Joseph Beale on the Restatement (First) for which he was the Chief Reporter.[410] Taking into account the case law of the Supreme Court it is evident that courts endorsed the principle of party autonomy.[411]

Restatements reflect current legal practices and case law, yet sometimes ideological decisions are made by the drafters. On the issue of party autonomy there was thus a gap between theory and practice. Practice was more likely to subscribe to party autonomy than theory where there were severe differences of opinion.[412] In the end practice prevailed and when the Restatement (Second) of the Conflicts of Law was published in 1971 it recognised party autonomy.[413]

In the UK the concept of party autonomy developed further following Lord Mansfield's initial considerations. This came to be known as the proper law of the contract doctrine.[414]

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decrease certainty for the parties because they could never be sure whether on grounds of public policy their choice would be respected.

[408] *Pritchard v Norton* 106 U.S. 1224 (1882)

[409] Mathias Reimann, 'Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century' (1998-1999) 39 Virginia Journal of International Law 571, 575

[410] Symeon C Symeonides, 'Party Autonomy in International Contracts and the Multiple Ways of Slicing the Apple' (2014) 39 Brooklyn Journal of International Law 1123, 1125
(who notes that others resisted Beale's view upon this issue)

[411] Joseph Beale was the Chief Reporter for the *Restatement (First) of the Conflicts of Law* and his views on the concept of party autonomy and the vested rights doctrine were extremely influential in the *Restatement (First).* For this see for instance Mathias Reimann, 'Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century' (1998-1999) 39 Virginia Journal of International Law 571
Joseph H Beale, 'What Law Governs the Validity of a Contract?' (1910) 23 Harvard Law Review 260

[412] Hessel E Yntema, 'Autonomy' in Choice of Law' (1952) 1 The American Journal of Comparative Law 341

[413] Restatement (Second) of Conflict of Laws s 187
http://www.kentlaw.edu/perritt/conflicts/rest187.html

[414] Chris M V Clarkson and Jonathan Hill, *Jaffey on the Conflicts of Laws* (Second Edition, Oxford University Press 2002) 198

There are three stages to this process whereby the court establishes first whether the parties have made an express choice of law, secondly the court looks at whether there is an implied choice of law, and only when no explicit or implicit choice has been made the court establishes the applicable law.[415] Party autonomy is thus respected in contractual disputes. In 1937 Lord Atkin said: *'the proper law is the law which the parties intended to apply.'*[416] In 1939 this view was confirmed by Lord Wright under the caveat that the choice should be made in good faith and should not be made to avoid public policy.[417]

In France the development of party autonomy that started with Dumoulin continued as well. Although the Code Napoleon did not address the issue of party autonomy directly, case law continued to affirm the principle.[418] In 1910 the Cour de Cassation in the *American Trading Company* case affirmed the principle of party autonomy.[419] In a dispute regarding spoiled merchandise during a maritime transport one of the questions raised was that of the applicable law. The court stated that the applicable law to contracts between parties of different nationalities is the law of the place where the contract is concluded ***unless the parties have chosen a different law***.[420] In 1959 the Cour de Cassation affirmed again that the

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Interestingly enough Lord Mansfield is also credited with beginning the process of absorbing the lex mercatoria into the common law through his qualification of trade customs as legal rules (see for this Filip de Ly, *International Business Law and Lex Mercatoria (*T.M.C Asser Instituut 1992) 17)

[415] Chris M V Clarkson and Jonathan Hill, *Jaffey on the Conflicts of Laws* (Second Edition, Oxford University Press 2002) 198

[416] *R. v. International Trustee for the Protection of Bondholders Aktiengesellschaft* [1937] A.C. 500

[417] *Vita Food Products, Inc. v. Unus* Shipping Co., Ltd. [1939] A.C. 277

[418] Private international law is not extensively codified in French internal law. Articles 3, 4 and 5 of the Civil Code give some general principles and guidelines, but do not go into details.
Article 3 covers the applicable law to immovable property and the applicable law to French citizens with regards to personal status and covers applicability of mandatory laws. Article 4 states that even when the law is silence the judge must still pronounce itself on the issue whereas article 5 prohibits the judge to deduct general principles from individual cases.

[419] *Arrêt American Trading Compan*y, Cour de Cassation, Chambre Civil, 5 Décembre 1910, Revue Droit International, 1911, 395
http://www.lexinter.net/JPTXT2/loi_applicable_au_contrat.htm

[420] '*Attendu, d'autre part, que la loi applicable aux contrats, soit en ce qui concerne leur formation, soit quant à leurs effets et conditions, est celle que les parties ont adoptée ; que si, entre personnes de nationalités différentes, la loi du lieu où le contrat est intervenu est en principe celle à laquelle il faut s'attacher, ce n'est donc qu'autant que les contractants n'ont pas manifesté une volonté contraire ; que non seulement cette manifestation peut être expresse, mais qu'elle peut s'induire des faits et circonstances de la cause, ainsi que des termes du contrat .'*

applicable law is the one the parties choose.[421] Rühl confirms that the dominant view in both Europe and the US favours party autonomy.[422]

Some criticism is levelled against party autonomy. This criticism mainly concerns the protection of parties, the state, or society. That parties cannot place themselves above the law as for instance Joseph Beale argued is not a prevalent criticism these days. Symeonides states that in his analysis of American choice-of-law cases, which he has conducted for these past 28 years, he has come across many cases where one of the parties uses choice of law to the detriment of the other party.[423] Muir Watt also questions whether overreaching party autonomy could not negatively affect the rights of the parties. This could for example be the case when one of the parties was not involved in the original drafting of the contract, like when a bill of lading (containing a choice of law clause) is sold on to a third party.[424]

Muir Watt discusses that only private interests are promoted when a case is put before a forum that has no connection to the case and is governed by a law which is not connected to either the contract or the forum. The forum would be less concerned with protecting societal interest than a forum which has a substantive connection to the case.[425] Thus party autonomy can affect the interests of society. This explains why limits are placed on party autonomy when it comes to sensitive issues that touch directly on (international) public policy. In

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[421] *'La loi applicable aux contrats est celle que les parties ont adoptée : à défaut de la déclaration expresse de leur part, il appartient aux juges du fond de rechercher d'après l'économie de la convention et les circonstances de la cause, quelle est la loi qui doit réagir les rapports des contractants.'*
Arrêt Fourrures Renel, Cour de Cassation, Chambre Civil, 6 Juillet 1959,
Note Henri Battifol, Revue Critique du Droit International Privé [1959] 708

[422] Giesela Rühl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' (2007) 3 Comparative Research in Law & Political Economy Research Paper, 4 http://digitalcommons.osgoode.yorku.ca/clpe/227 Last accessed 29 February 2016
See also: Russell J Weintraub, 'Functional Developments in Choice of Law for Contracts' (1984) 187 Recueil des Cours Académie du Droit International 271

[423] Symeon C Symeonides, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61 American Journal of Comparative Law 873, 878
These cases do not just include B2B contracts, but also B2C contracts for instance.

[424] Horatia Muir Watt, 'Party Autonomy in international contracts: from the making of a myth to the requirements of global governance' (2010) 6 European Review of Contract Law 250, 275

[425] Ibid,282

developing states there is concern that unrestricted party autonomy can give multinational companies further influence to the detriment of smaller local businesses.[426] Restricting party autonomy would then protect local businesses by ensuring the forum and the applicable law protect their interests to an extent.

There are thus reasons besides state sovereignty on why states might limit party autonomy. Yet despite these objections, states do overall support party autonomy. There are several explanations for this. Professor Lehmann suggests that the interests of the state are not affected to such an extent that the state would be concerned with the outcome of international commercial contract disputes.[427] Party autonomy is directly linked to freedom of contract: as the parties shape the contract to their intentions they choose the applicable law to fit these intentions.[428] This ties in with the view of Henri Battifol that party autonomy comes from the freedom of the parties to contract which also gives the parties the freedom to localise their contract where they wish.[429] Perhaps this is the result of the process that Galgano describes whereby society develops a greater tendency towards self-organisation and contracts between private citizens take on the value of law.[430] Party autonomy increases predictability as to the applicable law and this makes it more likely that businesses will contract internationally which could stimulate import/export and thus economic growth. This is in the interest of the state as well as the business community.

The discussion at this point has focused solely on the concept of party autonomy in general and has not divulged into which laws can be chosen by the parties. The next step is to analyse

[426] Ingeborg Schwenzer, and Pascal Hachem, 'The CISG- Successes and Pitfalls' (2009) 57 The American Journal of Comparative Law 457,464
[427] Matthias Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41 Vanderbilt Journal of Transnational Law 381,415
[428] Ibid
[429] Henri Battifol, *Les Conflits de Lois en Matière des Contrats* (Librairie du Recueil Sirey 1938)
[430]Francesco Galgano, 'The New Lex Mercatoria' (1995) 2 Annual Survey International & Comparative Law Journal 99, 103

the latter. This is done by examining how party autonomy works in different legislations with a particular focus on non-state rules.

4.3 Restrictive Views on Party Autonomy

In some jurisdictions party autonomy is restricted. This is for instance the case in some Latin American countries.[431] Fresnedo de Aguirre discusses that there is a reticence towards party autonomy because there is a perceived clash between this and fundamental values such as access to justice and protection of the rights of the parties.[432] Territorialism (which is closely linked to the vested rights doctrine) also plays a role. The importance of territorialism can be traced back to the influence of scholars who were involved in drafting new legal codifications and who were proponents of this theory.[433]

Brazil is an example of a country with a well-developed and globalised economy where state courts regularly do not enforce choice of law clauses.[434] Brazilian law restricts party autonomy in court litigation.[435] Private international law in Brazil can be categorised as being

[431] Argentina, Bolivia, Brazil, Costa, Rica, El Salvador, Honduras, Nicaragua, and Uruguay are Latin American countries where party autonomy is restricted.
(Lauro Gama Jr, 'Prospects for the UNIDROIT Principles in Brazil' (2011) 16 Uniform Law Review 613
(Lauro da Gama e Souza Jr. 'The UNIDROIT Principles of International Commercial Contracts and their Applicability in the MERCOSUR Countries' (2012) 36 Revue Juridique Thémis 375
In other Latin American countries party autonomy is recognised. For instance, Paraguay which has recently adopted The Hague Principles on Choice of Law (this will be discussed further on in the chapter) and Venezuela which has incorporated provisions from the *Inter-American Convention On the Law Applicable to International Contracts* into its domestic legislation.

[432] Cecilia Fresnedo de Aguirre, 'Party Autonomy - A Blank Cheque?' (2012) 17 Uniform Law Review 655, 658

[433] Maria Mercedes Albornoz, 'Choice of Law in International Contracts in Latin American Systems' (2010) 6 Journal of Private International Law 23, 49

[434] Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction and the Emerging Third Way' (2005-2006) 44 Columbia Journal of Transnational Law 959

[435] Brazil is a signatory of the *New York Convention of 1958 on Recognition and Enforcement of Arbitral Awards*. *The Brazilian Arbitration Act* also allows free choice-of-law (Article 2, §1 and §2). The comments on party autonomy in Brazil should therefore be read strictly in the context of court litigation.

(more) traditional and rigid (than European or American conflicts of law) according to professor Tiburcio.[436]

Private international law can be found in the 1942 Introduction to the Civil Code.[437] This introduction governs the general application of Brazilian law. Article 9 discusses the applicable law. The main rule is that the applicable law is the lex loci contractus or when the contract is concluded by correspondence, the law of the residence of the offeror. The exception is when the obligation is to be executed in Brazil as then Brazilian law is the applicable law.[438] Brazilian private international law is different from European and American private international law as the latter two use various points of connection to determine the applicable law, whereas Brazil primarily relies on the lex loci contractus. The article is silent on what happens when the parties include a choice of law clause. This is a change from the previous Introduction to the Civil Code which dates from 1916 and stated that the lex loci contractus was the applicable law ***unless the parties made a different choice***.[439] It should be noted that despite this liberal choice of words the law formulated many exceptions when Brazilian law would be applicable regardless of the choice of law clause.[440] Yet it does mean that the principle of party autonomy was recognised in Brazilian law prior to 1942.

The change to the new Introduction created uncertainty as to the position of party autonomy. Some experts argue that the absence of this principle from the Introduction means that party

[436] Carmen Tiburcio, 'Private International Law in Brazil: A Brief Overview' (2013) 1 Panorama of Brazilian Law 11, 37
[437] *Lei de Introdução às Normas do Direito Brasileiro/ decreto-lei* (n. 4657/42)
The text can be found online at:
http://www.planalto.gov.br/ccivil_03/decreto-lei/Del4657compilado.htm
[438] The original text in Portuguese reads:
Art. 9o Para qualificar e reger as obrigações, aplicar-se-á a lei do país em que se constituirem.
§ 1o Destinando-se a obrigação a ser executada no Brasil e dependendo de forma essencial, será esta observada, admitidas as peculiaridades da lei estrangeira quanto aos requisitos extrínsecos do ato.
§ 2o A obrigação resultante do contrato reputa-se constituido no lugar em que residir o proponente.
[439] Nadia de Araujo. Fabiola I Guedes de C. Saldanha, 'Recent Developments and Current Trends on Brazilian Private International Law Concerning International Contracts' (2013)1 Panorama of Brazilian Law 73, 77
[440] Ibid

autonomy is no longer recognised at all, others state that party autonomy is still possible as long as it is recognised under the lex loci contractus, and others that mere silence does not mean that party autonomy is not allowed as it is not expressly forbidden either.[441] These commentators point to the continuation of the law and that the principles underlying the law stay the same unless expressly changed and that since party autonomy was recognised in the 1916 Introduction it still stands.[442] The latter seems to be the minority opinion.[443] Courts generally react with a restrictive interpretation and often do not uphold choice of law clauses.[444] There is no real consensus as there are also cases where party autonomy is accepted, yet the general tendency is towards disallowing choice of law.[445] Courts seem to strongly favour the application of Brazilian law and maximise the use of the public policy exception in their application of private international law.[446]An important and pragmatic reason for falling back on the lex fori is an overburdened judicial system that does not allow the courts much time for individual cases.[447]

The new Brazilian Civil Procedural Code allows for choice of forum clauses in international contracts, but does not discuss choice of law clauses.[448] Brazil has signed the Inter-American Convention on the Law Applicable to International Contracts which permits choice of law, but it has not ratified it. An updated version of the Civil Code was introduced in the early

[441] Ibid,78
[442] Carmen Tiburcio, 'Private International Law in Brazil: A Brief Overview' (2013) 1 Panorama of Brazilian Law 11,23
[443] Ibid
[444] Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction and the Emerging Third Way' (2005-2006) 44 Columbia Journal of Transnational Law 959,973
[445] Nadia de Araujo and Fabiola I Guedes de C. Saldanha, 'Recent Developments and Current Trends on Brazilian Private International Law Concerning International Contracts' (2013)1 Panorama of Brazilian Law 73,80
[446] Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction and the Emerging Third Way' (2005-2006) 44 Columbia Journal of Transnational Law 959,
[447] Maria Mercedes Albornoz, 'Choice of Law in International Contracts in Latin American Systems' (2010) 6 Journal of Private International Law 23, 48
[448] For the full text see: http://www.planalto.gov.br/ccivil_03/_Ato2015-2018/2015/Lei/L13105.htm

2000s yet the articles on private international law were not changed.[449] This indicates that enlarging choice of law is currently not a priority for legislators in Brazil.

Among Brazilian scholars there seems to be a consensus that private international law should be updated to expressly allow for choice of law outside of arbitration.[450] Stringer argues that the restrictions on party autonomy have a negative effect on the economy as it raises contracting costs substantially.[451] In the area of sale of goods contracts uncertainty is diminished with the 2014 entry into force of the CISG in Brazil as this raises predictability on the substance of the law although of course that does not enhance the agency of the parties.[452] Given the restrictions placed on party autonomy in general it is not surprising that Gama jr confirms that a choice of law for non-state rules would not be accepted outside of arbitration.[453] The above shows that even if party autonomy is the most pervasive doctrine globally it is not universally accepted.

4.4 A Substantive Connection to the Applicable Law

The second model is legislations that allow party autonomy, but require a significant relationship between the contract and the applicable law. The example discussed here is that of the USA. Private international law in the US is regulated at state level and not at federal

[449] Lauro da Gama e Souza Jr, 'the UNIDROIT Principles of International Commercial Contracts and their Applicability in the MERCOSUR Countries' (2012) 36 Revue Juridique Thémis 375, 416
[450] Ibid,418
[451] Dana Stringer, 'Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction and the Emerging Third Way' (2005-2006) 44 Columbia Journal of Transnational Law 959, 983
[452] See for more on this: Iacyr de Aguilar Viera, 'The CISG and Party Autonomy in Brazilian International Contract Law' (2013) 1 Panorama of Brazilian Law 173
[453] Lauro Game Jr, 'Prospects for the UNIDROIT Principles in Brazil' (2011) 16 Uniform Law Review 613, 641
The author also discusses that in arbitration this would be different as a choice for non-state rules would be acceptable per the *Brazilian Arbitration Act*
(Article 2: At the parties' discretion arbitration may be in law or equity. §1 – The parties may freely choose the rules of law applicable in the arbitration, as long as their choice does not violate good morals and public policy.
§2 – The parties may also stipulate that the arbitration shall be conducted under general principles of law, customs, usages and the rules of international trade.)

level.[454] It should be taken into account that conflicts of law legislation covers interstate contracts as well as international contracts. The main focus within legislation and debate is on interstate conflicts of law far more than on international disputes. As space precludes discussing each individual state's private international law this section focusses on two pieces of legislation: The Restatement (Second) of the Conflicts of Law and the Uniform Commercial Code.

4.4.1 The Restatement (Second) of the Conflicts of Law

The Restatement (Second) of the Conflicts of Law was published in 1971 by ALI. [455] Restatements are codifications of general principles that are deducted from case law. Restatements are not binding, but they are highly authoritative. Twenty-three states have adopted legislation that has the same approach as the Restatement (Second) of the Conflicts of Law.[456] Therefore, the Restatement is an important document for understanding how party

[454] Attempts to unify some aspects of conflicts of law regulation have been made, but so far have gained little support. An example is the *Uniform Computer Information Transactions Act*. This model law was designed to unify transactions related to computer licences and such. Its provisions on choice of law did not stipulate any required substantive link to the chosen law. It was only adopted in two states (Maryland and Virginia).
Through the Commerce Clause (Article 1, Section 8, Clause 3 of the US Constitution) Congress has power to '*regulate commerce with foreign Nations, and among the several states, and with the Indian Tribes.'* Federal law thus regulates (parts of) international commerce. Congress does not attempt to regulate every aspect of international commerce. Federal courts sometimes interpret the Clause restrictively although at other times their interpretation is more far-reaching. This is often depending on the current constitution of the Supreme Court. Although this seldom has effect on private international law aspects it should still be kept in mind that federal law does play a part in international commerce.

[455] In 2015 the American Law Institute has started work on the Restatement (Third) of the Conflicts of Law. Reporter is Professor Kermit Roosevelt III
See for the current status: https://www.ali.org/projects/show/conflict-laws/#_status
Last accessed 2 March 2016

[456] States that follow the Restatement (Second) on choice of law: Alaska, Arizona, Colorado, Connecticut, Delaware, Idaho, Illinois, Iowa, Kentucky, Maine, Michigan, Mississippi, Missouri, Montana, Nebraska, New Hampshire, Ohio, South Dakota, Texas, Utah, Vermont, Washington, West Virginia.
12 other states follow a traditional approach (Alabama, Florida, Georgia, Kansas, Maryland, New Mexico, Oklahoma, Rhode island, Sour Carolina, Tennessee, Virginia, and Wyoming), 4 states follow the significant contacts approach (Arkansas, Indiana, Nevada, North Carolina), 2 states follow the better law approach (Michigan and Wisconsin), and the remaining states follow the combined modern approach (California, District of Colombia, Hawaii, Louisiana, Massachusetts, New Jersey, New York, North Dakota, Oregon, and Pennsylvania.)

autonomy is approached in the US. In the Restatement (Second) the approach to party autonomy in contracts (both international and interstate) can be found in §187: Law of the State Chosen by the Parties:

(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.
(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either
(a) The chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties' choice, or
(b) application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the state of the applicable law in the absence of an effective choice of law by the parties.
(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law

Under the Restatement (Second) party autonomy is thus restricted by the need to prove a substantial relationship to the chosen law and by public policy. The first requirement seems to severely restrict which law can be chosen, but this freedom is significantly enhanced by practice and the official commentary. The official commentary reads: '*parties enter into contracts for serious purposes and usually do not provide for choice of law clause 'in the spirit of adventure' or to provide 'mental exercises for the judge.*'[457] Thus, courts should give serious considerations to the chosen law even when the connection is not immediately obvious.

See for this: Symeon C Symeonides, 'Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey' (2016) 64 American Journal of Comparative Law, Forthcoming 64
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709668##
Note that the above is valid for choice of law in contracts and not necessarily in other matters which are beyond the scope of this thesis.
Another approach does not necessarily mean that party autonomy is treated differently. The law of New York for instance endorses party autonomy if there is a substantial relationship with the chosen law (unless the contract is worth more than $250,000 as in that case there is no need for a substantial relationship). Therefore, the approach is similar to that of the Restatement
See *New York Law of General Obligations section 5-1401*
Although states follow certain approaches to conflicts of law it is not so that in practice they always clearly adhere to that method:
Symeonides notes that conflicts of law cases often seem isolated from one another and that it is not always easy to find the methodological underlying principles in individual cases.
Symeon C Symeonides, 'The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning' (2015) 2 University of Illinois Law Review 1847
Online: http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2568175
[457]http://www.kentlaw.edu/perritt/conflicts/rest187.html

Under the Restatement (Second) a substantial relationship can be any reasonable basis underlying the choice. This reasonable basis could be:

- Experience with this type of case
- Underdeveloped law in other states that have a more substantial relation with the contract
- More complete law in this particular state
- Lex loci contractus
- Place of performance
- Place of domicile of one of the parties
- Place of incorporation of one of the parties
- Place of principal business of one of the parties

These could all fulfil the substantial relationship requirement. This indicates willingness towards accepting choice of law clauses even when the connection is not straightforward.

The leading cases do seem to point to a choice being honoured even when the relation between the contract and the choice of law is more opaque. In the case of *Radioactive, J.V v. Manson* it was held that the law of New York had sufficient connections with the contract despite neither party being based there and the contract not being concluded or executed there: '*New York federal and state courts have significant experience with music industry contracts, and the parties wanted to avail themselves of that experience by selecting a New York forum and New York law.'* [458] Therefore, the expertise of the law of New York in the music industry was deemed to be a substantial enough relationship to allow for this choice. Calleros is critical of the substantial relationship criterion: it restricts the options of the

[458] *Radioactive, J.V, v Manson*, 153 F. Supp. 2d 462 (S.D.N.Y 2001)http://law.justia.com/cases/federal/district-courts/FSupp2/153/462/2433434/

parties *'to reduce […] insecurity'* [459] and it could prevent the choice for a neutral law. Practice seems to suggest that a choice for a neutral law could be respected under certain circumstances, but it is also clear there are limits placed on this choice.

Limits are also placed by '*the fundamental policy of a state which has a materially greater interest than the chosen state and which would be the state of the applicable law in the absence of choice of law by the parties.'*[460] Under the Restatement (Second) there are hence two questions for the court to consider when confronted with a choice of law clause: first of all, whether there is a substantial relationship with the chosen law, and secondly whether there is a fundamental policy of the otherwise applicable law that bears a closer relationship to the contract. Professor Symeonides conducts an annual survey into American choice of law cases. His conclusion, based on this long-standing work, is that in most cases when a choice of law clause is not honoured the reason is the public policy exception and not the absence of a substantial relationship.[461] The main reasons for this are most likely a mix

[459]Charles R Calleros, 'Towards Harmonization and Certainty in Choice of Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?' (2010) 28 Wisconsin International Law Journal 639, 666

[460] *§ 187. Law of the State Chosen by the Parties* http://www.kentlaw.edu/perritt/conflicts/rest187.html

[461] See for instance Symeon C. Symeonides, 'Choice of Law in the American Courts in 1996: Tenth Annual Survey' (1997) 45 American Journal of Comparative Law 447 where he reported that out of a 100 cases the choice of law was not enforced in only six of these. In all six cases this was for public policy reasons.

For more recent examples see:

Symeon C. Symeonides, 'Choice of Law in the American Courts in 2013: Twenty-Seventh Annual Survey' (2014) 62 American Journal of Comparative Law 223 analysed several cases where the choice of law clause was not upheld by the court. Only in one of the cases discussed did the absence of a substantial relationship play a part in the decision. In the other cases the reason was the fundamental policy exception.

Symeon C. Symeonides, 'Choice of Law in the American Courts in 2014: Twenty-Eight Annual Survey' (2015) 63 American Journal of Comparative Law 299

Again in the cases discussed the reasons for not enforcing a choice of law clause is fundamental public policy.

As an example one of the cases discussed in the survey is *Exxon Mobil Corp. v. Drennen 2014 WL 4782974 (Tex. 2014)*. This concerned a choice of law clause in an employment contract for New York law. The Texas Supreme Court reinforced the choice despite there being a more significant relationship with Texan law because the application of New York law would not run contrary to fundamental public policy. The Texas Supreme Court noted that even if New York did not have a substantial relationship to the contract there was a reasonable basis for the choice because: (*1) New York had a well-developed body of law regarding employee stock and incentive programs and securities-related transactions; and (2) the choice of New York law assured a uniform treatment of Exxon's employee incentive programs in all states* (P41)

between the wide interpretation of the substantial relationship criterion and that lawyers already premeditate this criterion when advising clients on choice of law.[462] Thirdly, in many cases parties would most likely wish to select a law anyway that is connected to the case as often this is the most practical choice.

In *Allstate Insurance Co. v. Hague,* the Supreme Court stated that *'for a state's substantive law to be selected in a constitutionally permissible manner, that state must have a significant contact or significant aggregation of contacts, creating state interests, such that the choice of its law is neither arbitrary nor fundamentally unfair.'*[463] This confirms the need for a significant relationship to the chosen law. It should again be noted that American conflicts of law literature generally focuses on interstate conflicts and less so on international conflicts.[464]As private international law in the US was mainly developed with a view to interstate conflicts this explains why the substantial relationship requirement is important. This also explains why mainly the fundamental public policy of the otherwise applicable law is the reason that a choice of law is not respected. Within a federal state respecting the other

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Symeon C Symeonides, 'Choice of Law in the American Courts in 2015: Twenty-Ninth Annual Survey' (2016) 64 American Journal of Comparative Law, Forthcoming http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2709668##

[462] Of course examples of cases where a choice of law clause was not respected ca be found. Examples are:
First National Bank of Mitchell v. Daggett, 497 N.W.2d 358 (Nebraska 1993). (a choice for Georgian law was not enforced. This case concerned a defendant who was domiciled in Alaska and who wished to convey a trust of real estate located in Alaska to his sons to avoid paying his debts to the bank. The defendant had selected the law of Georgia to identify the beneficiaries of the trust. The court held that unconnected outside jurisdictions should not determine the ownership of real estate within the state of Nebraska because of the adverse effect this would have on certainty of ownership and ease of transfer of land.
Curtis 1000, Inc. v. Suess 24 F.3d 941 (7th Cir. 1994), where in an employment contract a choice for Delaware law was not upheld by the Illinois Court because of the absence of a sufficient connection with the state of Delaware (the only connection was that the company was incorporated in Delaware) (However other courts have enforced choice of law clauses whereby the incorporation of a company in a given state was sufficient evidence of a substantial relationship.
Valley Juice Ltd., Inc. v. Evian Watersof France, Inc., 87 F.3d 604, 608 (2d Cir. 1996))
Prows v. Pinpoint Retail Sys., 868 P.2d 809 (Utah 1993), the choice for New York law in a contract between a Canadian company and a company from Utah was not upheld because of lack of contact with the state of New York.

[463] *Allstate Insurance Co. v. Hague,* 449 U.S. 302,312-13 (1981)
American states' choice of law legislations also contains provisions where a substantial relationship to the chosen law is not required. The need for this substantial relationship is therefore not absolute.

[464] Mathias Reimann, 'Parochialism in American Conflicts Law' (2001) 49 American Journal of Comparative Law 369, 388

states' public policy is far more important than in the international context where countries will not care that much about another country's public policy.

Could party autonomy under the Restatement (Second) be extended to non-state rules? The aforementioned article §187 states: *(1) The law of the state chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.* The wording law of the state is used throughout the article. State can refer to a foreign state or to a US state, but it is clear that it cannot refer to a law which comes from an entity that cannot be described as a state. Even if it could be said that there is a merchant community there is certainly not a merchant state.

Comment C on subsection 1 reads: *'In the alternative, they may incorporate into the contract by reference extrinsic material which may, among other things, be the provisions of some foreign law.'* This leaves scope for the inclusion of non-state rules. What the 'among others' could be is not further specified in this comment. The Reporter's Notes to the Restatement provide some clarity on what this extrinsic material could be: *'may also stipulate for the application of trade association rules or well-known commercial customs.*'[465] This is broad enough to allow reference to (at least some) non-state rules. These can thus be used as contractual rules.

In absence of a choice of law clause §188 regulates the applicable law. This article states that *'the applicable law is the local law of the state which, with respect to that issue, has the most significant relationship to the transaction and the parties…* '[466] As the text clearly refers to state law it would be difficult to see how this could lead to the application of non-state rules. This becomes more evident when one reviews the points of contact that should be

[465] Reporter's Notes Subsection 1, article 187
[466] §188 Law governing in absence of effective choice by the parties
http://www.kentlaw.edu/perritt/conflicts/rest188.html

taken into account to establish the most significant relationship. These points of contacts are: the place of contracting, the place of negotiation of the contract, the place of performance, the location of the subject matter of the contract, and the domicile, residence, nationality, place of incorporation and place of business of the parties.[467] These all refer to a geographical place and thus all point to the law of a territorial entity. The same is true for special type contracts where the points of contact that determine the most significant relationship are all geographical.[468] Therefore, when the Restatement is followed this could not lead to the application of non-state rules which by their very definition are not the law of any state.

Now that work has started on the third incarnation of the Restatement things might change. Professor Symeonides notes that the Restatement (Second) contains very little material on international conflicts of law situations which can be explained by the insularity of American conflicts of law theories in the 60s and 70s as well as by a lack of international cases.[469] Chances are the new Restatement will consider international contracts in more depth because of the increased number of cases. With regards to non-state rules Symeonides

[467] §188 Law governing in absence of effective choice by the parties
http://www.kentlaw.edu/perritt/conflicts/rest188.html
[468] § 189-90 Land contracts-law of site.
http://www.kentlaw.edu/perritt/conflicts/rest189.html
§ 191 Contracts to sell interests in chattels-the place of delivery.
http://www.kentlaw.edu/perritt/conflicts/rest191.html
§ 192 Life insurance contracts-the domicile of the insured.
http://msgre2.people.wm.edu/2ndRestatement.html
§ 193Contracts of fire, surety, or casualty insurance-the principal location of the insured.
http://www.kentlaw.edu/perritt/conflicts/rest193.html
§ 194Contracts of surety ship-the law governing the principal obligation.
http://www.kentlaw.edu/perritt/conflicts/rest194.html
§ 195Contracts for the repayment of money-the place of repayment.
http://www.kentlaw.edu/perritt/conflicts/rest195.html
§ 196 Contracts for the rendition of services-the place where the major portion of the services are to be rendered.
http://msgre2.people.wm.edu/2ndRestatement.html
§ 197Contracts for transportation-place of departure or dispatch.
http://www.kentlaw.edu/perritt/conflicts/rest197.html
[469]Symeon C Symeonides, 'The Choice-of-Law Revolution Fifty Years after Currie: An End and a Beginning' (2015) 2 University of Illinois Law Review 1847, 1919

hopes that the new Restatement will address the place of non-state rules more thoroughly.[470] It remains to be seen how the drafters will work out these issues in the coming years and how much success the new Restatement will have.

4.4.2 The Uniform Commercial Code

The Uniform Commercial Code was first published in 1952 by NCCUSL and ALI.[471] A permanent editorial board regularly proposes updates and publishes official comments. The UCC is a model law that can be adopted by the individual states. The UCC consists of mainly of variable default rules that will only be applied if the contract is silent on the issue. The drafters saw the lex mercatoria as an ancestor of the UCC.[472] The UCC does not address itself specifically to merchants. Most provisions are applicable to all who engage in commerce, including consumers.[473] All 50 states have adopted the UCC.[474] States can make changes to the UCC. Mostly these changes are minor and concern, for example, the numbering of the articles, but in other cases the changes are more extensive. For instance, Louisiana has not adopted the second chapter of the UCC (concerning sale of goods) and has kept its existing law in this area. The interpretation of the code also varies which means that despite uniformity on paper the UCC has not unified commercial law completely.[475]

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[470] Ibid,1920

[471] Professor Chen notes that the UCC is a Holy Roman Empire: it is not uniform, nor commercial, nor a code (Jim C Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Texas International Journal 91, 93)
It is not uniform as changes are made by the states when adopting the UCC, it is not strictly commercial as it not just applicable to merchants and it is also not a comprehensive code as is understood in the civil law tradition.

[472] Official comments to §1-301:
it is in large part a reformulation and restatement of the law merchant and of the understanding of a business
community which transcends state and even national boundaries
For more information on this see:
Bruce L Benson, 'The Spontaneous Evolution of Commercial Law' (1989) 55 Southern Economic Journal 644

[473] Jim C Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Texas International Journal 91, 106

[474] The District of Colombia, Puerto Rico, Guam, and the US Virgin Islands have also enacted the UCC

[475] Robert J Nordstrom and Dale B Ramerman, 'The Uniform Commercial Code and the Choice of Law' (1969) 4 Duke Law Journal 623, 624

Before the reforms in 2001 article §1-105 of the UCC concerned party autonomy. This article states that when a transaction bears a reasonable relation to this state (the particular state in which the UCC is enacted) as well as to another state or nation the parties can choose either law to govern their transaction.[476] It therefore reflects the substantial relationship criterion of the Restatement (Second). What a reasonable relationship is does not become clear from the article.[477] The official Comments give guidelines and state that the reasonable relationship criterion needs to fulfil the criteria that were laid down by the Supreme Court in *Seeman v. Philadelphia Warehouse* and that the law chosen must be that *'of a jurisdiction where a significant enough portion of the making or performance of the contract is to occur or occurs.'*[478] Thus, a choice of law would be valid as long as there is a connection to either the making or execution of the contract, the transaction is valid at the place of performance, and the choice is made in good faith. For specific contracts (like bank deposits, investment securities, and rights of creditors) different rules concerning choice of law are applicable.[479]

[476] § 1-105 (1) except as provided hereafter in this section, when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties. Failing such agreement this Act applies to transactions bearing an appropriate relation to this state.

[477] Note UCC article 4A regarding fund transfers allows banks to choose an applicable law without a reasonable relation criterion. Article 8 gives the same leeway in the area of investment securities and article U.C.C. § 5-116(a) to letters of credits. Therefore, with regards to certain types of contracts there is no substantive relationship needed with the chosen law.

[478] See: UCC § 1-105, Comment 1.
Subsection (1) states affirmatively the right of the parties to a multi-state transaction or a transaction involving foreign trade to choose their own law. That right is subject to the firm rules stated in the six subsections listed in subsection (2), and is limited to jurisdictions to which the transaction bears a 'reasonable relation.'
Seeman v. Philadelphia Warehouse Company., 274 U.S. 403, 47 S. Ct. 626, 71 L. Ed. 1123 (1927)
The text of this case can be found at:
https://www.law.cornell.edu/supremecourt/text/274/403
This case concerned the applicable law to a loan transaction between a borrower from New York and a lender from Pennsylvania. The contract did not contain a choice of law clause, but the contract was signed and performed in Pennsylvania. The district court in New York found the law of New York to be the applicable law but the Court of Appeal reversed this decision. The parties claimed that preliminary discussions took place in New York and the contract was made there even if it was signed in Pennsylvania. The Supreme Court decided that as the contract was actually signed and performed in Pennsylvania the law of the latter would be the applicable law and that the transaction would be valid if it was considered so at the place of performance or the place of making as long as the parties are acting in good faith.

[479] UCC § 1-105 (2)

§1-105 was replaced in the updated version of the UCC in 2001 with §1-301.[480] The makers were influenced significantly by the Rome Convention.[481] This new article distinguishes between an international contract and an interstate contract. In an international contract the law of a foreign nation can be chosen whether it is related to the contract or not. In a domestic contract only the law of a US state can be chosen. This law need not be related to the contract. Therefore, in a contract between a buyer from Arizona and a seller from France the parties could choose the unrelated Italian law. In a contract between a buyer from Arizona and a seller from Nevada the parties could not choose the unrelated Italian law, but they could choose the unrelated law of Montana. Most states adopted the 2001 version of the UCC, however the text of the article §1-301 proved less than popular. States that adopted the new version of the UCC retained the text of the original §1-105. Examples of how this looks are for instance the codes of Delaware[482] and Virginia.[483] In the end only the US Virgin Islands adopted the new text. In 2008 it was subsequently withdrawn by the editorial board.

Two major objections were made to the text of article §1-301.The first was that extending party autonomy in this way makes it easier for the parties to the contract to choose an artificial law and this would allow them to evade a law which is more closely connected to

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[480] Uniform Commercial Code (as amended March 8, 2008)
§ 1-301 Territorial Applicability; Parties' Power to Choose Applicable Law.
(c) Except as otherwise provided in this section:
(1) an agreement by parties to a domestic transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State is effective, whether or not the transaction bears a relation to the State designated; and
(2) an agreement by parties to an international transaction that any or all of their rights and obligations are to be determined by the law of this State or of another State or country is effective, whether or not the transaction bears a relation to the State or country designated.
(d) In the absence of an agreement effective under subsection (c), and except as provided in subsections (e) and (g), the rights and obligations of the parties are determined by the law that would be selected by application of this State's conflict of laws principles.
http://www.law.cornell.edu/ucc/1/1-301

[481] U.C.C. § 1-301 Reporter's Note b (Proposed Draft, Nov. 2000)

[482] § 1-301 Territorial applicability; parties' power to choose applicable law.
(a) Except as otherwise provided in this section, when a transaction bears a reasonable relation to this State and also to another state or nation the parties may agree that the law either of this State or of such other state or nation shall govern their rights and duties.
http://delcode.delaware.gov/title6/c001/sc03/index.shtml
This text is thus the same text as article § 1-105 in the previous version of the UCC

[483] Code of Virginia §8.1A-301. Territorial applicability; parties' power to choose applicable law.
https://leg1.state.va.us/cgi-bin/legp504.exe?000+cod+8.1A-301

the contract, but considered inconvenient. [484] SME might not be able to properly research what it entails if the applicable law is completely unrelated to the transaction. This could decrease security in business transactions. The second objection came from a different angle, and asserted that the new article actually restricts party autonomy as it distinguishes between B2C and B2B contracts which the old article §1-105 did not do.[485]

There were also questions regarding the constitutionality of the amendment. The Full Faith and Credit Clause (Article IV, Section 1 of the Constitution) covers the duties that states have to one another with respect to public acts and judicial proceedings.[486] It was questioned whether or not the proposed amendment was constitutional in light of the Full Faith and Credit Clause and the *Allstate Insurance Co. v. Hague* case law. The argument is that applying the law of a state which has no interest (even remotely) in the conflict infringes on the rights of a state that does have an interest in the outcome of the conflict and that consequently applying this unrelated law violates the Full Faith and Credit Clause.[487] Others argued that fundamental policy provisions are enough to satisfy the demands of the Clause.[488] There is evidence in case law indicating that the interest of a state in the dispute should be taken into account although it is not clear to what extent this should be done.[489] As there are

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[484] Giesela Rühl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' (2007) 3 Comparative Research in Law & Political Economy Research Paper 21 http://digitalcommons.osgoode.yorku.ca/clpe/227

[485] See section e of article § 1-301 for the provisions on consumer contracts:
http://www.law.cornell.edu/ucc/1/1-301
A reasonable relationship to the chosen law is still required for consumer contracts and this law may not deprive the consumer of the protection of the law of its principal residence or that of the law where he receives the goods in sales of goods contract.

[486] The text of the clause reads:
Full faith and credit shall be given in each state to the public acts, records, and judicial proceedings of every other state. And the Congress may by general laws prescribe the manner in which such acts, records, and proceedings shall be proved, and the effect thereof

[487] Richard K Greenstein, 'Is the Proposed UCC Choice of Law Provision Unconstitutional?' (2000) *73 Temple Law Review* 1159

[488] Ibid,1179

[489] *Alaska Packers V. Industrial Accident Commission*, 294 U.S. 532 (1935)
This case considered an employment contract between an employer from California and an employee with a choice of law clause for Alaskan law. The employee was injured whilst working in Alaska. The Court reasoned that the Full Faith and Credit Clause permitted the court in California to apply its own law because:
Prima facie every state is entitled to enforce in its own courts its own statutes, lawfully enacted. One who challenges that right, because of the force given to a conflicting statute of another state by the full

(provisions of) conflicts of law legislations in the US that do not require a substantial relationship to the chosen law and these have so far not been declared unconstitutional it might be presumed that the article would not have been contrary to the Full Faith and Credit Clause.[490] There are currently no plans to re-introduce a new updated version of the old Article §1-105 so for now this issue is shelved.

The discussion in the previous section concerned the choice for a state law. Under the current articles parties enjoy freedom of choice provided that a reasonable relationship can be established to the chosen law. The wording of the UCC makes it explicit that the chosen law should be a state law: '*…when a transaction bears a reasonable relation to this state and also to another state or nation the parties may agree that the law either of this state or of such other state or nation shall govern their rights and duties*.' This wording does not sanction a choice of law for non-state rules.

When the 2001 text of §1-301 was drafted the question of non-state rules did come up. In the official comments this was addressed:

'This Section does not address the ability of parties to designate non-legal codes such as trade codes as the set of rules governing their transaction. The power of parties to make such a designation as part of their agreement is found in the principles of Section 1-302. That Section, allowing parties' broad freedom of contract to structure their relations, is adequate for this purpose. This is also the case with respect to the ability of the parties to designate recognized bodies of rules or principles applicable to commercial transactions that are promulgated by intergovernmental organizations such as UNCITRAL or Unidroit. See, e.g., Unidroit Principles of International Commercial Contracts.'[491]

This allows the parties to choose non-state rules for any non-mandatory provisions. The article addresses both the possibilities to choose trade branch rules as well as international rules. As discussed the text of this article was not adopted and the official comments to this

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faith and credit clause, assumes the burden of showing, upon some rational basis, that of the conflicting interests involved those of the foreign state are superior to those of the forum.
This case shows the interest analysis approach. California had an interest in the case and the Californian courts should apply their own law unless the relationship to the law of another state was more significant.

[490] See for instance the conflict of law legislation in Oregon and Louisiana (see section 4.4.3 for more on this)

[491] UCC 1957, 1-302, Comment 2 (2001 Revision)

article are thus not applicable. The official comments above refer to Section §1-302. This reads:

(a) Except as otherwise provided in subsection (b) or elsewhere in [the Uniform Commercial Code], the effect of provisions of [the Uniform Commercial Code] may be varied by agreement.

(b) The obligations of good faith, diligence, reasonableness, and care prescribed by [the Uniform Commercial Code] may not be disclaimed by agreement. The parties, by agreement, may determine the standards by which the performance of those obligations is to be measured if those standards are not manifestly unreasonable. Whenever [the Uniform Commercial Code] requires an action to be taken within a reasonable time, a time that is not manifestly unreasonable may be fixed by agreement.

(c) The presence in certain provisions of [the Uniform Commercial Code] of the phrase "unless otherwise agreed", or words of similar import, does not imply that the effect of other provisions may not be varied by agreement under this section.

Contrary to the 2001 text of §1-301 the text of §1-302 is widely adopted by state legislations. Parties could use their rights to vary from the UCC and incorporate non-state rules as long as this does not run contrary to the obligations described in sub-article b. As the parties themselves can choose the standards by which these obligations are measured (provided these are reasonable) this gives the parties considerable leeway. The parties would still need to choose a governing state law and any mandatory provisions of the UCC (and the applicable law) would apply.

The official comments on this article discuss the possibility to use non-state rules further:

An agreement that varies the effect of provisions of the Uniform Commercial Code may do so by stating the rules that will govern in lieu of the provisions varied. Alternatively, the parties may vary the effect of such provisions by stating that their relationship will be governed by recognized bodies of rules or principles applicable to commercial transactions. Such bodies of rules or principles may include, for example, those that are promulgated by intergovernmental authorities such as UNCITRAL or UNIDROIT (see, e.g., UNIDROIT Principles of International Commercial Contracts), or non-legal codes such as trade codes.[492]

As a large part of the UCC consists of variable rules this gives the parties to the contract considerable room to incorporate non-state rules.

[492] See for the full official comments on this article: http://nebraskalegislature.gov/laws/ucc.php?code=1-302

Article §4-103 on bank deposits and collections confirms the possibility to vary from the default rules.[493] Article §4-103 (b) even goes so far as to state that in certain cases some non-state rules could be applied even when not all those involved in the transaction have consented to using them.[494] This would for example include users of checks and credit cards. Professor Symeonides questions whether the justification given in the official comments that such transactions involve a great number of people which makes it quasi impossible to get the assent of all parties is enough, as it gives *'private for-profit entities'* a great deal of power to impose rules upon people who a) had no say in whether these should be included in the contract and b) had no democratic say in the rule making process.[495] Professor Snyder argues that clearing house associations have not been endowed democratically yet have the ability to dictate rules that affect millions of people in their financial dealings.[496] These are often consumers or SME that do not have any realistic alternative beyond accepting these non-state rules, of whose existence they might not even be aware.

If no choice of law clause is included in the contract then article §1-301 states that *b) In the absence of an agreement effective under subsection (a), and except as provided in subsection (c), the Uniform Commercial Code applies to transactions bearing an appropriate relation to this state.* As the UCC is not a conflict of law legislation it does not indicate how to find the applicable law in absence of a choice of law clause. This is left to the private international law of the forum. Sub section C lists a number of articles on how to decide the applicable law in special type contracts. The comments state furthermore that if the case has a reasonable relation to a state which has enacted the UCC as well as to other jurisdictions '*the question*

[493] Article 4-103 regarding bank deposits and collections states:(a) The effect of the provisions of this Article may be varied by agreement, but the parties to the agreement cannot disclaim a bank's responsibility for its lack of good faith or failure to exercise ordinary care or limit the measure of damages for the lack or failure. However, the parties may determine by agreement the standards by which the bank's responsibility is to be measured if those standards are not manifestly unreasonable. http://www.law.cornell.edu/ucc/4/article4.htm

[494] UCC §4-103 (b) Federal Reserve regulations and operating circulars, clearing-house rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled

[495] Symeon C Symeonides, 'Contracts subject to Non-State Norms' (2006) 54 American Journal of Comparative Law 209, 220

[496] David V Snyder, 'Private Lawmaking' (2003) 64 Ohio State Journal 371, 397

what relationship is appropriate is left to judicial decision.' [497] In multistate transactions it could be suitable to apply the UCC based on its comprehensiveness, uniformity, and its understanding of business which transcends state and national boundaries even when it does not represent the most significant relationship to the contract.[498]

As the UCC is not a conflict of law legislation it can only indicate when it is applicable and not which other laws might be applicable. Therefore, the UCC does not indicate a situation in which non-state rules could govern the contract in absence of a choice of law clause. This is not because the UCC is hostile towards non-state rules (in fact it is not as seen above), but rather because it says nothing about what the applicable law is in a situation where the UCC is not applicable.

4.4.3 Extending Party Autonomy to Non-State Rules: The Examples of Oregon and Louisiana

Some states have enacted legislation that extends the choice of law beyond a state with which the contract has a substantial relationship. These are Oregon[499] and Louisiana.[500] Several other states such as Texas,[501]California,[502] New York[503], Delaware,[504] and Illinois[505] have

[497] c) If one of the following provisions of [the Uniform Commercial Code] specifies the applicable Law, that provision governs and a contrary agreement is effective only to the extent permitted by the law so specified.
[498] Official comments §1-301. Territorial Applicability; Parties' Power to Choose Applicable Law (as amended 8 March 2008) http://www.law.indiana.edu/instruction/dhlong/5534/doc/ucc_amend_1-301.pdf
[499] Oregon: § 81.120 Choice of law made by parties http://www.oregonlaws.org/ors/2007/81.120
[500] Louisiana 2009 Louisiana Civil Code: CC 3540 - Party autonomy
http://law.justia.com/codes/louisiana/2009/cc/cc3540.html
[501] Texas: Business and Commerce Code Title 9. Applicability of law to Commercial Transactions Chapter 271. Rights of the Parties to Choose Law Applicable to certain transactions.
http://www.statutes.legis.state.tx.us/Docs/BC/htm/BC.271.htm
Valid for any transactions with a value of at least $1 million.
[502] New York General Obligation Law § 5-1401: NY Code - Section 5-1401: Choice of law
http://codes.lp.findlaw.com/nycode/GOB/5/14/5-1401#sthash.b6TuVwoN.dpuf
Transactions over $ 250,000
[503] California Civil Code Section 1646.5
http://law.onecle.com/california/civil/1646.5.html
Transactions over $ 250,000
[504] Delaware Code Annual title 6, § 2708
http://delcode.delaware.gov/title6/c027/sc01/index.shtml
Transactions over $ 100,000.

enacted legislation that allows a choice of law for that state without the presence of a substantive relationship provided that the transaction in the contract is worth more than a certain amount of dollars.[506]

Oregon and Louisiana have a wider view of choice of law. Firstly, these states have no substantial relationship criterion. Secondly, both of these legislations propagate a wider view on which laws can be included in a choice of law clause. Both of these states permit a choice for non-state rules.

The 2001 Oregon Choice of law codification uses the word 'law' instead of 'state law.'[507] This implies that it would be possible to choose non-state rules as the applicable law. However, if we look further into the codification the definition of the word law is given in §81.100. This definition states that law *'means any rule of general legal applicability adopted by a state, whether that rule is domestic or foreign and whether derived from international law, a constitution, statute, other publicly adopted measure or published judicial precedent.'*[508] This plainly implies that the chosen law must be that of a state.

§81.100 defines a state as follows: *'State" means the United States, any state of the United States, any territory, possession or other jurisdiction of the United States, any Indian tribe, other Native American group or Native Hawaiian group that is recognized by federal law or formally acknowledged by a state of the United States, and any foreign country, including*

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[505] Civil Procedure (735 ILCS 105/) Choice of Law and Forum Act. http://www.ilga.gov/legislation/ilcs/ilcs5.asp?ActID=2018&ChapterID=56 Transactions over $ 250,000

[506] Note that California, Delaware, Illinois and New York allow the parties to choose their own law as the applicable law in these cases whereas Texas allows the parties to choose any law and not just the law of Texas.

[507] Oregon: § 81.120 Choice of law made by parties: *Except as specifically provided (...) the contractual rights and duties of the parties are governed by the law or the laws that the parties have chosen* http://www.oregonlaws.org/ors/2007/81.120

[508] § 81.100. Definitions for ORS 81.100 to 81.135 38 WLR 397 (2002) http://www.oregonlaws.org/ors/2007/81.100

any territorial subdivision or other entity with its own system of laws.[509]*'* If one follows certain theories the merchant community could be seen as an independent entity with its own system of law (the lex mercatoria). This was discussed in the second chapter. Therefore, would it be possible to argue that a choice of law for the lex mercatoria would be valid under Oregon law based on this definition? The prospect is interesting even if farfetched as this theory is controversial (as discussed in chapter 2.4)

Things become even more interesting if one looks at the official comments to Section 7 which state that the parties may select model rules or principles such as the UPICC as a choice of law.[510] Party autonomy in Oregon is thus extended to non-state rules. It seems that this applies to codified non-state rules. The UPICC are mentioned by name so these would constitute an acceptable choice. It is unclear from the comments whether uncodified non-state rules would also be an acceptable choice.

The Oregon code specifies that if parties have not made a choice of law then the court must find the most appropriate law. The court must first identify which states have a relevant relationship with the transaction, then identify whether there are any underlying public policies of the laws that are relevant, and thirdly evaluate the relative strength and pertinence of these policies.[511] As the first step the court takes is to identify the states that have a

[509] § 81.100. Definitions for ORS 81.100 to 81.135 38 WLR 397 (2002)
http://www.oregonlaws.org/ors/2007/81.100
[510] See: Annex III, Comments § 7(3) Report on Conflicts Law Applicable to Contracts – LC 2255
https://willamette.edu/wucl/centers/olc/reports/reports/adopted.html
'In exercising this autonomy, parties may select model rules or principles. For example, parties to an international contract may choose to have it governed by the Unidroit Principles of International Commercial Contracts.'
For further information, see these articles:
James A R Nafziger, 'Oregon's conflicts law applicable to contracts' (2002) 38 Willamette Law Review 397 Symeon S Symeonides, 'Oregon's choice of law codification for contract conflicts: an exegesis' (2007) 44 Willamette Law Review 205
[511] § 81.130 General rule
The most appropriate law is determined by:
(1) Identifying the states that have a relevant connection with the transaction or the parties, such as the place of negotiation, making, performance or subject matter of the contract, or the domicile, habitual residence or pertinent place of business of a party;

relevant connection with this transaction it is evident that this article refers to the law of a state. The definition of the word state includes *'any territorial subdivision or other entity with its own system of laws.'* If one thus follows the idea that merchants are their own entity with their own system of law (lex mercatoria) it could (theoretically) be possible that a court would apply the lex mercatoria in absence of a choice of law clause in the contract. Again this is unlikely, but following the lex mercatoria doctrine support for this theory can be found.

The second example is that of Louisiana.[512] In the preliminary title of the civil code published in 1807 Louisiana codified its private international law but the provisions were rather limited.[513] In 1992 a specific conflicts of law codification was introduced. Regarding choice of law, this codification states: '*All other issues of conventional obligations are governed by the law expressly chosen or clearly relied upon by the parties, except to the extent that the law contravenes the public policy of the state whose law would otherwise be applicable.'* [514] This article does not say 'state law' or 'law of a state,' but only uses the word law. This leaves some discretion to the adjudicator to decide what law is. Professor Symeonides is of

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(2) Identifying the policies underlying any apparently conflicting laws of these states that are relevant to the issue; and
(3) Evaluating the relative strength and pertinence of these policies in:
(a) Meeting the needs and giving effect to the policies of the interstate and international systems; and
(b) Facilitating the planning of transactions, protecting a party from undue imposition by another party, giving effect to justified expectations of the parties concerning which state's law applies to the issue and minimizing adverse effects on strong legal policies of other states
http://www.oregonlaws.org/ors/2007/81.130

[512] For a more in-depth discussion of private international law in Louisiana see the works by professor Symeonides who was the Rapporteur of the Louisiana choice of law codification. A small selection:
Symeon C Symeonides, 'The Conflicts Book of the Louisiana Civil Code: Civilian, American, or Original?' (2008) 83 Tulane Law Review 1041
Symeon C Symeonides, 'Les Grands Problèmes de Droit international Privé et la Nouvelle Codification de Louisiane' (1992) 81 Revue Critique de Droit International Privé 223
Symeon C Symeonides, 'Louisiana Conflicts Law: Two 'Surprises' (1994) 54 Louisiana Law Review 497
See also:
Russell J Weintraub, 'Courts Flailing in the Waters of the Louisiana Conflicts Code: Not Waving but Drowning' (2000) 60 Louisiana Law Review 4
Carol S Bruch, 'Codifications of Conflicts Law: The Louisiana Draft' (1987) 35 American Journal of Comparative Law 255

[513] Symeon C Symeonides, 'Louisiana Conflicts Law: Two 'Surprises' (1994) 54 Louisiana Law Review 497

[514] Louisiana Civil Code article 3540: http://www.legis.state.la.us/lss/lss.asp?doc=110561

the conviction that indeed a choice for non-state rules would be acceptable.[515] Because of his involvement in the codification as the Rapporteur, his opinion should carry ample weight. Unlike the Oregon codification the Louisianan Civil Code does not contain any definition of the word law.

If one contrasts article 3540 with article 3537 that contains the general rule in absence of a choice of law clause the possibility that non-state rules are acceptable as a choice of law is even stronger. Article 3547 states that *'except as otherwise provided in this Title, an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.*[516] This article manifestly refers to the law of a state whereas the choice of law article only uses the word law. This indicates a deliberate decision to omit the word state from article 3540.

If one contrasts the Louisiana Civil Code with the Oregon legislation the word state is defined as '*the United States or any state, territory, or possession thereof; the District of Columbia; the Commonwealth of Puerto Rico; and any foreign country or territorial subdivision thereof that has its own system of law*.[517]' Whereas the Oregon code also mentions the possibility of non-territorial entities with their own system of law, the Louisiana Civil Code does not mention these. Therefore, under Oregon law one could perhaps argue that the merchant community is an entity with its own system of law which can be applied in absence of a choice of law clause, but in Louisiana this is not possible. These two examples show that individual states in the US can extend party autonomy to non-state rules. Both of these legislations do not require a substantial relationship to the chosen law and thus differ from the mainstream position in American conflicts of law legislation.

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[515] Symeon C Symeonides, 'Contracts subject to Non-State Norms' (2006) 54 American Journal of Comparative Law 209,222

[516] Art. 3537 General rule
Except as otherwise provided in this Title, an issue of conventional obligations is governed by the law of the state whose policies would be most seriously impaired if its law were not applied to that issue.
http://legis.la.gov/Legis/Law.aspx?p=y&d=110557

[517] Louisiana Civil Code article 3516: http://lcco.law.lsu.edu/?uid=145&ver=en#145

Symeonides describes the general position towards non-state rules in American law as non-hostile.[518] This seems an accurate description. Under the UCC and the Restatement (Second) of the Conflicts of Law it is not possible to choose a non-state law as the law of the contract. It is possible to incorporate these into the contract, provided that there is a governing state law. Under the variation by agreements rules of the UCC and the incorporation by reference rules of the Restatement parties have considerable leeway to use non-state rules. In Oregon and Louisiana, a choice for non-state rules as the law of the contract is possible.

4.5 Party Autonomy without Borders: The Rome I Regulation on the Law Applicable to Contractual Obligations

The third approach to party autonomy does not require any substantive connection between the contract and the chosen law. The parties could opt for a neutral law. The EU has legislation that allows the parties to choose the (state) law they wish without any restrictions. In the EU the applicable law to contractual obligations is regulated by the Rome I Regulation on the Law Applicable to Contractual Obligations.[519] Rome I entered into force in 2008. It was preceded by the Convention on the Law Applicable to Contractual Obligations (known as the Rome Convention) which entered into force in 1991. The Rome Convention was signed by the then member states of the European Community. On accession of new member states adhesion treaties to the Rome Convention were concluded. Partly due to the cumbersome nature of this process the decision was made to convert the Convention into a Regulation.

[518] Symeon C Symeonides, 'Contracts subject to Non-State Norms' (2006) 54 American Journal of Comparative Law 209,223

[519] Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I) http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=celex%3A32008R0593

The UK was not automatically a party to Rome I, but opted in.[520] Denmark decided not to opt in. The Rome Convention is therefore still applicable in Denmark. All other EU member states and their overseas territories automatically became parties to the Regulation. Rome I is applicable to all contracts concluded on or after 17 December 2009. Therefore, Rome I is currently the most important legislative instrument in the EU on the conflicts of law in contractual obligations.

The Rome I Regulation favours party autonomy.[521] The preamble states:

(11) The parties' freedom to choose the applicable law should be one of the cornerstones of the system of conflict-of-law rules in matters of contractual obligations.

Rome I does not cover all aspects of the contract and excludes several important areas such as status or legal capacity, obligations arising out of family relations, obligations arising out of matrimonial property regimes, obligations arising out of negotiable instruments, obligations arising out of arbitration, obligations arising out of company law, power of agency, obligations arising out of trusts, pre-contractual obligations, obligations arising out of specific insurance contracts, and evidence and procedure. For these issues national private international law continues to determine the applicable law.

Article 3 is the primary article that concerns party autonomy:

A contract shall be governed by the law chosen by the parties. The choice shall be made expressly or clearly demonstrated by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or to part only of the contract.

[520]The Protocol on the Position of the United Kingdom and Ireland on Policies in Respect of Border Controls, Asylum and Immigration, Judicial Cooperation in Civil Matters and on Police Cooperation http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:C:2004:310:0353:0355:EN:PDF
Protocol no. 4 (1997) (United Kingdom and Ireland annexed to the Treaty on European Union (TEU) and to the Treaty establishing the European Community (TEC) art. 1-4)
Commission Decision of 22 December 2008 on the request from the United Kingdom to accept Regulation (EC) No 593/2008 of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=OJ:L:2009:010:0022:0022:en:PDF

[521] Paul Lagarde, 'Remarques sur la Proposition de Règlement de la Commission Européenne sur la Loi Applicable aux Obligations Contractuelles (Rome I)' (2006) 95 Revue Critique de Droit International Privé 33

This paragraph does not mention any criteria to which the chosen law must adhere. Therefore, the chosen law does not need to have a substantive relationship to the contract. Parties are free to choose any law. As can be seen from this paragraph dépeçage is allowed. This enhances the freedom of the parties further. The second section of Article 3 allows parties to change the applicable law at any time as long as this does not affect the formal validity of the contract or the rights of third parties.[522]

The third and fourth paragraph place some limits on the effects of the chosen law. Paragraph 3 states that mandatory provisions of the putative applicable law cannot be derogated from.[523] Paragraph 4 states that mandatory provisions of community law cannot be derogated from if the otherwise applicable law is that of a Member State.[524] Article 9 specifies that mandatory laws of the forum shall be applied and that mandatory laws of the country where the contract is executed may be applied.[525] Finally, article 21 states that the public policy of the forum can override the application of the applicable law.[526] These constraints do not limit the choice of law. They merely limit the effect of the chosen law.

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[522] 2. The parties may at any time agree to subject the contract to a law other than that which previously governed it, whether as a result of an earlier choice under this Article or of other provisions of this Convention. Any variation by the parties of the law to be applied made after the conclusion of the contract shall not prejudice its formal validity under Article 9 or adversely affect the rights of third parties.

[523]3. Where all other elements relevant to the situation at the time of the choice are located in a country other than the country whose law has been chosen, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

[524] 4. Where all other elements relevant to the situation at the time
of the choice are located in one or more Member States, the parties' choice of applicable law other than that of a Member State shall not prejudice the application of provisions of Community law, where appropriate as implemented in the Member State of the forum, which cannot be derogated from by agreement

[525] 9
2. Nothing in this Regulation shall restrict the application of the overriding mandatory provisions of the law of the forum.
3. Effect may be given to the overriding mandatory provisions of the law of the country where the obligations arising out of the contract have to be or have been performed, in so far as those overriding mandatory provisions render the performance of the contract unlawful. In considering whether to give effect to those provisions, regard shall be had to their nature and purpose and to the consequences of their application or non-application.

[526] 22 The application of a provision of the law of any country specified by this Regulation may be refused only if such application is manifestly incompatible with the public policy (ordre public) of the forum.

The Regulation imposes special conditions on choice of law in consumer and employment contracts. In those cases, the choice cannot be made to deprive the consumer or employee from any mandatory provisions of the otherwise applicable law.[527] There are also special provisions for specific insurance contracts whereby only a limited number of laws constitute an acceptable choice.[528] Therefore, Rome I limits the freedom of choice in specific cases for protectionist reasons. In general commercial contracts the choice of law is not limited by such constraints.

The above concerns the choice for a state law. Would it be possible for parties to choose non-state rules as the applicable law to the contract? Article 3 of the original Rome Convention on choice of law does not mention the word state at all.[529] However, if one combines this article with article 1 it becomes apparent that what is meant is a choice between the laws of countries: *'The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries'* This was confirmed in court.[530] This has not been without controversy. Juenger writes with regards to the Rome Convention that this *'strange positivistic feature, a throwback to an earlier age, is at odds*

[527] See article 6 consumer contracts and article 8 individual employment contracts
[528] See article 7 Insurance Contracts
[529] Article 3 Rome Convention
Freedom of choice
1. A contract shall be governed by the law chosen by the parties. The choice must be expressed or demonstrated with reasonable certainty by the terms of the contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.
http://eur-lex.europa.eu/legal-content/EN/TXT/?uri=URISERV:l33109
[530] An example would be *Halpern v Halpern* [2007] EWCA Civ 291
This case concerned inheritance issues whereby the parties had agreed on Jewish law as the applicable law.
Lord Justice Waller of the Court of Appeal stated:
'the starting point for the Rome Convention was a point accepted by all countries party to that convention, that laws could not exist in a vacuum; by 'laws' were meant laws enforceable in the courts of countries whether parties to the Convention or other states'
And (quoting Dicey, Morris & Collins, the Conflicts of Law, 14th Edition (Sweet & Maxwell 2006)
'Article 1(1) of the Rome Convention makes it clear that the reference to the parties' choice of the law to govern a contract is a reference to the law of a country. It does not sanction the choice or application of a non-national system of law, such as the lex mercatoria or general principles of law'
For the full text see:
http://www.nadr.co.uk/articles/published/ArbitLRe/Halpern%20v%20Halpern%202007.pdf

with current commercial and judicial practice' and is an '*anachronism'* [531] This might be a bit of a hyperbole considering that few private international laws do allow for this choice.

A seminal case in the UK also dealt with this issue.[532] In the *Bank Shamil of Bahrain v. Beximco* the choice of law clause stated that the contract was subject to the Sharia and would be governed in accordance with English law. Both the trial court and the Court of Appeal ruled that English law was the applicable law. The Court of Appeal stated that under the Rome Convention only a choice for the law of a country is permissible.[533]

The original proposal for the Rome I Regulation read in its article 3 (2): *'Parties shall be allowed to choose as the applicable law the principles and rules recognised internationally or in the community.'*[534] According to the accompanying explanatory memorandum, this wording meant to authorise a choice for the UPICC, PECL, or a possible future Community instrument. It excluded the lex mercatoria which is not precise enough and private codifications that are not adequately recognised by the international community.[535] The latter refers to standard terms and conditions elaborated by trade associations. On a side note it is interesting to see that the authors made a distinction between the lex mercatoria and codified non-state rules and did not assimilate the two. It seems that in their view the lex mercatoria equals the narrower definition of unwritten trade usages and general principles. Busseil

[531] 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 381,384

[532] *Shamil Bank of Bahrain EC v Beximco and others* [2004] EWCA Civ 19, English Court of Appeal

[533] See for more on this case for instance:
Jason C T Chuah, 'Impact of Islamic Law on Commercial Sale Contracts – A Private International Law Dimension in Europe' (2010) 4 European Journal of Commercial Contract Law 191
Jason C T Chuah, 'Private international law - choice of law - Islamic law' (2004) 10 Journal of International Maritime Law 125

[534] Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) COM (2005) 650 final),
http://eur-lex.europa.eu/LexUriServ/LexUriServ.do?uri=COM:2005:0650:FIN:EN:PDF

[535]Comments on the European Commission's Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) - Max Planck Institute for Comparative and
International Private Law (2007) 226, 230
http://scholarship.law.duke.edu/cgi/viewcontent.cgi?article=2612&context=faculty_scholarship
Last accessed: 01 April 2016

argues that deciding the legitimacy of specific non-state rules should be left to the national legislator.[536] On the other hand if the legislation does not include any criteria this could entail that biased or unprecise non-state rules could be chosen. The effects of this choice would be limited by public policy, but this would raise unpredictability for the parties. This proposal would have given parties considerable freedom to choose non-state rules, even if restrictions were placed on what choice could be made.

The final version of the Rome I Regulation no longer mentions the option to choose non-state rules as the law of the contract. It is unclear why this choice was made. There are no reported documents on when this decision was discussed. It simply seems to have fallen by the side. So would parties have any possibility to use non-state rules in the final version of Rome I?

The first paragraph of Article 3 does not give any context to the word law. Based on this paragraph it could be argued that a choice for non-state rules is acceptable. However, if one reads the entire Regulation the grounds for this position are not that firm. The Preamble at different points refers to the law of a country. Nowhere does the Preamble specifically state that the choice is limited to the law of a country, but by regularly using this wording it is apparent that this is what is meant. This becomes even more obvious further on in article 3. Paragraph 3 reads:

> Where all other elements relevant to the situation at the time of the choice are located in a country **other than the country whose law has been chosen**, the choice of the parties shall not prejudice the application of provisions of the law of that other country which cannot be derogated from by agreement.

This implies that what is meant in the first paragraph by law is the law of a country. Consequently, this would exclude a choice for non-state rules as the law of the contract.

[536]Guillaume Busseuil, 'L'Avenir des Principes Unidroit Relatifs aux Contrats de Commerce International et des Principes Européens du Droit du Contrat : du Droit Mou ou Droit Dur ?' [2004] Centre de Droit Civil des Affaires et du Contentieux Economique 1,12 http://www.glose.org/CEDCACE4.pdf Last accessed: 27 February 2016

The Preamble states *this Regulation does not preclude parties from incorporating by reference into their contract a non-state body of law or an international convention.* Parties can thus incorporate non-state rules, but they cannot choose these as the applicable law. An exception is made for an eventual future EU contract instrument which can be chosen as the applicable law.[537] An example of such an instrument would have been the now defunct Common European Sales Law.[538] It is not clear what the exact scope of this statement in the Preamble is. It is not an article in the Regulation. It is not sure what is meant by a non-state body of law. This should be interpreted wider than the text of the proposed article 3 which allowed a choice for non-state rules, but excluded for instance the lex mercatoria. [539] At the same time the exact legislative authority of this statement is not explicit.[540] Is it so that the non-state rules would be simple contractual rules when applied by reference or would they be considered an applicable law (just not the sole applicable law)? [541] The answers to these questions are not (yet) clear. In the practical application this should not matter as much. The court should give primacy to the contract and hence to any incorporated non-state rules. The applicable state law should then be used for gap filling and for all mandatory provisions. It is also not evident whether the incorporated non-state rules should be interpreted in light of the applicable state law or vice versa. The exact weight that should be accorded to non-state rules incorporated by reference is thus not clarified further. This is left to the interpretation of the courts of the EU Member States.

[537] *(14) Should the Community adopt, in an appropriate legal instrument, rules of substantive contract law, including standard terms and conditions, such instrument may provide that the parties may choose to apply those rules.*

[538] The CESL is currently being reworked into two directives in the area of ecommerce. These would thus not be non-state rules. The idea of a voluntary contract instrument is not being taken forward for the foreseeable.

[539] Jason C T Chuah, 'Impact of Islamic Law on Commercial Sale Contracts – A Private International Law Dimension in Europe' (2010) 4 European Journal of Commercial Contract Law 191, 195

[540] Ibid

[541] Olugbenga Bamodu, 'The Rome I Regulation and the Relevance of Non-State Law' in Peter Stone and Youseph Farah (Editors), *Research Handbook in EU Private International Law* (2015 Edward Elgar Publishing) 221/222

Muir Watt explains the absence of the possibility to choose non-state rules on the basis that there is a presumption that contract laws of (liberal) states are interchangeable because they are based on the same societal needs, and that as non-state rules are not based on those needs they are not interchangeable with state laws.[542] Muir Watt argues that this argument is not altogether logical because non-state rules could be qualitatively better than a given state law, and more importantly if the mandatory rules of the states are to be applied anyway, then it really does not matter whether non-state rules are based on those same societal needs. It is also dangerous to assume that the sole fact that the chosen law is a state law means that it is based on the same societal needs.[543]

International conventions can be considered as non-state rules in those countries that have not ratified these. For instance, in an international sale contract the law of France can be chosen as the applicable law under the Rome I Regulation. The court will then apply the CISG which France has ratified. If the parties had chosen the CISG itself as the applicable law this would not have been a valid choice.[544] Yet, the law that would be applied is the same in both cases. This indicates that completely disallowing a choice of law for non-state rules is not altogether logical.

Under the Rome I Regulation, the applicable law when the parties have not made a choice of law is discussed in article 4. The general rule is that the law of the country where the party that performs the characteristic performance has his habitual residence (article 4.2) is the applicable law. The characteristic performance is usually the non-pecuniary performance. Article 4.1 lists special type contracts to which a specific law is applicable. In the case of a sales contract the law of the country where the seller has his habitual residence is the

[542] Horatia Muir Watt, 'Party Autonomy' in international contracts: from the making of a myth to the requirements of global governance' (2010) 6 European Review of Contract Law 250, 261
[543] Ibid, 264/265
[544] Olugbenga Bamodu,'The Rome I Regulation and the Relevance of Non-State Law' in Peter Stone and Youseph Farah (Editors), *Research Handbook in EU Private International Law* (2015 Edward Elgar Publishing) 234

applicable law. Article 4.3 furthermore states that if another country is closer connected to the contract, then that law shall be the applicable law. Article 4.4 states that if the applicable law cannot be found under paragraphs 1 and 2 then this shall be law of the country with which the contract has the closest connection. It becomes clear from reading article 4 as well as article 5 (the law applicable to contracts of carriage), article 6 (consumer contracts), article 7 (insurance contracts), and article 8 (individual employment contracts) that the otherwise applicable law under Rome I always refers to the law of a country. Every single paragraph of these articles uses the wording 'law of the country' to determine the applicable law. In absence of a choice of law clause the Rome I Regulation can thus only lead to the application of the law of a country.

4.6 International Legislation

This part looks at international choice of law legislation, party autonomy, and international commercial contracts. There have been several attempts to create choice of law conventions, but so far these attempts have met with limited success. The focus is on whether these instruments allow a choice for non-state rules.

4.6.1. The Inter-American Convention on the Law Applicable to International Contracts

The Inter-American Convention on the Law Applicable to International Contracts was drafted by the Organisation of American States to create a uniform choice of law regime in the Americas.[545] Article 7 discusses the applicable law: '*The contract shall be governed by the law chosen by the parties.'* There is no need for a substantive relationship. It does not specifically say that this law must be a state law. The Spanish version uses the word derecho which is a wider concept than the word ley. In arbitration regulations the word derecho is

[545] Signed by Bolivia, Brazil, Venezuela, Mexico, and Uruguay, but only ratified by Mexico, and Venezuela: http://www.oas.org/juridico/english/sigs/b-56.html
Note that whereas current Brazilian internal law has a restrictive view on party autonomy this convention would have significantly extended the scope of party autonomy in Brazil.

often used instead of ley to indicate a broader approach to which laws can be chosen as the applicable law. Article 17 defines the word law*: 'For the purposes of this Convention, "law" shall be understood to mean the current law in a State, excluding rules concerning conflict of laws*.' This would indicate that non-state rules are excluded by this definition. The issue was debated amongst scholars and no consensus was reached on whether or not a choice for non-state rules would be acceptable under the convention. [546]

Article 9 determines the applicable law in absence of a choice of law*: 'If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties.'* This unmistakably refers to the law of a state and excludes non-state rules. Article 9 continues with: *'shall also take into account the general principles of international commercial law recognized by international organizations.'* Some non-state rules would thus be applied regardless of whether they are part of the contract. This might include the UPICC as these have been drafted and recognised by international organisations (drafted by UNIDROIT and endorsed by UNCITRAL.) This OAS Convention was only ratified by Venezuela and Mexico so the exact extent of party autonomy under this instrument has not been subject to much further scrutiny. Mexico and Venezuela both allow for non-state rules as a choice of law although the exact scope for this has not been defined completely.[547] This indicates that a choice for non-state rules could be permissible under the Convention.

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[546] For instance, Professor Ralf Michaels believes that the article intended to refer to state law only (See Ralf Michaels, 'Non-State Law in the Hague Principles of Choice of Law in International Contracts'(2014) 7 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386186) whereas Professor Juenger is convinced that the article can be interpreted to allow for non-state rules as a choice of law (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) Professor Fresnedo de Aguirre is in agreement that non-state rules can be chosen 'within certain limits' (Cecilia Fresnedo de Aguirre, 'Party Autonomy - A Blank Cheque?' (2012) 17 Uniform Law Review 655, 666)
If one compares the language in the Convention to that of the UNCITRAL Arbitration Rules, whereby the word law is specifically meant to include non-state rules, it seems as if the language of the Convention should be interpreted to allow a choice for these.

[547] Claudia Madrid Martínez, 'Notas Sobre La Lex Mercatoria: entre el Silencio del Legislador Europeo y el Silencio de los Estados Americanos' in J. Moreno Rodríguez and D. Fernández Arroyo

4.6.2. The Hague Convention on the Law Applicable to the International Sales of Goods

The Hague Convention of 1955 (Convention on the Law Applicable to the International Sale of Goods) applies to conflicts of law in the international sale of goods.[548] It entered into force in 1964 and currently has 8 members.[549] The convention allows parties to choose the applicable law. Article 2 mentions only the option to choose the domestic law of a country.[550] This article leaves no room to choose non-state rules. There are no additional articles in this (relatively short) convention that allude to the possibility to choose non-state rules or incorporate these in the contract. It can be concluded that under this Convention a choice of law for non-state rules is not permissible.

Article 3 determines that the law applicable to the contract in the absence of a choice made by the parties is the law of the state where the seller has his place of business, except in some specific cases when it is the law of the country where the buyer has his place of business.[551] This territorial determinant excludes any possible application of non-state rules.

(editors) *Derecho internacional privado y Derecho de la Integración. Libro Homenaje a Roberto Díaz Labrano* (CEDEP 2003) 333

[548] This includes most goods with the exception of sales of securities, sales of ships and of registered boats or aircraft, or to sales upon judicial order or by way of execution
http://www.hcch.net/index_en.php?act=conventions.text&cid=31

[549] These are Denmark, Finland, France, Italy, Norway, Sweden, Switzerland, and Niger.
http://www.hcch.net/index_en.php?act=conventions.status&cid=31

[550] Article 2
A sale shall be governed by the domestic law of the country designated by the Contracting Parties. Such designation must be contained in an express clause, or unambiguously result from the provisions of the contract.
Conditions affecting the consent of the parties to the law declared applicable shall be determined by such law.
http://www.jus.uio.no/lm/hcpil.applicable.law.sog.convention.1955/2.html
(unofficial translation of the Convention)

[551] Article 3
In default of a law declared applicable by the parties under the conditions provided in the preceding Article, a sale shall be governed by the domestic law of the country in which the vendor has his habitual residence at the time when he receives the order. If the order is received by an establishment of the vendor, the sale shall be governed by the domestic law of the country in which the establishment is situated.
Nevertheless, a sale shall be governed by the domestic law of the country in which the purchaser has his habitual residence, or in which he has the establishment that has given the order, if the order has

The Hague Convention on the Law Applicable to Contracts for the International Sale of Goods of 1986 was supposed to replace the 1955 Convention. This document covers choice of law in article7.[552] The wording used in the article is *'a contract of sale is governed by the law chosen by the parties.'* Article 8 concerns the applicable law in absence of a choice of law clause. In this article the wording is different and refers expressly to the law of a state.[553] This indicates that a wider interpretation of the word law could be used when applying article 7. Yet, if one looks at article 15 the word law is defined further: '*In the Convention "law" means the law in force in a State other than its choice of law rules.'* This would lead to a tentative conclusion that under this instrument a choice for non-state rules would not be possible. This convention has not entered into force and given its completion date this is not likely to happen in the future so a definite answer cannot be given.

4.6.3 The Hague Principles on Choice of Law in International Commercial Contracts

The Hague Principles on Choice of Law in International Commercial Contracts (The Hague Principles) were elaborated by the HCCH. The elaboration process started in 2009 when a Working Group was established. The Hague Conference decided on this undertaking because there currently is a great deal of ambiguity regarding choice of law. Whether a choice of law is respected varies between countries, as was also discussed in the preceding sections of this chapter. Instead of elaborating a convention the HCCH decided on drafting a set of Principles. Earlier research indicated that the probability that a convention would be

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been received in such country, whether by the vendor or by his representative, agent or commercial traveller.
In case of a sale at an exchange or at a public auction, the sale shall be governed by the domestic law of the country in which the exchange is situated or the auction takes place.
http://www.jus.uio.no/lm/hcpil.applicable.law.sog.convention.1955/3.html

[552] http://www.hcch.net/index_en.php?act=conventions.text&cid=61

[553] To the extent that the law applicable to a contract of sale has not been chosen by the parties in accordance with Article 7, the contract is governed by the law of the State where the seller has his place of business at the time of conclusion of the contract.
http://www.hcch.net/index_en.php?act=conventions.text&cid=61

ratified by a large number of countries was small.[554] The Principles can be used by courts or arbitral tribunals as guidance, or by states as a model law. The Hague Principles are intended for commercial contracts and exclude consumer contracts from their scope. Contrary to, for instance, the UPICC, The Hague Principles defines what is meant by an international contract. In article 1(2) the definition given is that *'for the purpose of these Principles, a contract is international unless the parties have their places of business in the same State and the relationship of the parties and all other relevant elements, regardless of the chosen law, are connected only with that State.'*[555] The Working Group thus opted for a broad definition.

Choice of law is discussed in the second article which is entitled *freedom of choice*. According to this article:

1. A contract is governed by the law chosen by the parties.
2. The parties may choose-
a) The law applicable to whole contract or to only part of it; and
b) Different laws for different parts of the contract.
3 The choice may be made or modified at any time. A choice or modification made after the contract has been concluded shall not prejudice its formal validity on the rights of third parties.
4. No connection is required between the law chosen and the parties or their transaction.[556]

The main principle is party autonomy without a substantial relationship requirement. The term law is not specified further. The official commentary stipulates that this particular article means the law of a State.[557] These official notes also discuss that The Hague Principles are not applicable in contracts between businesses belonging to separate territorial units of one nation state (unless domestic law says otherwise). The notes do not specify whether or not the parties can choose the law of such a territorial unit, provided that they themselves are from different countries.

[554] Symeon C Symeonides, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61 American Journal of Comparative Law 873
[555] The Hague Principles on Choice of Law in International Commercial Contracts, http://www.hcch.net/index_en.php?act=conventions.text&cid=135
[556] Ibid
[557] Ibid

So far this is familiar territory, but Article 3 pushes the concept of party autonomy further and explicitly allows the parties to choose non-state rules:

'Article 3- Rules of law
The law chosen by the parties may be the 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.'[558]

Three important things should be noted about this article. First of all, it allows a choice of law for non-state rules. Secondly, the article itself does not define what exactly rules of law are although it does give some criteria to establish which rules constitute an acceptable choice. These guidelines seem to disallow rules elaborated by trade associations and other professional bodies as these are not neutral. This is supported by the official commentary which states that neutral should be explained as a neutral, impartial body that represents diverse legal, political, and economic perspectives. A set of rules made by an impartial, neutral body also excludes the lex mercatoria, general principles of law, or other such formula. Thirdly, this article leaves it up to the forum whether or not such a choice is possible. The last point is a drawback as this brings an element of uncertainty to the contract. Nor was it really necessary as The Hague Principles are a model law and states could adapt the provisions as they see fit.

In the official notes rules of law are defined further as rules which do not emanate from state sources, thus equating these with what is defined in this thesis as non-state rules. The official notes elaborate the criteria mentioned above and give some examples of acceptable choices. These mention that international treaties and conventions are an acceptable choice as are non-binding instruments formulated by established international bodies and independent groups of experts. The instruments mentioned by name are the UNIDROIT Principles, the PECL, and the CISG. Finally, the notes also mention that as the number of non-state rules is growing this list should not be considered exhaustive. Professor Michaels questions these conditions as

[558] Ibid

they are vague and imprecise.[559] What is a set of rules and why can only sets of rules be chosen? What is generally accepted and neutral? [560] The answers to these questions cannot be found in The Hague Principles or in the official comments.

The official commentary gives no solution on gap filling if the applicable non-state rules are not complete, but reminds the parties that they should take this into account. As The Hague Principles do not cover the applicable law in the absence of a choice of law clause this issue is not dealt with further. This could be problematic. Non-completeness is an intrinsic feature of non-state rules as none can be said to be complete. So in allowing non-state rules as a choice of law this incompleteness is something which will inherently come up. Therefore, if the parties choose a non-state law, but no other applicable law it would be up to the forum to apply its private international law to find the applicable law to fill in the gaps. This could be the lex fori or the otherwise applicable law. It would have been better if the Principles could have included an article indicating how any gaps should be filled. This would have provided more certainty as there would be a uniform approach to this issue. In the case of a choice for state laws this need is less urgent as these are much more complete.

Michaels notes that in the original working draft no limits were placed on which non-state rules could be chosen. [561]As this proved too controversial the Working Group then added the conditions set forth in article 3. Michaels believes this to be the wrong decision. If this choice is made possible, then no conditions should be placed on it. This would give complete freedom of choice to the parties and take away uncertainty on which rules can or cannot be chosen.[562] However, Symeonides argues that placing these conditions was the right approach: adding the requirements excludes the potential application of trade branch rules which can

[559] Ralf Michaels, 'Non-State Law in The Hague Principles of Choice of Law in International Contracts'(2014) 7
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386186
[560] Ibid
[561] Ibid
[562] Ibid

favour one of the parties too strongly.[563] Fresnedo de Aguirre also agrees that there need to be limits on which rules can be chosen in order to protect the rights of the weaker party.[564] However, this could be solved by relying on the application of mandatory rules and international public policy. The counter argument is that too much reliance on these concepts makes the lex fori stronger and reduces the effects of the applicable law. This intervenes with the wishes of the contracting parties and raises unpredictability. In the end adding criteria for which rules can be chosen is probably a wise decision. In the interests of predictability and uniformity, it would have been better if these criteria had been elaborated further. This could include a comprehensive list of which rules can be chosen that is annually updated.

Although The Hague Principles represent a large step forward in extending party autonomy to non-state rules it should be kept in mind that an eventual effect from the Principles will not be felt for some time to come. This effect will depend on whether states adopt or use The Hague Principles. The beginning is promising as Paraguay has already adopted the Principles into their new private international law legislation.[565]

4.7 Party Autonomy and Non-State Rules

The previous parts of this chapter explored the concept of party autonomy in the context of non-state rules. This part discusses the objections raised against extending party autonomy to non-state rules and explores whether or not these objections are justified. The main objections include lack of protection, lack of predictability for the parties, difficulties in establishing the content of non-state rules, and lack of completeness.

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[563] Symeon C Symeonides, 'The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments' (2013) 61 American Journal of Comparative Law 873, 893

[564] Cecilia Fresnedo de Aguirre, 'Party Autonomy - A Blank Cheque?' (2012) 17 Uniform Law Review 655,667

[565] Paraguay Promulgates the Law based on the Draft Hague Principles on Choice of Law in International Commercial Contracts
http://www.hcch.net/index_en.php?act=events.details&year=2015&varevent=392
Last accessed: 15 April 2016

The objections to a 'contract without a law'[566] include that such far-reaching autonomy could have negative consequences for the protection of the rights of the parties.[567] Non-state rules in this view would not accord the same amount of protection that a state law would. This would especially be problematic if the contracting parties have unequal bargaining power. This can for example be seen in maritime transport contracts where the carrier imposes his standard conditions on the owner of the goods as there is often a dis-balance of power between these two.[568]

Yet, it is not necessarily so that the rights of the parties would inherently be better protected by choosing a state law. The same concerns that a 'contract without a law' raises can come into play when parties chose a foreign law. It is not always possible to know in advance with sufficient certainty whether the foreign law protects these rights. Some states have a more laissez-faire approach to protectionist issues. This is why (international) public policy and mandatory laws play an important part in private international law. These can protect the parties against an imbalance of rights in non-state rules in the same way as they can against an imbalance of rights in a foreign state law. The forum has the tools to protect the parties without having to discount a choice of law clause for non-state rules. The fact that non-state rules fold before mandatory provisions already provides sufficient guarantees of protection.

Symeonides is sceptical about allowing parties to choose non-state rules as the law of contract: *'Nevertheless, history cannot – and the merchant community will not – protect the*

[566] It should be noted that the concept of a contract without a law is not a common law concept. It is best translated as a contract not governed by a state law. It does not mean that the contract is not governed by any law at all. It merely indicates the absence of a state law as the governing law according to French private international law. The latter is called a 'contrat sans droit' whereas the first is referred to as a 'contrat sans loi.' Perhaps this is best translated as a contract without law and a contract without a law. A contract without law would be a contract which contains no reference to any law whatsoever, be it a state law or non-state rules. A contract without a law means a contract without any reference to a state law but not without any law at all
(See Lena Gannagé, 'Le Contrat Sans Loi en Droit International Privé' (2007) 11 Electronic Journal of Comparative Law 1, 6)

[567] Ibid

[568] Cecilia Fresnedo de Aguirre, 'Party Autonomy - A Blank Cheque?' (2012) 17 Uniform Law Review 655,667

individual contractor, much less the consumer, of the 21st century, the contemporary state can and will.'[569] He discusses that there is a lot of attention (and praise) for those non-state rules which have been designed by respected institutions like UNIDROIT and UNCITRAL, but that it should not be forgotten that many instruments are not like those 'paragons' of transnational commercial law and are rather utilitarian instruments drafted by organisations that have a direct (financial) stake in the outcome of disputes.[570] These would for instance be the rules promulgated by banking clearing houses and (commodity) trade associations.[571]

These instruments are mainly there to protect the business interests of a specific group instead of providing fair and balanced rules that promote uniformity in international commerce. There is a tendency for these instruments to be biased towards the service provider or the seller, who is a member of the association.[572] Canaris said on the subject that it is not the quality of the UPICC themselves which are in question, but that the recognition of the UPICC as a choice of law sets precedent for the recognition of more questionable instruments that are not of a similar quality.[573] Canaris argues that as scholars concentrate on instruments which were drafted by respected institutions this leads to a general assumption that the quality of non-state rules is high.[574] It should be noted that standard contract terms set up by trade associations have a long history and can count on strong support among merchants who resort to these far more frequently than they do to for instance the UPICC. The picture is therefore not all black and white.

Professor Snyder discusses this issue in his seminal article on 'private law making.'[575] Here he discusses three types of private law making. The first type is private law making by

[569] Symeon C Symeonides, 'Contracts subject to Non-State Norms' (2006) 54 American Journal of Comparative Law 209,210
[570] Ibid,222
[571] Ibid
[572] Ibid
[573] As quoted in David Oser, *The Unidroit Principles of International Commercial Contracts: a Governing Law* (Martinus Nijhoff 2008) 24
[574] Ibid
[575] David V Snyder, 'Private Lawmaking' (2003) 64 Ohio State Journal 371,371

institutions such as ALI. The instruments drafted by these organisations need to be adopted by a legislature or applied by courts. There is a public approval needed for these to become law. The second type he discusses are the rules made by trade associations. These usually only affect a limited number of parties: only direct participants in the trade. These often do not affect outsiders. The third category he describes is that of rules which have an effect on other parties beyond the direct participants in a specific trade.

Snyder discusses several examples in this third category. The first one he discusses is rules on checks. These were already mentioned in section 4.4.2. The UCC has given clearing houses power to impose their rules whether or not all parties have agreed to use these.[576] The rules of those clearing houses become law for all cheque users. These are non-state rules that people cannot avoid unless they stop using cheques which is of course a practical impossibility for most. The other example, which is the most pertinent to this thesis as it affects international commerce, is that of the UCP. The UCP are drafted by a private organisation (ICC) and imposed by other private organisations (banks). The UCP are imposed not just on the parties to the documentary credit, but also involve third parties such as the carrier of the goods who issues the bill of lading.[577] Whether all parties wish to adhere to the UCP is immaterial. They are imposed by the banks. It is virtually impossible for parties to avoid them unless they do not take out a letter of credit which would hamper their business. Officially the UCP are variable, yet in practice the disproportionate difference in bargaining power between a bank and most traders would make this impossible. Therefore, for all intents and purposes the UCP impose themselves as law upon the contractual parties despite being non-state rules.

There is the argument on the one hand that mandatory provisions and public policy are enough to ensure that the rights of the parties are respected. There is the counter argument

[576] (b) Federal Reserve regulations and operating circulars, clearing-house rules, and the like have the effect of agreements under subsection (a), whether or not specifically assented to by all parties interested in items handled

[577] David V Snyder, 'Private Lawmaking' (2003) 64 Ohio State Journal 371, 391

that some non-state rules are drafted to protect the interests of only one of the parties. This becomes especially problematic when these rules impose themselves upon parties that have no knowledge of these rules or have no choice but to consent to their application, as there is no practical alternative available. Non-state rules could consequently be especially problematic as a choice of law if one of the parties did not have any real choice in whether or not to accept these.[578] If non-state rules are permitted as a choice of law without any reference to an applicable state law this would increase the power of these rules and their promulgators. This might be to the detriment of the rights of the weaker parties.

The second argument which is used against allowing a choice for non-state rules is that the unfamiliarity of the court with their application could lead to unexpected results. The choice of a foreign law does not necessarily represent a safer choice for the parties. Lando refers to a study made by Max Rheinstein who analysed 40 cases in which American courts applied a foreign law. Rheinstein found that out of the 40 cases in 32 instances the law was not applied correctly, and in 4 of the remaining cases it was doubtful whether the application of the foreign law was correct.[579] Even if the parties know the foreign law well the result could be different than expected as application by the court could yield different results.

Moss observes:

> 'While the degree of freedom available to the parties would not increase significantly by permitting to choose a non-state law, the degree of uncertainty would increase. This is only in part due to the difficulty of ascertaining the exact content of the lex mercatoria. Even assuming that the parties chose a codified restatement of the lex mercatoria, such as the UNIDROIT Principles or the PECL, there would be considerable uncertainty in respect for example of gaps and legal standards that need concretisation by the judge. These restatements have to be interpreted autonomously and in the light of principles of international trade: but how can any gaps be integrated or legal standards interpreted in the cases where there are no underlying principles and no generally acknowledged principles in international trade that permit autonomous interpretation?'[580]

[578] Kerry Lynn Mackintosh, 'Liberty, Trade, and the Uniform Commercial Code, When Should Default Rules Be Based on Business Practices?' (1996) 38 William & Mary Law Review 1465, 1470
[579] Ole Lando, 'Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification' (2003) 8 Uniform Law Review 123
[580] Giudetta Cordero Moss, *Norwegian National Report to the XVII Congress of the International Academy of Comparative Law Contracts without a Proper Law in Private International Law and Non-*

Moss raises two important issues: first, the content of non-state rules can be difficult to ascertain and secondly, even if the first problem is circumvented by choosing codified non-state rules there are no clear general principles for an autonomous interpretation. Therefore, the instruments might not be interpreted in the way they themselves prescribe (autonomous and in the light of international commerce), but rather in the same way as the lex fori would be interpreted. Both of these issues lead to uncertainty for the parties.

This raises the important point of interpretation. There is no real (body of) (international) (case) law on how non-state rules should be interpreted. Yet, this problem of interpretation is not exclusive to non-state rules as was seen from Rheinstein's study. Problems of interpretation can be an issue in the application of foreign laws as well. It could be conceded that non-state rules are applied less often (especially in court litigation) and that there is not enough case law or other materials available to guide the courts in interpreting non-state rules. This would especially be true for unwritten non-state rules whose content is the most ambiguous. On others, such as the UNIDROIT Principles the wide amount of material available makes it more difficult to maintain this standpoint. Non-state rules do come up with some frequency in arbitration and although most cases are not published a fair amount of arbitral awards on the application and interpretation of non-state rules can be found.

The other issue that Moss mentions is lack of completeness. Although Moss uses the expression lex mercatoria it is evident from the above quote that she also includes codified non-state rules in this. As the lex mercatoria cannot be considered complete it is necessary to use a state law to fill in these gaps.[581] This can be seen in practice. An example is an ICC case which was to be decided by the lex mercatoria as expressed by the UPICC.[582] At the time the

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State Law (2006) *as* quoted in Lena Gannagé, 'Le Contrat Sans Loi en Droit International Privé' (2007) 11 Electronic Journal of Comparative Law 1,16

[581] Jürgen Basedow, 'Lex Mercatoria and the Private International Law of Contracts in Economic Perspective' (2007) 12 Uniform Law Review 697, 706

[582] ICC Award No. 11018 (2002)
Abstract can be found: http://www.unilex.info/case.cfm?pid=2&do=case&ID=1420

UPICC did not cover the issue of illegality so the tribunal resorted to French law for this.[583] Thus although non-state rules were applied ultimately recourse to a state law was necessary to supplement the non-state rules. This decreases predictability for the parties as they might not know which state law will be applied and the interaction between state law and non-state rules can lead to unexpected results. While this is true there are also cases when a foreign law chosen by the parties would be supplemented by the lex fori or the otherwise applicable law. Furthermore, parties can consider this issue in advance and decide to use non-state rules for parts of the contracts whereas they will have other parts governed by a state law or other non-state rules (depeçage). This could be difficult as one of the reasons why the parties might choose non-state rules is that they could not agree on a state law in the first place. It is certainly so that non-state rules are less complete than most state laws and this issue is germane to a choice for non-state rules.

This section explored the arguments against extending party autonomy to non-state rules. The main objections are: balance of the rights of the parties (which includes protection of weaker parties), the undemocratic element of non-state rules (no public sanction), the difficulties in establishing the content, the interpretation of non-state rules, and their lack of completeness.

Are these arguments enough to disallow a choice for non-state rules? First of all, many objections against extending party autonomy to non-state rules are not inherent to just these, but also occur when a foreign law is chosen. A foreign state law might not provide the

583 *'The lex mercatoria is not yet very elaborated on nullity as a consequence of illegality. For instance, the UNIDROIT Principles of International Commercial Contracts or the Principles of European Contract Law do not deal with invalidity arising from illegality. However, many principles of the lex mercatoria related to nullity in general are relevant in the present case. Moreover, to the extent necessary, French law that is very elaborate on the issue of nullity will be taken into consideration as an additional source of law.'*
http://www.unilex.info/case.cfm?pid=2&do=case&id=1420&step=FullText
The 2010 version of the UNIDROIT Principles does cover this issue
See for instance: Michael Joachim Bonell, 'The New Provisions on Illegality in the UNIDROIT Principles 2010' (2011)16 Uniform Law Review 517
Giles Guniberti, 'Le Nouvel Article 3.3.1 Des Principes Unidroit 2010 Sur le Contrat Violant une Règle Impérative: un Regard Critique du Point de Vue du Droit International Privé' (2013)18 Uniform Law Review 490

protection that the lex fori does. Mandatory rules and public policy can protect the rights of the parties. The more mandatory laws and public policy exceptions there are the more it raises the importance of the lex fori and thus decreases the predictability of the outcome of the dispute. The more safeguards there are in place to protect the parties, the less it protects their freedom of choice. It is in between these that a balance must be found.

The lack of public approval of non-state rules is moot as the forum has not publicly approved a foreign state law either. Of course the foreign state law has had public approval elsewhere. However, does that public approval meets the standards of the forum? What of a foreign law passed in an undemocratic state? Is that public approval more acceptable than the private approval of non-state rules? Especially if those rules are drafted by a neutral organisation composed of members from a wide array of countries? This is rather a philosophical argument more that it is a solid reason for disallowing a choice of law clause for non-state rules. This is even more so if one takes into account that some non-state rules such as international conventions might have precisely this public approval in other states like the example of the CISG shows (non-state rules in England, publically approved law in France).

Non-state rules have popularity backing due to their bottom up approach. If non-state rules are the product of the international merchant community, then these reflect the societal needs of that community, and these needs could be just as valid as the societal needs of a nation. There is competition between different non-state rules and those that are chosen regularly have popular backing and therefore a type of democratic support. If merchants are not happy with certain non-state rules they will simply not use them or they might make use of the opportunity to develop new rules. If specific non-state rules are used frequently that must mean that at least a large number of participants are happy with these.[584] This does not address those situations where there is a power disparity between the parties. In that case it is possible to set up an alternative system in theory, but not in practice. This can be problematic.

[584] David V Snyder, 'Private Lawmaking' (2003) 64 Ohio State Journal 371,425

The lex fori can be used to ensure there is a healthy and competing market for non-state rules.[585] The state could provide a legal structure in which non-state rules can operate and which sets certain safeguards.[586] Legislation could allow certain types of non-state rules and even mention by name those which are permissible as a choice of law in order to guarantee a certain baseline in quality.

Gannagé observes that the academics who contributed to the reports that are at the basis of her article have a strong preference for codified non-state rules as opposed to uncodified non-state rules because these are less predictable as their content is not as clear.[587] Imposing conditions would diminish the freedom of the parties to choose the non-state rules they wish. Ambiguity in what is allowed could also decrease security for the parties as they cannot be sure whether their choice will be honoured, unless the legislation is explicit enough.[588] If parties cannot be sure of the outcome they would be less inclined to choose non-state rules. Even if this might be their preferred choice aversion of ambiguity could stop merchants from making that choice.

Non-state rules can be more flexible than state laws. It was argued in chapter 2 that one of the reasons why international organisations elaborate non-state rules instead of binding instruments is that these are quicker to draft and easier to amend. This means that these instruments are quicker to respond to certain concerns of the market and might better represent the view of the international business community than some state laws do.

The lack of completeness of non-state rules is a serious issue. Non-state rules are less complete than state laws. Private international law could propose how non-state rules will be

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[585] Ibid,444
See also: Gillian K Hadfield, 'Privatizing Commercial Law' (2001) 24 Regulation Magazine 40, 45
[586] In the previous section it could be seen that The Hague Principles on the Conflicts of Law, the Oregon state legislation and the original proposal for the Rome I legislation all three include conditions on what type of non-state rules are allowed as a choice of law.
[587] Lena Gannagé, 'Le Contrat Sans Loi en Droit International Privé' (2007) 11 Electronic Journal of Comparative Law 1, 17/18
[588] Ralf Michaels, 'Non-State Law in The Hague Principles of Choice of Law in International Contracts' (2014)
http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386186

completed. The original proposal to the Rome I Regulation included that if parties choose non-state rules any matters not settled by these would be governed by *'general principles underlying them, or failing such principles, in accordance with the law applicable in the absence of a choice under this Regulations.'*[589] There is the issue of how these general principles would be discovered and interpreted, yet the inclusion of such a gap filling rule in private international law would help to deal with the problem of incompleteness. It does not solve it completely as it does leave a degree of insecurity. Whether the forum resorts to private international law to find the putative applicable law, uses the lex fori (as they would if a foreign applicable law is not complete), or applies general principles of law would in all cases lead to a degree of unpredictability. This cannot be avoided as long as non-state rules do not cover every single issue that could arise in international commercial contracting.

Concluding there are some serious objections against allowing a choice of law for non-state rules. Most of these also apply when a foreign state law is chosen. Others could be mitigated by guidance from the lex fori. The lack of completeness and lack of guidance on how these non-state rules should be interpreted are the most substantial objections as they lead to uncertainty on how the law will be applied. In most cases either the lex fori or the otherwise applicable law would be used to resolve this, but that does not lower unpredictability as to how the law and non-state rules would interact, and how they would be interpreted and applied by the court. The same is true with regards to uncodified non-state rules. Their content is difficult to establish. The latter issue is analysed more thoroughly in chapter 6.

Despite this, these objections do not seem strong enough to disallow parties from choosing non-state rules as the law of the contract as they can be mitigated to an extent. Certainly, these issues can be anticipated by the contracting parties who could construct a choice of law clause that reduces any conflicts or problems. There are two important reasons for allowing a

[589]Proposal for a Regulation of the European Parliament and the Council on the law applicable to contractual obligations (Rome I) COM (2005) 650 final
Article 3
http://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52005PC0650&from=EN

choice for non-state rules: first of all, the risks associated with choosing non-state rules are not intrinsically all that different from the risks associated with choosing a foreign state law and secondly, if parties are given the autonomy to select the applicable law because it is believed that they know what is the best law for their particular situation, then they should be given the agency to determine whether they want to choose non-state rules as the applicable law if they believe this to be the best option.

4.8 Conclusion

This chapter analysed two important issues. Firstly, this chapter discussed the concept of party autonomy in relation to non-state rules. Secondly, this chapter discussed the objections raised against extending party autonomy to non-state rules. For the first issue it is concluded that a choice of law for non-state rules is not possible in most jurisdictions. There are some exceptions, but the majoritarian approach does not allow a choice of law for non-state rules as the sole law governing the contract. The examination of the second issue led to the conclusion that these objections have merit, but are not of such a nature that they should preclude a possible choice of law for non-state rules.

Party autonomy is one of the cornerstones of private international contract law. This might be the majoritarian view, but it is not a universal view. As was discussed some jurisdictions do not allow parties to choose the applicable law in court litigation (although might allow this in arbitration.) It is plain that in such cases a choice for non-state rules would not be accepted. Non-state rules are not treated differently from foreign state laws. Choice of law clauses in general are not accepted by the forum.

The majority of jurisdictions support party autonomy. Restrictions are sometimes placed upon what laws can be chosen. In most cases only state laws can be chosen. In most of the states of the USA a substantive relationship to the chosen law is required. In other jurisdictions there is no substantive relationship requirement. The example discussed was that

of the EU. Behr points out that the major difference is that under Rome I the parties can go to court knowing their choice will be respected whereas in the US this is more ambiguous, even if in practice choice of law is respected in the vast majority of cases.[590] Another difference is that in American private international law public policy considerations are taken into account when establishing the applicable law, whereas in European private international law public policy only comes into the equitation after the applicable law is established.[591] Nevertheless, these differences should not be overestimated. Mathias Reimann notes that in the past decades a convergence between American and European private international law can be observed.[592]

Conflicts of law legislations lead to the application of a state law in the absence of a choice of law clause. General rules in absence of a choice of law by the parties mainly use geographical criteria to determine the applicable law: residence of the seller, place of execution of the contract, or the place where the contract was made. By using geographical connection points this would never lead to the application of non-state rules which cannot be traced back to any physical territorial entity.

In these jurisdictions (US and Europe) it is possible to incorporate non-state rules by reference.[593] In practice this could mean that non-state rules play a more determinant role in

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[590] Volker Bëhr, 'Rome I Regulation, A Mostly Unified Private International Law of Contractual Relationships within most of the European Union' (2010) 29 Journal of Law and Commerce 233, 242

[591] Ibid,268

[592] Mathias Reimann, 'Savigny's Triumph? Choice of Law in Contracts Cases at the Close of the Twentieth Century' (1998-1999) 39 Virginia Journal of International Law 571, 573
See also for instance:
Ole Lando, 'New American Choice-of-Law Principles and the European Conflicts of Law of Contracts' (1982) 30 American Journal of Comparative Law 19
Giesela Rühl, 'Party Autonomy in the Private International Law of Contracts: Transatlantic Convergence and Economic Efficiency' (2007) 3 Comparative Research in Law & Political Economy Research Paper 4 http://digitalcommons.osgoode.yorku.ca/clpe/227

[593] Although for Europe only the Rome I Regulation was discussed this also is the case in national laws. As an example in France article 1134 of the Civil Code gives private contracts the status of law between the parties. Therefore, what parties insert in the contract is binding insofar as it does not violate any mandatory provisions or public policy. The status of the contract as law is only possible because the lex fori allows for this. The authority of the contract does not come from the contract, but from the forum which permits the contract this legal status
(Article 1134 Les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites. Elles ne peuvent être révoquées que de leur consentement mutuel, ou pour les causes que la loi autorise. Elles doivent être exécutées de bonne foi)

the contract than the applicable state law. In the states discussed here much commercial law consists of default rules that the parties can deviate from. These default rules only come into play when the parties have not incorporated specific provisions in their contract on those same issues. Conventional law can also allow for this incorporation. The CISG in article 6 specifies that parties can derogate or vary the provisions of the convention.

Party autonomy and freedom of contract are linked intrinsically. Parties can shape the law in the same way as they shape their contract.[594] Especially in B2B contracts there is considerable freedom for the parties. This freedom can be used to incorporate non-state rules in the contract.

This leads to two conclusions. The first is that a choice of law clause that refers solely to non-state rules as the governing law of the contract would be problematic in most jurisdictions. It is possible to incorporate non-state rules for any non-mandatory provisions provided that there is an applicable state law. In theory this reduces non-state rules to simple contractual rules that derive their authority from the contract. Their legal authority is thus limited. The second conclusion is that although in theory the legal value of non-state rules is limited in practice the situation is different. The law takes into account that parties will wish to vary from the default provisions. In that sense non-state rules do take on the authority of law and can determinate the rights and obligations of the contract.

This leads to a final question. Are there any jurisdictions that do accept a choice of law clause for non-state rules? In this chapter the laws of Oregon and Louisiana were discussed. Oregon explicitly allows a choice of law for certain non-state rules. Louisiana does so implicitly by not defining law as the law of a state in its conflicts of law regulation. This is also the case in some other jurisdictions. For instance, Talpis advances that in Québec a choice of law for

[594] Matthias Lehmann, 'Liberating the Individual from Battles between States: Justifying Party Autonomy in Conflict of Laws' (2008) 41 Vanderbilt Journal of Transnational Law 381

non-state rules would be acceptable per Article 3111 of the Québécois civil code.[595] The reasons are that the concept of autonomy in the Québécois civil code is far-reaching and in the first paragraph the article does not mention the word 'law of a state' but solely the word 'law.'[596]

The Hague Principles on Choice of Law allow for non-state rules as a choice of law. These have been adopted recently by Paraguay. Therefore, in Paraguay a choice of law for non-state rules could now be acceptable. As this legislation is new it remains uncertain how Paraguayan courts will deal with this in practice. Another example is Venezuela where the Supreme Court accepted a choice of law for the lex mercatoria.[597] Venezuela and Mexico have ratified the OAS convention that could potentially allow a choice of law for non-state rules. The Supreme Court of Colombia has stated that parties can choose non-state rules as the law of the contract provided these do not run counter to public policy and mandatory legal provisions.[598] It is not clear from this case which exact conditions the choice of law clause must meet and whether all non-state rules would be an acceptable choice.

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[595] Jeffrey Talpis, 'Retour Vers le Futur : Application en Droit Québécois des Principes d'Unidroit au Lieu d'une Loi Nationale' (2002) 36 Revue Juridique Thémis 609
Article 3111 Code Civil du Québec. L'acte juridique, qu'il présente ou non un élément d'extranéité, est régi par la loi désignée expressément dans l'acte ou dont la désignation résulte d'une façon certaine des dispositions de cet acte. Néanmoins, s'il ne présente aucun élément d'extranéité, il demeure soumis aux dispositions impératives de la loi de l'État qui s'appliquerait en l'absence de désignation. On peut désigner expressément la loi applicable à la totalité ou à une partie seulement d'un acte juridique.

[596] Jeffrey Talpis, 'Retour Vers le Futur : Application en Droit Québécois des Principes d'Unidroit au Lieu d'une Loi Nationale' (2002) 36 Revue Juridique Thémis 609, 619-620

[597] Maria Mercedes Albornoz, 'Choice of Law in International Contracts in Latin American Systems' (2010) 6 Journal of Private International Law 23, 37
citing the case: *Banco Union v Banque Worms* [1989] Corte Suprema de Justicia, 144 Gaceta Forense 507

[598] *Rafael Alberto Martínez Luna y María Mercedes Bernal Cancino vs. Granbanco S.A*, Corte Suprema de Justicia, 21.02.2012
http://www.unilex.info/case.cfm?pid=2&do=case&id=1709&step=Abstract
This case actually did not concern the application of non-state rules. It was a domestic case judged under Colombian law. It concerned a civil claim against a bank by two Colombian citizens with regards to a loan agreement. The plaintiffs claimed that as a result of the financial crisis in Colombia the contract became more onerous than when they contracted and that this created an imbalance in the contract. The lower courts ruled that there was not enough evidence to prove this. This was confirmed by the Supreme Court. The Supreme Court recognised that there is a general principle of revision of the contract under Colombian law, but that this case did not meet the criteria. The Court furthermore stated that this principle is part of the lex mercatoria. The court cited the UNIDROIT Principles articles 6.2.1.and 6.2.3 as evidence of this. In the reasoning the court then stated that parties can choose non-state rules:

The examples are limited in number. The developments with regards to The Hague Principles show that there are possibilities to extend party autonomy to non-state rules. The objections against this extension are not of such a nature that the negatives could not be mitigated as discussed in section 4.7

Would it be easier for states where no substantive relationship is required to accept a choice of law clause for non-state rules than for countries where this is required? This would not necessarily be the case. Levin notes that if party autonomy is restricted to laws with a substantive relationship to the contract the points of connection could include trade associations and international commercial custom.[599] When a choice for the law of New York is accepted on the basis that this law has significant experience with the music industry that makes it viable that a choice of law for the UNIDROIT Principles could be justified based on their experience in international commerce.[600]

The goal of this chapter was to consider the agency parties have to choose non-state rules in order to understand when non-state rules can be applied. This chapter concluded that it is not possible in the majority of the cases to choose non-state rules as the applicable law outside of arbitration. This can lead to the conclusion that non-state rules play a small role in international commercial contracts. Yet, at the same time this chapter concluded that when incorporating non-state rules by reference these can be leading in the contract which makes their role in practice far more important than private international law suggests.

The next chapter concentrates on the agency that courts have in the application of non-state rules outside of the private international law context. Chapter 5 answers the question of when non-state rules are applied by the courts. Together this chapter and the next chapter thus

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'*Indispensable aclarar que las partes pueden regular el contrato mercantil internacional por sus reglas, en cuyo caso, aplican de preferencia a la ley nacional no imperativa,'*

[599] Morris J Levin, 'Party Autonomy: Choice-of-Law Clauses in Commercial Contracts' (1957-1958) 46 Georgetown Law Journal 260

[600] See: *Radioactive, J.V, v Manson*, 153 F. Supp. 2d 462 (S.D.N. Y 2001) http://law.justia.com/cases/federal/district-courts/FSupp2/153/462/2433434/

provide full insight into the application of non-state rules and answer the questions of when non-state rules can be applied and when they are applied.

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Chapter 5: The Application of Non-State Rules by the Courts

5.1 Introduction

The previous chapter analysed non-state rules in the context of private international law. It concluded that in most jurisdictions it is (currently) not possible for parties to choose non-state rules as the law of the contract. A minority of jurisdictions allow parties to choose non-state rules as the applicable law or the legislation is ambiguous enough to potentially allow for this. An outright choice of law for non-state rules as the law of the contract does not happen frequently outside of arbitration, as evidenced by the lack of supporting legislation and case law. The parties to the contract can incorporate non-state rules in their contract by reference. This gives non-state rules the status of contractual rules, which have weak legal authority in theory, but can be leading in practice. There are some theoretical questions regarding whether in such cases non-state rules are applied as simple contractual rules or whether they are applied as a type of auxiliary law that is supplemented by (mandatory provisions of) the putative applicable law.

Chapter 5 explores the application of non-state rules away from private international law. The focus of chapter 4 is on the agency of the parties whereas this current chapter concentrates on the agency of the courts. Chapter 4 concluded that state courts do not have the agency to apply non-state rules as the governing law of the contract in the absence of a choice of law clause. However, this does not mean that courts cannot apply non-state rules in other circumstances. Just like the parties can incorporate non-state rules in their contract provided

they choose an applicable state law, courts can apply non-state rules through the applicable (state) law.

The first part concentrates on the application of non-state rules as a source of domestic law. This part analyses the role of trade usages under the UCC and under the CISG as an example of this process. The second part of this chapter examines the use of non-state rules to interpret and/or supplement the applicable domestic law or conventional law. The third part studies the available (empirical) data on when non-state rules are applied.

This chapter focuses on the application of non-state rules through domestic (commercial) law. It demonstrates that non-state rules are far more pervasive than suggested by private international law. Chapter 4 started analysing when non-state rules can be applied and chapter 5 continues with this analysis. Whereas chapter 4 concentrated on the question when non-state rules can be applied, this chapter 5 concentrates on when non-state rules are applied. This also leads to an initial exploration of how non-state rules are applied. This chapter thus contributes to understanding two core questions of the thesis: when and how non-state rules are applied by courts.

5.2 The Application of Non-State Rules as a Source of Domestic Law: Trade Usages

Non-state rules can be sources of national law as discussed in chapter 3. This is the case when a convention is ratified and is in force. In that case the court applies this convention as part of its domestic law. Custom, trade usages, and general principles can be recognised as sources of law. The Spanish Civil Code for example lists general principles and customs as a source of law.[601] When Spanish law is the applicable law the court would have the freedom to apply

[601] English translation of article 3 of the Spanish Civil Code: Customs shall only apply in the absence of applicable statutes, provided that they are not contrary to morals or public policy, and that it is proven. Legal uses which are not merely for the interpretation of a declaration shall be considered customs.

non-state rules that can be considered as custom and/or general principles of law. The court could for instance apply international commercial law principles; not because these are the applicable law, but because these principles can be considered as a source of law of the applicable law. Whether or not such international commercial law principles would fall under the definition of general principles in the Spanish Civil Code would depend on any additional legislation, case law, or legal scholarship. If Spanish law is silent on this issue or if a foreign court has not been able to uncover evidence on how Spanish law determines the general principles of law, there is a margin of appreciation for courts to decide this. It should be noted that when non-state rules are recognised as a source of law in domestic law they are also applicable to domestic contracts (unless the law makes a distinction between the two.) The specific trade usages and general principles that are applicable might vary between domestic contracts and international contracts. This issue is analysed further by using a case study to critically analyse how non-state rules are applied as a source of domestic law. This case study focuses on the application of trade usages as a source of law in the UCC and in the CISG.[602]

5.2.1 The Application of Non-State Rules as Part of the Applicable Law: The Example of the UCC and Trade Usages

UCC §1-103 (a) (2) states that *'The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are….to permit the*

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4. General legal principles shall apply in the absence of applicable statute or custom, without prejudice to the fact that they contribute to shape the legal system.
http://www.elra.eu/wp-content/uploads/file/Spanish_Civil_Code_(C%C3%B3digo_Civil)%5B1%5D.pdf
The original Spanish version can be read at for instance:
http://noticias.juridicas.com/base_datos/Privado/cc.tp.html#tp

[602] Note that the UCC and the CISG are also non-state rules in origin. If parties were to choose either of these instruments directly as the governing law such a choice would likely not be honoured in states that do not accept a choice of law for non-state rules. Yet if parties choose the French law (which has ratified the CISG) as the applicable law or Californian Law (where both the UCC and the CISG are part of positive law) these would be applied.
See for this also: Olugbenga Bamodu, 'The Rome I Regulation and the Relevance of Non-State Law' in Peter Stone and Youseph Farah (Editors), *Research Handbook in EU Private International Law* (2015 Edward Elgar Publishing) 221

continued expansion of commercial practices ***through custom, usage****, and agreement of the parties.*[603]*'* Paragraph b of the same article states that the principles of law and equity, including the law merchant, must be taken into account unless these are displaced by other provisions in the UCC.[604] In article §1-201 an agreement is defined as '*the bargain of the parties in fact, as found in their language or inferred from other circumstances, including course of performance and course of dealing,* ***or usage of trade****.'* These articles indicate that trade usages are an important source of law under the UCC.

Article §1-205 on Course of Dealing and Usage of Trade defines the concept of trade usages further.[605] The article clarifies that a usage of trade is any practice that occurs with such regularity in a place, vocation, or trade that the expectation that it will be adhered to is justified. The term regularity implies that usages do not have to be followed perfectly, but only to such a degree that there is a clear pattern. It is only necessary for parties to know the usages of their own trade and not those that are common in other trades, even when they have cross-dealings with these other trades.[606] §1-205 is also reflected in article §221 of the Restatement (Second) of the Law of Contracts:

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[603]UCC §1-103 (a) (2) https://www.law.cornell.edu/ucc/1/1-103

[604] § 1-103. Construction of Uniform Commercial Code to Promote its Purposes and Policies: Applicability of Supplemental Principles of Law.
(a) The Uniform Commercial Code must be liberally construed and applied to promote its underlying purposes and policies, which are: (1) to simplify, clarify, and modernize the law governing commercial transactions; (2) to permit the continued expansion of commercial practices through custom, usage, and agreement of the parties; and (3) to make uniform the law among the various jurisdictions.
(b) Unless displaced by the particular provisions of the Uniform Commercial Code, the principles of law and equity, including the law merchant and the law relative to capacity to contract, principal and agent, estoppel, fraud, misrepresentation, duress, coercion, mistake, bankruptcy, and other validating or invalidating cause supplement its provisions.
See also: *Swift v. Tyson 41 U.S. 1* (1842): the law respecting negotiable instruments may be truly declared… to be in a great measure, not the law of a single country only, but of the commercial world.
And contrast with: *Erie Railroad Co. v. Tompkins*, 304 U.S. 64 (1938) the Supreme Court rejects the general law concept of *Swift v Tyson*.

[605] §1-205 (2) A usage of trade is any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question. The existence and scope of such a usage are to be proved as facts. If it is established that such a usage is embodied in a written trade code or similar writing the interpretation of the writing is for the court.
http://www.uniformlaws.org/shared/docs/ucc1/ucc1_sec1-205_1096.pdf

[606] *JH Rayner and Company, LTD. v. Hambros Bank LTD*, Court of Appeal, [1943] 1 K.B. 37
This case concerned a company in Denmark which asked the defendant to open a line of credit. The bank refused to pay because the invoice did not match the letter of credit. The name of the product was

(1) An agreement is supplemented or qualified by a reasonable usage with respect to agreements of the same type if each party knows or has reason to know of the usage and neither party knows or has reason to know that the other party has an intention inconsistent with the usage.[607]

It is not clarified in the UCC itself whether a trade usage can only be used to interpret an agreement or whether it can also add new terms to the contract.[608] It should be assumed that both are possible. In the case of *Barnard v. Kellogg*, which predates the UCC, it was argued that usages can only be used to interpret any ambiguities in the contract and that they cannot be applied when they contradict an express term.[609] Nevertheless, other cases admitted usages that contradicted express terms of the contract.[610] The UCC tried to reconcile these differences by stating that if a trade usages and an express term seem to contradict each other they should be constructed as to be consistent, and only if that is not possible the express term

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different in each document (machine shelled groundnut kernels versus Cormandel groundnuts. The plaintiff claimed that these are the same and that the letters C.R.S in the invoice were short for Coros or Cormandel and that how these terms are used interchangeably is a trade usage. The court held that the bank did not have to honour the invoice or the bill of lading because the terms used were different and the bank not being in this particular trade could not have known about any usages in the groundnut business.
'A banker is not affected with knowledge of the customs… of every one of the thousands of trades for whose dealings he may issue letters of credit.'

[607] See also:
§219.
Usage is habitual or customary practice.
§222.
(1) A usage of trade is a usage having such regularity of observance in a place, vocation, or trade as to justify an expectation that it will be observed with respect to a particular agreement. It may include a system of rules regularly observed even though particular rules are changed from time to time.
(2) The existence and scope of a usage of trade are to be determined as questions of fact. If a usage is embodied in a written trade code or similar writing the interpretation of the writing is to be determined by the court as a question of law.
(3) Unless otherwise agreed, a usage of trade in the vocation or trade in which the parties are engaged or a usage of trade of which they know or have reason to know gives meaning to or supplements or qualifies their agreement.

[608] Joseph H Levie, 'Trade Usage and Custom under the Common Law and the Uniform Commercial Code' (1965) 40 New York University Law Review 1101, 1109

[609] *Barnard v. Kellogg* 77 U.S. 10 Wall. 383 (1869)
See for the full text: https://supreme.justia.com/cases/federal/us/77/383/case.html
'The proper office of a custom or usage in trade is to ascertain and explain the meaning and intention of the parties to a contract, whether written or in parol, which could not be done without the aid of this extrinsic evidence. It does not go beyond this, and is used as a mode of interpretation on the theory that the parties knew of its existence, and contracted with reference to it. It is often employed to explain words or phrases in a contract of doubtful signification, or which may be understood in different senses, according to the subject-matter to which they are applied. But if it be inconsistent with the contract, or expressly or by necessary implication contradicts it, it cannot be received in evidence to affect it. Usage, says Lord Lyndhurst, 'may be admissible to explain what is doubtful; it is never admissible to contradict what is plain.' And it is well settled that usage cannot be allowed to subvert the settled rules of law.'

[610] Roger W Kirst, 'Usage of Trade and Course of Dealing: Subversion of the UCC Theory' [1977] University of Illinois Law Review 811, 819

should trump the trade usage.[611] From this it can be extrapolated that trade usages can add new terms to the contract. The importance of trade usages is such that in some cases they have been applied to vary express terms of a written contract, even if according to the UCC they should not.[612] This is justified on the grounds that the usages clarify or supplement the terms of the contract rather than that they actually contradict them.[613]

Trade usages are implied terms of the contract.[614] Usages can be contracted out of by expressly excluding them.[615] It is not enough to simply include an express term and assume

[611] § 2-208. Course of Performance or Practical Construction
(2) The express terms of the agreement and any such course of performance, as well as any course of dealing and usage of trade, shall be construed whenever reasonable as consistent with each other; but when such construction is unreasonable, express terms shall control course of performance and course of performance shall control both course of dealing and usage of trade
https://www.law.cornell.edu/ucc/2/2-208

[612] Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 University of Pennsylvania Law Review 1765, 1784
An example of a case is *Columbia Nitrogen Corp v Royster Co, 451 F2d 3, 8-11 (4th Cir 1971)* where a usage of trade was admitted as evidence to show that express terms with regard to quantity were actually not terms and conditions but instead represented options for the buyer.

[613] Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 University of Pennsylvania Law Review 1765,1784
See also: Joseph H Levie, 'Trade Usage and Custom under the Common Law and the Uniform Commercial Code' (1965) 40 New York University Law Review 1101, 1112

[614] § 2-202. Final Written Expression: Parol or Extrinsic Evidence.
Terms with respect to which the confirmatory memoranda of the parties agree or which are otherwise set forth in a writing intended by the parties as a final expression of their agreement with respect to such terms as are included therein may not be contradicted by evidence of any prior agreement or of a contemporaneous oral agreement but may be explained or supplemented
(a) by course of dealing or usage of trade…
https://www.law.cornell.edu/ucc/2/2-202
See for a pre UCC example: *Dixons Irmaos & Cia v Chase National Bank* 53 F. Supp. 933 (S.D.N.Y. 1943) which concerned a conflict between a usage and a written term that was sometimes ignored in favour of the usage. The defendant confirmed a letter of credit issued by a Belgian bank for a Brazilian shipper. A provision in this letter required a full set of bills of lading. The bills of lading that were presented to the bank only contained one set instead of two sets. In lieu of the second set a letter of indemnity was issued to protect the defendant. The defendant rejected this and refused to pay. The issue was whether the express term of requiring a full set of bills of lading could be contradicted by a usage of trade which accepted an indemnity letter in lieu of the full set. The trial court ruled that the defendant was not required to accept the letter of indemnity even though the usage did exist. The court of appeal ruled that the defendant was required to follow the usage because there was not a single instance to be found when the usage was not followed and this therefore indicated it was not a discretionary matter.
'In issuing the credits, however, it is evident that the Chase Bank had certain definite customs in mind and that those were the ones included in the document referred to in the credits. In view of this, I think there is no room for the inference that other customs not referred to may be considered as having been in the minds of the officials of the Chase Bank responsible for the language of the credits. "An expression in the contract of one or more things of a class implies the exclusion of all not expressed, although all would have been implied had none been expressed.' Manners v. Morosco, 2 Cir., 258 F. 557, 560.
For a thorough expose of this case see:

that this will exclude any usage that deals with the same matter. §2-208 states that the express terms, course of performance, course of dealing, and usage of trade shall be constructed whenever reasonable as consistent with each other. Therefore, if possible the court shall try to incorporate the trade usage despite the existence of an express term dealing with the same issue. Even when there is an exclusion clause the court would investigate whether this exclusion is the actual intent of the parties. For instance, if the clause is a boiler plate clause, the exclusion might not express the actual intent of the parties as they might not have given conscious thought about whether or not they wished to exclude any trade usages.[616] A general exclusion clause is thus not enough. The exclusion clause should be drafted in a precise and explicit manner. This favourable approach to trade usages can present difficulties if parties are not aware of the trade usage or if they are not aware that they need to contract out of them.[617] Seeking the intent of the parties is not always straightforward, especially when there are conflicting opinions between the contracting parties on whether a trade usage is excluded.

There is a presumption that merchants are aware of the relevant trade usages. The court does not need to investigate whether they actually do know them. This could seem unfair on those who are new to the trade. The importance of unwritten usages makes it more daunting for newcomers. Usages are not as prevalent in all trades, but in trade of many commodities they play a large role. New traders will be held liable if they do not follow trade usages. However, if pleading ignorance would be a reasonable defence for newcomers, this would hamper trade as it would decrease legal certainty and discourage established traders from contracting with

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Dana Backus and Henry Harfield, 'Custom and Letters of Credit: The Dixon, Irmaos Case' (1952) 52 Colombia Law Review 589
John Honnold, 'Letters of Credit, Custom, Missing Documents and the Dixon Case: A Reply to Backus and Harfield' (1953) 53 Columbia Law Review 504

[615] See for instance: *Nanakuli Paving & Rock Co. v. Shell Oil Co*., 664 F.2d 772 (9th Cir. 1981) which stated that under the UCC trade usages can explain or supplement the express terms of a written contract:
Trade usage and course of performance will be implied into contracts if there is evidence that it is not inconsistent with the terms of the contract, and they are so prevalent that the parties would have intended to incorporate them.

[616] Roger W Kirst, 'Usage of Trade and Course of Dealing: Subversion of the UCC Theory' [1977] University of Illinois Law Review 811,866

[617] David V Snyder, 'Private Lawmaking' (2003) 64 Ohio State Journal 371,417

these newcomers. In the long run this would not be practical as it would prevent fledging competition from growing, and thus prevent the existence of a healthy, competitive market.[618] Taking the above into consideration it is unmistakable that under the UCC trade usages are a primary source of law and will always be applied, unless the intent of the parties that they should be excluded is made manifest in a precise way.

The UCC favours the word trade usage over the word custom. Custom and trade usage were used interchangeably before the UCC was published.[619] Under the common law the party seeking to establish custom should prove that this custom is legal, notorious, reasonable, certain, universal, obligatory, and ancient or immemorial.[620] The UCC distinguishes between usage and custom by stating in the official commentary that usage is not bound by the common law test of custom.[621] Usages do not have to be universal, but can exist in a specific locality.[622] Usages do not have to be ancient or immemorial. New trade usages can develop. There is no minimum amount of time that needs to elapse before a practice can be considered a trade usage. The practice can be relatively new.

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[618] Jim C Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Texas International Journal 91, 126

[619] *Dixons Irmaos & Cia v Chase National Bank* 53 F. Supp. 933 (S.D.N.Y. 1943)
When usage or custom is considered in relation to the terms of a contract it is done upon the theory that the parties contracted with the usage or custom in mind to the end that in construing the contract the court may arrive at what the parties intended by the words they used. With such proof contracting parties may be held to have inferred that they would be bound by such usage.
In this case the court decided that banks are legally bound to follow the custom to accept an indemnity in lieu of the document specified in a letter of credit. This case used the term custom, but under the UCC the term trade usage would be used to denominate this practice.

[620] Jim C Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Texas International Journal 91, 98

[621] Official commentary article §1-205 Course of Dealing and Usage of Trade:
A usage of trade under subsection (2) must have the "regularity of observance" specified. The ancient English tests for "custom" are abandoned in this connection. Therefore, it is not required that a usage of trade be "ancient or immemorial", "universal" or the like. Under the requirement of subsection (2) full recognition is thus available for new usages and for usages currently observed by the great majority of decent dealers, even though dissidents ready to cut corners do not agree. There is room also for proper recognition of usage agreed upon by merchants in trade codes
This is also reflected in the Restatement (Second) of Contracts in the official comments of Article §222:
A usage of trade need not be "ancient or immemorial," "universal," or the like.

[622] See for instance the decision in *Ebasco Services Inc. v. Pennsylvania Power & L. Co*., 402 F. Supp. 421 (E.D. Pa. 1975)

Professor Chen writes that this change from custom to usage under the UCC is a paradigm change.[623] Under Hall's division of public policy changes, discussed in chapter 2.6.1, this is considered a change of the third order. This is the most ground-breaking type of change. Under custom the perceived legal obligation of the participants is a vital component. It is not important for trade usages. This change represents a power shift from the merchants to the courts. Under the traditional view of custom merchants could choose which customs they considered binding whereas under the UCC it is the court that declares which usages are binding.[624] Courts declare a practice binding based on observation. Custom and usages are thus recognised in different ways: subjectively (opinio iuris) and objectively (observance).[625] It takes away legal authority from the merchant community to declare whether something is law.[626] Usages will continue to develop independently from the courts, but the courts have the exclusive power to declare these binding.[627] The moral and legal authority of the merchant community is diminished. Merchants can be required to follow a trade usage regardless of whether they consider this practice binding.

There are several reasons why trade usages have an extensive place in the UCC. Firstly, the drafters considered the lex mercatoria as a predecessor to the UCC. They were therefore sympathetic to the argument that merchants should have the possibility to self-organise. The UCC recognises that merchants operate in a community framework that can make collective decisions which are imposed on individuals.[628] The drafters considered that trade usages better express the intention of the parties than the contract itself does as these usages are

[623] Jim C Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Texas International Journal 91, 98
[624] Ibid, 118
[625] Ibid, 118
[626] Joseph H Levie, 'Trade Usage and Custom under the Common Law and the Uniform Commercial Code' (1965) 40 New York University Law Review 1101, 1104
[627] Jim C Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Texas International Journal 91, 121
[628] Amy H Kastely, 'Stock Equipment for the Bargain in Fact: Trade Usage, Express Terms, and Consistency under § 1-205 of the Uniform Commercial Code' (1986) 64 North Carolina Law Review 777, 813

internalised so that their inclusion should be presumed.[629] Another reason is that it makes the law more flexible and adaptable to the needs of trade, both internal and international. It can also reduce legal costs as not every single eventuality would need to be included in the contract and thus less time is needed for negotiations.[630] Consequently, trade usages allow merchants to operate within a flexible and low cost environment: '*without freedom, individuals could not develop rational business practices in the pursuit of profit. When one looks at business practices, one sees the reflection, the echo of individual choices made over time. Business practices, as the products of liberty, have an inherent moral legitimacy.*'[631]

Lisa Bernstein questions whether when given the choice merchants would actually wish to be bound by trade usages or that they would prefer to be solely bound by the contract and statutory legal provisions.[632] The fact that merchants follow certain trade usages does not necessarily mean that they wish to be legally obliged to follow them. Bernstein argues that for reasons of trust, friendship, reputation, and/or long term gain, parties might in the short term make concessions on issues such as delivery, quantity, price, or other. They do not do so because they consider these as trade usages, but because they value the longer term contractual relationship. Bernstein cites the example of warranties on software which are

[629] *Urbana Farmers Union Elevator Co. v Schock* 351 N.W.2d 88 (1984) – *established practices and usages within a particular trade can more reliably reveal the parties' intent than the sometimes imperfect and often incomplete language of the contract*

[630]Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 University of Pennsylvania Law Review 1765, 1769

[631] Kerry Lynn Mackintosh, 'Liberty, Trade, and the Uniform Commercial Code, When Should Default Rules Be Based on Business Practices?' (1996) 38 William & Mary Law Review 1465, 1478

[632] Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 University of Pennsylvania Law Review 1765, 1769

In this article the author is critical of this approach by the UCC and analyses how it actually countermands the flexibility of the UCC.

She uses a case study of the National Grain and Feed Association (NGFA) tribunal which very rarely uses commercial practices and usages in their awards and instead relies upon their own trade rules. Bernstein notes that the arbitrators seem to be reluctant to use general trade practices and signal their dislike of these in the awards. Bernstein does note several uses of trade usages and practices: they are used as additional justification, to assess credibility of evidence, to signal whether the contract is out of sync with standard trade practices, and when they believe a standard trade practice should be incorporated in the Trade Rules. Trade practices might also be used by arbitrators subconsciously in their reasoning. Despite this the arbitrators do not rely on trade usages as terms of the contract.

Bernstein considers whether this stricter approach which is initiated by the merchant community itself might not be more reflective of the wishes on the community than the approach of the UCC which prioritises trade usages.

limited in the contract, but are applied more generously in practice.[633] This is to the satisfaction of both parties: the software provider who limits his liability & the buyer who gets a cheaper product (as the warranty provisions are less extensive and thus less costly) and who can rely on a more generous practice. If this is considered a trade usage this could lead to the provider restricting this practice or raising his prices. This would ultimately be a loss for both the buyer and the seller.

When the parties wish to end the contractual relationship they do not necessarily wish to be held to the practices they established when preserving the relationship was the goal. Therefore, they do not perceive the usages as binding. As the binding value of usages under the UCC does not come from a sense of obligation, but from observance of the pattern this would have no effect on the legal obligations of the parties. Yet, these usages do not express the wishes of the parties and should not be considered as implied terms as this was not the intention. Courts do not always distinguish between practices done out of courtesy, social norms, and trade usages.

There are times when a usage can be considered as unreasonable or undesirable. This does not happen frequently: in a competitive market surviving usages can be assumed to be beneficial.[634] The goal of the parties is usually to increase their profit (or other output) and a usage that stands in the way of this goal would soon give way to another one. The UCC thus presumes that trade usages are reasonable. According to Chen this is an acceptable presumption as it is better to tolerate a rare unreasonable usage than go through the effort and

[633] Ibid, 1790

[634] Jim C Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Texas International Journal 91, 123/124
This is especially so as reputation is vital in international trade. This has always been so. The enforcement of the lex mercatoria also depended on reputation. A sanction was for instance the exclusion from commercial fairs (see page 132 of professor Chen's article)
See also:
Kerry Lynn Mackintosh, 'Liberty, Trade, and the Uniform Commercial Code, When Should Default Rules Be Based on Business Practices?' (1996) 38 William & Mary Law Review 1465,1478
Even though it is rare there are some usages which can be considered as unreasonable such as the practice to give a letter of indemnity to the captain in exchange for a clean bill of lading (see *Brown Jenkinson & Co v Percy Dalton* as discussed in chapter 4.4.1)

costs of trying to define precisely whether a trade usage is reasonable in every single case. [635] Practice confirms the wisdom of this approach as no UCC decision has found a trade usage to be unreasonable; at least not up until 1992.[636]

The court can declare a trade usage unreasonable when needed. The official comments to §1-205 specify that the articles on unconscionable contracts and clauses should be used to deal with any unreasonable usage.[637] Article §2-30 suggests three ways an unconscionable clause should be dealt with:

- Refuse to enforce the contract
- Enforce the contract without the clause
- Limit the application of the clause to avoid injustice [638]

An unreasonable trade usage could thus be dealt with by not enforcing the contract, enforcing the contract without taking the trade usage into account, or limit the application of the trade usage. It is difficult to see why a valid contract would not be enforced just because a trade usage is unreasonable, except if the whole contract builds on this usage. Limiting the application of the trade usage or simply not enforcing it would in most cases be the best course of action.

This section explored the place that trade usages have under the UCC. The UCC accords an important place to trade usages. The concept of trade usages under the UCC is flexible. Whether something is a trade usage is determined by the courts based on observation. Trade usages can be used to interpret written terms or add new terms to the contract. Trade usages are applied before variable rules of the UCC. They are sometimes even applied when they

[635] Jim C Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Texas International Journal 91, 135
[636] Ibid,132
[637] The policy of this Act controlling explicit unconscionable contracts and clauses …applies to implicit clauses which rest on usage of trade and carries forward the policy underlying the ancient requirement that a custom or usage must be "reasonable"
[638] § 2-302 unconscionable contract or clause
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contradict written terms of the contract if the court decides that the usage expresses the intent of the parties better. They have to be contracted out of expressly. The UCC acknowledges the law merchant as one of the underlying principles of the UCC. When a court applies the UCC it can apply certain non-state rules (usages and the principles of the law merchant). Thus under the UCC the application of uncodified non-state rules is permitted.

What would be the case be for codified non-state rules? Could these be applied as trade usages under the UCC? The Incoterms and the UCP are mainly seen as contractual terms. This would also be the case for rules promulgated by trade branch associations. The UCC has its own trade terms which closely resemble the Incoterms. The Incoterms should be included by name if that is the intent of the parties. If the term CIF is included without any additional information the court could apply the CIF term as defined in the UCC. The court could also decide that the intention of the parties was to include the Incoterms if the contract is international. This would thus cause some uncertainty. Chapter 4.4.2 already discussed that the UCP are not considered as trade usages under the UCC, but are contractual terms.

When it comes to the UPICC or similar type instruments their status is less evident.[639] The Preamble states that the UPICC can be applied if parties have used a formula such as 'usages and customs of international trade' in their contract. Gabriel points to the possibility that an American court could apply the UPICC as a reference if it decides that these would represent the intentions of the parties.[640] Theoretically it seems possible that the court could apply one of the UPICC as a trade usage. Whether they would do so in practice is a different question. In a survey done in Florida on the application of the UPICC there was no indication that

[639] The UPICC themselves also allow for the application of usages.
Article 1.9 of the UNIDROIT Principles (2010)
(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
(2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned except where the application of such a usage would be unreasonable.

[640] Henry Deeb Gabriel, 'The UNIDROIT Principles of International Commercial Contracts: An American Perspective on the Principles and Their Use' (2012) 17 Uniform Law Review 507

courts would apply these without the parties having requested this.[641]Although this survey concerned the application of the UPICC as the law of the contract it is reasonable to conclude from this that the UPICC are not established enough to be considered trade usages by American courts. The same survey indicated that most judges did not feel they were familiar with the UPICC.[642] This supports the argument that they would not be applied as trade usages. A follow-up survey was conducted in 2007 among practitioners, academics, and judges from several different US states.[643] This confirmed the lack of familiarity with the Principles: 88% of judges declared they were unfamiliar with these.[644] The results indicate that the judiciary would only consider applying the UPICC if these are referenced in the contract.[645] If the UPICC are considered trade usages then there is no reason why they could not be applied under the UCC.[646] However, it does not seem as if this would become a reality in the near future due to this lack of familiarity.

5.2.2 The Application of Non-State Rules as Part of the Applicable Law: The Example of the CISG

The CISG considers trade usages as having legal authority.[647] Article 9 of the CISG states:

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[641] Michael Wallace Gordon, 'Part II Some Thoughts on the Receptiveness of Contract Rules in the CISG and the UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges' (1998) 46 American Journal of Comparative Law Supplement 361,369

[642] Ibid

[643] Peter L Fitzgerald, 'The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the CISG and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States' (2008) 27 Journal of Law and Commerce 1

[644] Ibid,43

[645] Ibid,80

[646] See chapter 3.5.3 for the discussion on the general status and legal authority of the UNIDROIT Principles.

[647] The predecessors of the CISG: The Uniform Law for international Sales (ULIS) and the Uniform Law for the Formation of Sales Contract (ULFIS)also contained articles on usages.
Article 9.2 and 9.3 of ULIS:
They shall also be bound by usages which reasonable persons in the same situation as the parties usually consider to be applicable to their contract. In the event of conflict with the present Law, the usages shall prevail unless otherwise agreed by the parties.
3. Where expressions, provisions or forms of contract commonly used in commercial practice are employed, they shall be interpreted according to the meaning usually given to them in the trade concerned.
Article 13 of ULFIS provided that:

(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves.
(2) **The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned.**

This is supplemented by article 8(3) which states that to determine the intentions of the parties to the contract due consideration should be given to all relevant circumstances, including trade usages.[648] The CISG does not lay out a hierarchy for established practices and trade usages in the way the UCC does. This is left to the court. Based on article 8.3 which gives primacy to the intentions of the parties it could be assumed that practices/course of dealing are more important than trade usages as these would more closely express the will of the parties. However, there could be cases when the court decides the exact opposite as there is not a clear rule. The CISG is silent on what happens if trade usages are conflicting, but scholarly commentary states that these should then be mutually exclusive, and if the contract gives no further indication the issue should be solved per the gap filling rules of the CISG.[649]

The CISG is silent on what happens in case there is a conflict between a trade usage and an article of the CISG. Commentary agrees that in such cases the trade usage should take

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1. Usage means any practice or method of dealing, which reasonable persons in the same situation as the parties, usually consider to be applicable to the formulation of their contract.
2. Where expressions, provisions or forms of contract commonly used in commercial practices are employed they shall be interpreted according to the meaning usually given to them in the trade concerned.
The main difference with the CISG is that ULIS/ULFIS use the term reasonable which the CISG omits. This approach is more subjective as it gives greater leeway to the court to decide whether a usage can be considered as reasonable.
Interestingly enough in the UNIDROIT Principles this criterion of reasonableness is encountered again:
1.9 (2) The parties are bound by a usage that is widely known to and regularly observed in international trade by parties in the particular trade concerned **except where the application of such a usage would be unreasonable**

[648] CISG article 8. (3) In determining the intent of a party or the understanding a reasonable person would have had, due consideration is to be given to all relevant circumstances of the case including the negotiations, any practices which the parties have established between themselves, usages and any subsequent conduct of the parties.

[649] Cesare Massimo Bianca and Michael Joachim Bonell, 'Commentary On Usages and Practices' in Cesare Massimo Bianca and Michael Joachim Bonell (editors), *Commentary on the International Sales Law - The 1980 Vienna Sales Convention* (Giuffrè 1987) 110

precedence.[650] Article 6 states that the parties can opt out of the entire CISG or its individual provisions. As the rules of the CISG are thus variable rules, trade usages should take precedence over the CISG. Trade usages are considered as implied terms of the contract. As the CISG is variable these implied terms should take precedence.

In order for trade usages to be recognised they should be widely known and regularly observed in the international trade of the specific good concerned. They do not necessarily need to be international in origin. They need only to be observed in international trade. Local usages could be applicable, provided these are either commonly used in trade with foreigners, or that the foreign merchant has been doing business in the specific locality regularly so it can be assumed that he has knowledge of the usage.[651] Not all local usages are applicable: only those known in international trade. The wording 'ought to have known' indicates that pleading ignorance would not be a sufficient defence. A court decision from 1992 where the judge did not even consider whether the parties knew about the trade usage confirms this.[652] This is the same as under the UCC.

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[650] Ibid
An example of a case dealing with this issue:
Bermatex s.r.l. v. Valentin Rius Clapers S.A. v. Sbrojovka Vsetin S.A, Juzgado Nacional Cortade Primera Instancia en lo Comercial No. 10, October 1994
On the issue of determining the interest rate on a credit the court stated:
'*Since CISG does not determine the interest rate, reference should be made to international trade usages which are assigned by CISG itself a hierarchical position higher than the very same CISG provisions (Art. 9 CISG)'*

[651] See for instance: *Parties Unknown*, Oberlandesgericht Graz, Austria, November 1995,
Text available at: http://cisgw3.law.pace.edu/cases/951109a3.html#cx
'The wording of Art. 9(2) CISG does not mean that, in the future, purely national or local usages can find no application for the interpretation and supplementation of contracts without an explicit reference by the parties. One can still presume an exception for usages which are in force at certain stock markets, trade fairs or deposit sites, as long as the usage is also regularly observed there in the trade with foreigners. Furthermore, the possibility does not seem to be excluded that a foreign tradesman, who is constantly active in another country and has already formed a number of transactions there, is bound by possible national usages.'
But see also: *Parties Unknown*, Oberlandesgericht Frankfurt am Main (Germany)
Text available at: http://www.unilex.info/case.cfm?pid=1&do=case&id=169&step=Abstract
'*CISG requires a trade usage to be international in order to be applicable to the contract, absent an agreement by the parties.*'
(in this case the German usage of concluding a contract through a letter of confirmation was not an international usage and was therefore not applicable)

[652] Zivilgericht Kanton Basel-Stadt (Switzerland), Dec. 12, 1992
Full text and English abstract available at:
http://www.unilex.info/case.cfm?pid=1&do=case&id=104&step=Abstract

Historically usages have always played a key role in international commerce and therefore these were included as a source of law in the CISG.[653] The UCC considers the lex mercatoria and its principles an important fundament and this is reflected in the CISG, although in contrast to the UCC the CISG does not mention the lex mercatoria by name as one its foundations or inspirations. It can be added that the UCC had some influence on the development of the CISG.[654] The strong position of trade usages under the UCC is reflected in the CISG. The scope that trade usages should be given was a matter of contention during the drafting process as anecdotal evidence from delegates suggests.[655] The participating socialist and developing countries viewed trade usages more negatively than the free-market economy countries and wanted to limit their role in the contract.[656]

There are two main theories on the of role trade usages that were discussed during the drafting process: objective and subjective.[657] Per the subjective theory usages are only applicable if the parties have consented to using them. Therefore, a trade usage of which the parties were not aware is not part of the contract. This was the viewpoint of many of the socialist countries. The objective theory considers that trade usages exist independently from the contract and that they have the legal authority to bind parties without their explicit consent. The liberal market states leaned more towards this theory. This theory reflects the concept of trade usages under the UCC more closely. After deliberations, the article was

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See also: Clayton P Gillette, 'Harmony and Stasis in Trade Usages for International Sale' (1998-1999) 39 Virginia Journal of International Law 707

[653] Clayton P Gillette, 'The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG' (2004-2005) 5 Chicago Journal of International Law 157, 169

[654] Franco Ferrari, 'The Relationship between the UCC and the CISG and the Construction of Uniform Law' (1996) 29 Loyola of Los Angeles Law Review 1021,1023

Michael Joachim Bonell, 'The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?' (1996) 1 Uniform Law Review 26,28

[655] Stephen Bainbridge, 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions' (1983-1984) 24 Virginia Journal of International Law 619, 636-637

[656] Ibid, 636-638

As the author himself notes these are of course generalisations and it could not be said that every developing and/or socialist state holds the exact same view.

[657] See for instance:

Clayton P Gillette, 'Harmony and Stasis in Trade Usages for International Sale' (1998-1999) 39 Virginia Journal of International Law 707

Ch Pamboukis, 'The Concept and Function of Usages in the United Nations Convention for the International Sales of Goods' (2005-2006) 25 Journal of Law and Commerce 107

accepted in its current form which is closer to the objective theory.[658] In all likelihood this was not for any legal reasons, but simply because these countries had a stronger voice in the deliberations.

The difficulties of the debate explain why several key matters were not resolved and left to the interpretation of the court. These include:

- A definition of the concept of trade usages
- Whether contemporary usages are permitted or only traditional ones
- The hierarchy between course of dealing and trade usages.
- Whether trade usages can be used to contradict express terms of the contract. [659]
- Whether a usage should be reasonable, when it is reasonable, and what should happen if a trade usage is not reasonable.[660]Although this issue is not dealt with explicitly Article 7 states that regard should be had to the observance of good faith in international trade.[661] From this it can be inferred that a trade usage that does not meet the standard of good faith should be considered unreasonable.[662]

[658] Stephen Bainbridge, 'Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions' (1983-1984) 24 Virginia Journal of International Law 619,641
Cesare Massimo Bianca and Michael Joachim Bonell, 'Commentary On Usages and Practices' in Massimo Bianca and Michael Joachim Bonell (editors), *Commentary on the International Sales Law - The 1980 Vienna Sales Convention* (Giuffrè 1987) 110
[659] Jim C Chen, 'Code, Custom, and Contract: The Uniform Commercial Code as Law Merchant' (1992) 27 Texas International Journal 91, 104
Gillette discusses that during the drafting of the CISG Chines trade delegates made an unsuccessful proposal that only reasonable trade usages should be acceptable: Clayton P Gillette, 'The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG' (2004-2005) 5 Chicago Journal of International Law 157,169
[660] This is different from the UNIDROIT Principles which state that usages do not bind if they are not reasonable (Art 1.8 (2) – in specific cases a known trade usage might not be applied if it can be considered as unreasonable in this situation.)
[661] Article 7 (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.
[662] Cesare Massimo Bianca and Michael Joachim Bonell, 'Commentary On Usages and Practices' in Cesare Massimo Bianca and Michael Joachim Bonell (editors), *Commentary on the International Sales Law - The 1980 Vienna Sales Convention* (Giuffrè 1987)113

Determining whether a practice is a trade usage is left to the courts that apply and interpret the CISG.[663] Phamboukis states that if courts apply trade usages in line with the underlying principles of the CISG a uniform definition of trade usages would emerge in the long term.[664] Whether this actually will happen is another matter. In practice there is a tendency for courts to use domestic law to define trade usages. (see the discussion on the homeward trend in chapter 5.3.1).[665] Courts could liken international usages to local usages and interpret these accordingly.[666] An American court could use the more extensive guidelines under the UCC to determine whether something is a trade usage. Gillette analysed arbitral awards that applied usages in the context of the CISG and found that arbitrators generally are conservative and only apply those usages that can be proven easily and that are certain.[667] Furthermore, arbitrators do not seem to use trade usages to change express terms of the contract.[668]

Would it be possible to apply codified non-state rules as trade usages under the CISG? Some case law deals with the application of the Incoterms as trade usages.[669] Parties might incorporate a trade term such as CIF or FOB without any additional information. As discussed previously trade terms do not only exist as Incoterms, but can also exist in domestic legislation. Therefore, if a court were to apply a generic trade term it would have to decide what the intention of the parties was. In a case that concerned the sale of gasoline between BP Oil International and an Ecuadorian oil company the court stated that*: 'Incoterms are*

[663]Article 4 CISG
This Convention governs only the formation of the contract of sale and the rights and obligations of the seller and the buyer arising from such a contract. In particular, except as otherwise expressly provided in this Convention, it is not concerned with:
(a) the validity of the contract or of any of its provisions or of any usage;
[664] Ch Pamboukis, 'The Concept and Function of Usages in the United Nations Convention for the International Sales of Goods' (2005-2006) 25 Journal of Law and Commerce 107,111
[665] Franco Ferrari, 'Homeward Trend and Lex Forism in International Sales Law' [2009] International Business Law Journal 333
[666] Franco Ferrari, 'Uniform Interpretation of the 1980 Uniform Sales Law' (1994) 24 Georgia Journal of International and Comparative Law 183,197
[667] Clayton P Gillette, 'The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG' (2004-2005) 5 Chicago Journal of International Law 157,179
[668] Ibid
[669] For a comprehensive analyses of cases that have arisen about this subject see: Ch Pamboukis, 'The Concept and Function of Usages in the United Nations Convention for the International Sales of Goods' (2005-2006) 25 Journal of Law and Commerce 107,126-129

incorporated into the CISG through article 9(2)' and *'even if the usage of Incoterms is not global, the fact that they are well known in international trade means that they are incorporated through article 9(2).'*[670] The court thus applied the Incoterms as trade usages. Bianca and Bonell state that knowledge of the Incoterms is widespread and this justifies their application as trade terms.[671] This collaborates with the analysis on this issue that Phamboukis made where he concludes that there is a tendency to interpret trade terms internationally.[672] There are cases when it is questionable what the intentions of the parties are. If for instance the law of New York is the applicable law, then perhaps the intention of the parties would be for the trade term to be interpreted according to the UCC as applicable in the state of New York. At the same time the CISG is also applicable in New York. The intention of the parties should decide this if this intention can be discovered. This is not always straightforward. Scholarship and case law do point to the possibility to use the Incoterms as trade usages.[673]

Would the UNIDROIT Principles be applicable as usages under the CISG? The UPICC are innovative and are more than simply a restatement of current commercial practices. This might make it more difficult to see the UPICC as trade usages. Yet, in practice this application can be observed. In 1998 a court of appeal in Paris enforced an arbitral award based on trade usages and referenced the UPICC and concluded that th*e 'arbitral tribunal is entitled to base its decision on the rules of law it considers most appropriate and to refer to trade usages.'*[674] This consequently can be considered a tacit recognition of the UPICC as trade usages. In 2003, in a dispute before the ICC, the parties requested that the decision

[670] *BP Oil International v. Empresa Estatal Petroleos de Ecuador*, United States 11 June 2003 Federal Appellate Court [5th Circuit], http://cisgw3.law.pace.edu/cases/030611u1.html
[671] Cesare Massimo Bianca and Michael Joachim Bonell, 'Commentary On Usages and Practices' in Cesare Massimo Bianca and Michael Joachim Bonell (editors), *Commentary on the International Sales Law - The 1980 Vienna Sales Convention* (Giuffrè 1987) 110
[672] Ch Pamboukis, 'The Concept and Function of Usages in the United Nations Convention for the International Sales of Goods' (2005-2006) 25 Journal of Law and Commerce 107,126-129
[673] The UCP would not be considered usages under the CISG because their field of application is different from that of the CISG
[674] *Société FORASOL v. Société mixte Franco-Kazakh CISTM*, Cour d'appel de Paris (1er Chambre Civile) (1998) http://www.unilex.info/case.cfm?pid=2&id=1034&do=case

should be based on '*international trade usages.'* [675] The Tribunal pointed out that this reference can be criticised for its vagueness and found that '*consideration of a specific codification, as the UNIDROIT Principles may provide a more precise set of rules.'* It is not clear from this formulation whether the Tribunal considers the UPICC as trade usages, but it seems to indicate that it does. In a case in the Netherlands the court stated expressly that the UPICC can be used to fill any gaps in the CISG.[676] It would be difficult to make a generic conclusion as national courts play a pivotal role. There is nothing in the CISG to suggest that the UPICC would not be able to qualify as trade usages under the CISG, but equally nothing to suggest that they should. Chapter 6.3 analyses this issue further.

Several conclusions can be made with regards to trade usages under the CISG. First of all, trade usages are accorded an important place in the CISG, but for lowest common denominator policy reasons key aspects are not resolved in the convention itself and are left to the discretion of the courts. This hampers uniform interpretation and leads to unpredictability. Secondly, courts tend to fall back on domestic legislation to interpret trade usages. As the exact nature of trade usages under the CISG has not been defined the fall back on domestic legislation surrounding trade usages and a restrictive interpretation of these is understandable. Thirdly, despite this there is some evidence that courts do try to use a more international interpretation through, for instance, the use of the Incoterms as trade usages.

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[675] ICC Award No. 12040 (2003)
http://www.unilex.info/case.cfm?id=1418

[676] *Parties Unknown*, Hof 'S-Hertogenbosch, 16-02-2002, English language abstract available at:
http://www.unilex.info/case.cfm?pid=2&do=case&id=959&step=Abstract
For an arbitral award dealing with the same issue see:
Tribunal of International Commercial Arbitration at the Russian Federation Chamber of Commerce and Industry, 5 June 1997, 229/1996, English language abstract available at:
http://cisgw3.law.pace.edu/cases/970605r1.html
The Tribunal applied the UNIDROIT Principles of International Commercial Contracts as an international usage on the basis of article 9.2 of the CISG.

5.3 The Application of Non-State Rules as Guidelines for Interpretation

Courts use non-state rules to interpret the applicable law. The first section of this part focuses on the application of non-state rules as a means to interpret conventional law. The example used is the CISG. The second section analyses the use of non-state rules as guidelines for interpreting domestic law.

5.3.1 The Application of Non-State Rules as part of international conventional law

The 1964 Convention for a Uniform Law on the International Sale of Goods (ULIS) excluded domestic law in the interpretation of any matter covered by the convention.[677] This was considered a revolutionary step forward to a more uniform interpretation of conventional law. As ULIS and its sister convention, the Uniform Law on the Formation of Contracts for the International Sale of Goods (ULFIS), were only ratified by 8 states this interpretation never materialised in practice.[678] Most of these states have now denounced the conventions.[679] In the United Kingdom ULIS and ULFIS are in force, but only if the parties opt-in to the conventions.[680] There is no available case law on whether this has ever happened.

Following the failure of ULIS/ULFIS to attract a large number of ratifications, the CISG was developed with the goal to create a viable uniform sale of goods law. De Ly seeks the failure of ULIS/ULFIS in their total exclusion of domestic law which was too radical for many states

[677] Article 17 ULIS:
Questions concerning matters governed by the present Law which are not expressly settled therein shall be settled in conformity with the general principles on which the present Law is based.
[678] Belgium. Germany, Gambia, Israel, Italy, Luxembourg, San Marino, the Netherlands, and the United Kingdom (opt in).
[679] ULIS and ULFIS are still in force in San Marino, the UK, and the Gambia.
See for the current status:
http://www.unidroit.org/status-ulis-1964
http://www.unidroit.org/status-ulfc-1964
Last accessed: 3 March 2016
[680] The Uniform Laws on International Sales Act 1967
http://www.legislation.gov.uk/ukpga/1967/45

(as well as because of the pre-dominantly civil law approach of the conventions).[681] It is therefore not surprising that the CISG took a different approach. The CISG does not exclude the use of domestic law to interpret the convention. Article 7 of the CISG discusses the interpretation of the Convention:

> (1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its -application and the observance of good faith in international trade.
> (2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private -international law.

The convention should thus be interpreted according to underlying international commercial law principles. The principles the convention specifically mentions are: internationality, uniformity, and good faith. The CISG does not specify further how these principles should be applied concretely or whether these are the only underlying principles. Only in absence of any underlying principles should courts look to the applicable law to interpret the CISG.

In practice there is a tendency for courts to use the lex fori to interpret the CISG. This is known as the homeward trend.[682] Ferrari concludes that courts tend to use their own domestic law to interpret the CISG.[683] For courts it is easier to apply the lex fori than to discover the

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[681] Filip de Ly, 'Sources of International Sales Law: An eclectic model' (2005) 25 Journal of Law and Commerce 1,2

[682] The term homeward trend originates with John Honnold who used it in his work *Documentary History of the Uniform Law for International Sales: The Studies, Deliberations, and Decisions that Led to the 1980 United Nations Convention with Introductions and Explanations* (Kluwer Law International 1989) 298-299
'The Convention, faute de mieux, will often be applied by tribunals (judges or arbitrators) who will be intimately familiar only with their own domestic law. The tribunals, regardless of their merit, will be subject to a natural tendency to read the international rules in light of the legal ideas that have been imbedded at the core of their intellectual formation. The mind sees what the mind has means of seeing.'
See also: John Honnold, 'The Sales Convention in Action- Uniform International Words: Uniform Application?' (1988) 8 Journal of Law and Communication 207
For a practical example of how this trend work see also: Angela M Romito, 'CISG: Italian Court and Homeward Trend - Queen Mary Case Translation Programme Corte d'Appello di Milano 20 March 1998 Italdecor s.a.s. Yiu's Industries (H.K.) Limited (default)' (2002) 14 Pace International Law Review 179

[683] Franco Ferrari, 'Homeward Trend and Lex Forism in International Sales Law' [2009] International Business Law Journal 333

underlying principles of the Convention.[684] These principles are not well-defined nor does the convention give concrete guidance on how these should be applied. These issues are not (as) prevalent in the lex fori which the court knows better and understands more instinctively.[685] It is thus easier to interpret the CISG in the same way as domestic law is interpreted. This is especially the case if the rules contained in the CISG are closely reflected in domestic law. This can easily lead to courts likening the international interpretation to the domestic interpretation. Ferrari notes that there are also many examples where the international character of the CISG is respected.[686] Smits finds a degree of consistent interpretation of the CISG even if this is not completely uniform.[687] More efforts should be made to come to a uniform interpretation of the CISG and the principles underlying it.[688]

To respect the international character of the CISG it should thus be interpreted according to these underlying principles. This immediately leads to the question of how these can be discovered and how these can lead the court to concrete rules. The principles of good faith, internationality, and uniformity are mentioned in the CISG. This does not mean there could not be others. General principles of transnational commercial law could also be applicable. These are principles such as due diligence and pacta sunt servanda.

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[684] And as discussed in chapter 4 there can be non-legal reasons why courts do so: an overburdened judicial system that leaves little room for reflexion and discovery.

[685] Jean-Flavien Lalive, 'Contracts between a State or a State Agency and a Foreign Company' (1964), 13 International and Comparative Law Quarterly 987, 1010
These general principles of law would go beyond article 38 as they would be general principles of transnational (contract) law

[686] Franco Ferrari, 'Homeward Trend and Lex Forism in International Sales Law' [2009] International Business Law Journal 333, 339

[687] Jan M Smits, 'Problems of Uniform Sales Law- Why the CISG may not Promote International Trade' (2013) 1 Maastricht European Private Law Institute Working Paper (accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197468) 6 Last accessed 3 March 2016

[688] Ingeborg Schwenzer, and Pascal Hachem, 'the CISG- Successes and Pitfalls' (2009) 57 The American Journal of Comparative Law 457

To discover the other underlying principles Hellner suggests a discovery process by analogy.[689] Basedow examines the possibility of using general principles of law as defined by article 38 of the ICJ and to distil from these the principles that have a bearing on private law.[690] Other methods could be comparing (international) key cases of the CISG or comparing the private law principles of different legal systems. All these methods have as inconvenient that, if done properly, they take a lot of time, which courts do not have. It is therefore understandable that in the interest of speedy procedures courts do not turn to such time consuming methods and prefer to take a short cut. One of these short cuts is thus to turn to the lex fori.

Another way that these underlying principles, and the concrete rules behind them, are uncovered is by using codified non-state rules to interpret the CISG. This happens especially with the UPICC. When the UNIDROIT Principles were published the possibility of using these to interpret the CISG was raised by Professor Bonell and others.[691] The advantages are self-evident. The UPICC are a concrete instrument that courts can consult easily which makes it a more attractive option than going through a longer process of comparative discovery to find the underlying principles of the CISG. A less utilitarian argument would be that the UNIDROIT Principles were drafted with the CISG in mind and the instruments are close in

[689] Jan Hellner, 'Gap-Filling by Analogy, Art. 7 of the UN Sales Convention in Its Historical Context' (1990)
Available online at: http://www.cisg.law.pace.edu/cisg/text/hellner.html
Last accessed: 3 March 2016

[690] Jürgen Basedow, 'Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts' (2000) 5 Uniform Law Review 129, 133/134

[691] Michael Joachim Bonell, 'The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?' (1996) 1 Uniform Law Review 26 ,35-37
Bonell gives several examples on how the UNIDROIT Principles could accomplish this. One of these is for instance that the criteria used to determine whether there is a fundamental breach of contract contained in article 7.3.1 of the Principles could be used to define the concept of fundamental breach under CISG article 25 further.
Alejandro M Garro, The Gap-Filling Role of the UNIDROIT Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG, [1994-1995] 69 Tulane Law Review, 1149
Jürgen Basedow, 'Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts' (2000) 5 Uniform Law Review 129
François Dessemontet, 'Use of the UNIDROIT Principles to Interpret and Supplement Domestic Law' (2002) Supplément Spécial Bulletin de la Cour Internationale d'Arbitrage de la CCI 1, 18
This possibility was also raised for the Principles of European Contract Law

spirit.[692] Some of the experts that were involved in drafting the CISG were also involved in drafting the UPICC. Most of the scholars working on the UPICC had already published extensively on the CISG in the past and know the Convention very well. Furthermore, the Principles represent the outcome of a thorough and comparative work of research. If a comparative study is the way to uncover the principles underlying the CISG then the work has already been done. Yet, it should be recognised that as the UPICC were a work of innovation and not just a restatement not all the content would reflect general principles of commercial law.

An argument against this practice is that the UPICC were drafted much later than the CISG and that they should not be used to interpret the CISG, as the underlying principles the latter refers to cannot be the UPICC.[693] There are accordingly two ways to identify these underlying principles. The first is the narrow way which confines these principles to the space and time when the CISG was drafted. The second is a wider view whereby these principles are distilled from current transnational commercial law and change over time as circumstances change.[694] Basedow quotes an ICJ decision that a treaty should be interpreted according to the context at the moment of interpretation and not the moment of creation or ratification.[695] This decision supports the possibility to use the UPICC to interpret the CISG.

Soon after the publication of the UPICC this usage can be observed in practice. In October 1996 the court of appeal of Grenoble mentioned the UNIDROIT Principles as support for the

[692] Michael Joachim Bonell, 'The UNIDROIT Principles of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?' (1996) 1 Uniform Law Review 26
[693] Michael Joachim Bonell, 'The UNIDROIT Principles and Transnational Law' (2000) 5 Uniform Law Review, 199, 210
[694] Herbert Kronke, 'The UN Sales Convention, the UNIDROIT Contract, Principles and the Way Beyond' (2005-2006) 25 Journal of Law and Commerce 451,457
[695] Jürgen Basedow, 'Uniform Law Conventions and the UNIDROIT Principles of International Commercial Contracts' (2000) 5 Uniform Law Review 129,133/136 quoting: International Court of Justice 21-06-71, ICI Rep. (1971), 31 (Legal consequences for States of the continued presence of South Africa in Namibia).

CISG and consequently made a connection between both instruments.[696] A French buyer and a German seller concluded a contract for the sale of machinery. The buyer claimed restitution of part of the purchase price which he paid in excess. French law was the applicable law and thus also the CISG (ratified by France). The court ruled that restitution should be made at the seller's place of business in accordance with the CISG. The court also stated that this rule is an interpretation of the general principle that payment takes place at the domicile of the creditor and that this principle can be found in article 6.1.6 of the UNIDROIT Principles.[697] The UPICC were accordingly used as support for an underlying principle of the CISG. In 1997 an ICC arbitration award went further and stated that the general principles of the CISG are contained in the UNIDROIT Principles.[698] The Court of Cassation in Belgium stated that gap filling in the CISG should take place per the underlying principles of the Convention which can especially be found in the UPICC.[699]

An example of using the UPICC to interpret the CISG is the interest rate. Article 78 of the CISG states that the party failing its obligation should pay interest, but does not say how the interest rate should be determined. The UNIDROIT Principles give concrete guidance on finding the interest rate.[700] Bonell discusses several arbitral awards that used the UPICC to

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[696] *SCEA GAEC Des Beauches Bernard Bruno v. Société Teso Ten Elsen GmbH & COKG*, Cour d'Appel de Grenoble, October 1996, http://www.unilex.info/case.cfm?pid=2&id=638&do=case

[697] '*Que, contrairement aux droits allemand et français, la Convention de Vienne fixe le lieu du paiement du prix de vente à l'établissement du vendeur (article 57-l)*
Que l'interprétation habituellement donnée de cette règle est qu'elle exprime le principe général que le paiement s'exécute au domicile du créancier […] étendu aux autres contrats du commerce international par l'article 6.1.6 des Principes d'Unidroit ('lorsque le lieu d'exécution de l'obligation n'est pas fixé par le contrat ou déterminable en vue de celui-ci, l'exécution s'effectue : … pour une obligation de somme d'argent au lieu d'établissement du créancier')'
http://www.unilex.info/case.cfm?pid=2&do=case&id=638&step=FullText

[698] ICC Award No. 8817 (1995)
Text available at:
http://www.unilex.info/case.cfm?pid=2&do=case&id=659&step=FullText
A court decision in the Netherlands that same year confirmed this:
Cooperative Maritime Etaploise v. Bos Fishproducts District Court Zwolle 5 March 1997

[699] *Scafom International BV vs Lorraine Tubes s.a.s*, Cour de Cassation, 19/06/2009
Text available at :
http://www.unilex.info/case.cfm?pid=2&do=case&id=1456&step=Abstract
'En vertu de ces principes, tels que consacrés notamment par Unidroit Principles of International Commercial Contracts '

[700] Article 7.4.9(2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists

interpret interest rates under the CISG.[701] Two court decisions from the Supreme Economic Court of Belarus also determined the interest rate according to the provisions of the UNIDROIT Principles.[702] The UPICC are thus used to materialise the underlying principles of the CISG and to find the concrete rules that the court can apply.

Other non-state instruments could be used in the same way. In practice the UPICC are the most viable instrument to use for this. The PECL have been used in this fashion, but not as regularly. As the PECL represent a European regional approach whereas the CISG is a global instrument it is not surprising that this does not happen regularly. The Incoterms are often used in conjunction with the CISG to regulate passage of risk. If an Incoterm is included in the contract it displaces the articles on the passage of risk in the CISG. Section 5.2.2 discussed that the Incoterms are applied as trade usages under the CISG. The Incoterms only cover a small area, but they could be used to interpret the CISG in that area.[703] The UCP and the CISG cover different subject areas. Trade association rules are not neutral and international enough to serve as principles underlying the CISG.

Other ways that courts can interpret the CISG is by conducting comparative research through one of online databases of case law. This can be time-consuming. UNCITRAL maintains a

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at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment.

[701] Michael Joachim Bonell, 'The UNIDROIT Principles and Transnational Law' (2000) 5 Uniform Law Review 199, 210

Two arbitral awards made by the International Court of Arbitration of Federal Chamber of Commerce in Vienna

And one made by the ICC: ICC Award No. 8128 (1995)

Text available at: http://www.unilex.info/case.cfm?pid=2&do=case&id=637&step=Abstract

This award also referred to article Art. 4.507 of the Principles of European Contract Law which also discusses interest rates:

'L'arbitre considère justifié d'appliquer au litige les règles identiques contenues dans les principes UNIDROIT et les principes du droit européen des contrats en tant que principes généraux au sens de l'article 7(2) de la Convention.'

[702] Parties Unknown, Supreme Economic Court of the Republic of Belarus, 03/01/2003 http://www.unilex.info/case.cfm?pid=2&do=case&id=1389&step=Abstract

Holzimpex Inc. v. Republican Agricultural Unitary Enterprise, Supreme Economic Court of the Republic of Belarus, 20/05/2003 http://www.unilex.info/case.cfm?pid=2&id=1007&do=case

[703] Ingeborg Schwenzer, 'The Danger of Domestic Pre-Conceived Views with Respect to the Uniform Interpretation of the CISG: The Question of Avoidance in the Case of Non-Conforming Goods and Documents,' (2005) 36 Victoria University Wellington Law Review 795, 803 and further

database with cases on the CISG.[704] This database is especially useful to find specific cases, but less practical to find concrete guidance on how the CISG should be interpreted. Based on this case law UNCITRAL publishes a case law digest. The latest version dates from 2012 and can be downloaded from their website or consulted online.[705] This greatly facilitates the interpretation of the CISG as it contains an article by article breakdown on important cases and the principles deriving from this. Under the article 7 headline different principles can be found that have been extracted from the CISG by different courts. These include: party autonomy, favor contractus, mitigation of damage, informality… The digest is not binding on ratifying states and contains cases from different countries. Some countries are overrepresented or underrepresented depending on the case numbers available in different jurisdictions. Nevertheless, this is an important tool that can contribute towards a more uniform interpretation of the CISG.[706]

Another initiative that should be mentioned is the CISG Advisory Council, which was founded in 2001 and publishes opinions on aspects of the CISG to come to a uniform interpretation of the Convention.[707] The Advisory Council lacks any authoritative force and is a private initiative. Nonetheless, their work could be of significant value in interpreting the CISG. If these opinions are used with regularity, they can be highly persuasive. Currently there are 16 opinions published. These have all been translated in French, English, German,

[704] http://www.uncitral.org/uncitral/en/case_law.html
Pace Law School & Unilex also maintain case law collections on the CISG
[705]UNCITRAL Digest of Case Law on the United Nations Convention on Contracts for the International Sale of Goods
http://www.uncitral.org/pdf/english/clout/CISG-digest-2012-e.pdf
[706] Another initiative is the trans-lex database which is not focused solely on the CISG, but on transnational commercial law in general. This database has extracted principles on transnational commercial law.
These principles can be found on the website:
http://www.trans-lex.org/principles/
[707] These opinions are published on their website:
http://www.cisgac.com/
The Advisory Council is a private initiative that consists of scholars from different cultures and backgrounds and *'is guided by the mandate of Article 7 of the Convention as far as its interpretation and application are concerned: the paramount regard to international character of the convention and the need to promote uniformity.*'
Last accessed: 2 March 2016

and Spanish. A number of the opinions are also translated in Russian, Arabic, Chinese, Portuguese, and Japanese. These opinions could take on the role of scholarly 'doctrine' and be used to interpret the CISG.

This section analysed the interpretation of the CISG. Non-state rules are used to interpret the CISG. These are the general principles underlying the CISG. Three of these principles are mentioned by name: internationality, uniformity, and good faith. The interpretation of the CISG should thus be done in a manner to promote uniformity and respect the internationality of the Convention. Furthermore, the actions of the parties should be measured against a good faith criterion. The CISG does not mention whether there are other underlying principles and how these should be found. The CISG also gives no guidance on how the principles should be interpreted and how these can lead to concrete rules. Good faith, uniformity, and internationality are all three generic principles of which a myriad of different meanings and interpretations can be found that differ from country to country.

Courts resort to domestic law to interpret the CISG and find the concrete rules. Although the Convention does allow for this it should only be done as a last measure in the absence of any underlying principles. Furthermore, courts should resort in that case to the lex contractus and not to the lex fori, but in practice they often resort to the latter. Falling back on the lex fori is understandable because it is less time consuming and costly than researching the underlying principles.

The publication of the UPICC and to a smaller degree the PECL led to courts using these to find the principles underlying the CISG. This task is made easier because the drafters were conscious of the importance of the CISG when they drafted the UPICC. The case law

suggests that in practice this usage occurs.[708] Other international initiatives that can aid in the interpretation of the CISG are the opinions issued by the CISG Advisory Council and the UNCITRAL case law digests. Concluding, courts apply non-state rules like general principles of law, restatements of law, case digests, and authoritative guidelines to interpret the CISG.

5.3.2 The Use of Non-State Rules as Guidelines for the Interpretation of National Law

Non-state rules are used to interpret domestic law or to fill gaps in the applicable law.[709] General principles of law are often considered sources of domestic law. In international contract situations courts can apply general principles of transnational commercial law to interpret the applicable law. Courts also use codified non-state rules to interpret the applicable law.

The UPICC are an example of an instrument that is regularly used in this fashion. On the Unilex database there are 263 cases where the UPICC were applied as means for supplementing and interpreting domestic law. Of these cases 86 are arbitral awards and the remaining are state court decisions.[710]As there are 405 cases in total on this database it is clear the leading usage of the UPICC is to interpret the applicable domestic law. This is even more striking because the pre-amble to the 1994 edition of the UNIDROIT Principles did not anticipate this function and makes no mention of it. The 2004 version of the pre-amble was updated to include this possibility: *They may be used to interpret or supplement domestic law*. The initiative for this usage consequently started in the courts.

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[708] The Unilex database counts 56 decisions where the UPICC have been used in conjunction with the CISG. 29 of these are arbitral awards and 27 are court decisions from a variety of jurisdictions including Russia, France, Italy, Belgium, and the Netherlands.
Last accessed: 21 March 2016

[709] This section is only concerned with how courts use non-state rules to interpret national law. It does not discuss how non-state rules influence legal drafters and thus shape national laws. An example is how the definition of non-conformity of goods under the CISG was used in the EC Directive on Certain Aspects of the Sale of Consumer Goods, or how the CISG influenced the sales of goods legislations in Scandinavia and China. This is an important way that non-state rules are used, but it is not part of this chapter which is solely concerned with application by the courts.

[710] The Unilex database is not complete. This is especially so with regards to arbitral awards as these are usually not published

The majority of the cases where the UPICC are used to interpret national law stem from Russia (37 cases), Spain (20 cases), the Ukraine(16), and Lithuania(14).[711] Professor Ramberg refers to five Scandinavian supreme court decisions which apply the UPICC in the context of domestic law.[712] In 2015 the supreme court of Lithuania used the UPICC to interpret the applicable law.[713]

The Court of appeal of Grenoble in *Société Harper Robinson v Société Internationale de Maintenance et de Réalisations Industrielle* applied French law and supplemented its considerations with reference to the UNIDROIT Principles.[714] An American company and a French company entered into a contract regarding the transportation of machinery from the US to France. The packaging was faulty, which caused damage to the equipment. The contract contained a liability clause. This clause read that the carrier would guarantee and compensate any loss owning to defective performance. In the standard terms that were incorporated in the contract the liability of the carrier was limited to $50 per shipment. In the judgment the court indicated that the standard terms and the contract were in contradiction. The court went on to say that in case of such contradiction a principle in international commercial law is that the term which is not the standard term should prevail. It then quoted the UNIDROIT Principles art 2.21 1994 edition as evidence of this principle.[715] The court thus used the UPICC as general principles of law to interpret the applicable law. Even though French law was applicable, the fact that it was an international dispute might have compelled the court to rely on the UPICC.

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[711] There should not be a great value attached to the concrete numbers as the Unilex database is incomplete and the numbers could be higher in practice.
[712] Christina Ramberg, 'The UNIDROIT Principles as a means of Interpreting Domestic Law' (2014) 19 Uniform Law Review 669, 672
[713] Parties unknown, Supreme Court of Lithuania (2015),
Text available at: http://www.unilex.info/case.cfm?id=1890
[714] *Société Harper Robinson v. Société internationale de maintenance et de réalisations industrielles*, Cour d'Appel de Grenoble, January 1996,
Text available at: http://www.unilex.info/case.cfm?pid=2&id=633&do=case
[715] '*Qu'il est de principe, en droit du commerce international, que "en cas d'incompatibilité entre une clause qui ne l'est pas, cette dernière l'emporte" (Principes d'Unidroit, article 2.21) et que "en cas d'ambiguïté, les clauses d'un contrat s'interprètent de préférence contre celui qui les a proposées' (Principes d'Unidroit, art. 4.6)'*
http://www.unilex.info/case.cfm?id=633

In a large number of these cases the UPICC are used to demonstrate that domestic law and international legal principles are similar, and that it is thus justifiable to apply the national legal solution.[716] In a case before the ICC the tribunal referred to the UNIDROIT Principles as *'a useful source for establishing general rules for international commercial contracts'* and consequently used the UPICC to demonstrate that these and the applicable New York law came to the same conclusion.[717] The court used the UPICC to show that the national and international legal practices are aligned on this specific subject.[718] Interestingly enough these cases are not necessarily international contract cases. The UPICC are also applied in purely domestic contractual situations. In 2013 in the case of *Grupo Santa Monica Sports V. Real Club Deportivo de la Coruña* the Spanish court referred to the UPICC in support of the applicable Spanish law to show that these both used the same solution.[719] When several different solutions exist within the domestic law the court could use the UPICC to justify why they picked a particular solution.[720]

Are other codified non-state rules used for this purpose? The PECL have been applied in this way on several occasions; often in conjunction with the UPICC.[721] They are referred to less

[716] Michael Joachim Bonell and Ole Lando, 'Future Prospects of the Unification of Contract Law in Europe and Worldwide' (2013) 18 Uniform Law Review 17,21
[717] ICC Award No. 8540 1996
http://www.unilex.info/case.cfm?pid=2&do=case&ID=644
[718]See also: François Dessemontet, 'Use of the UNIDROIT Principles to Interpret and Supplement Domestic Law' (2002) Supplément Spécial Bulletin de la Cour Internationale d'Arbitrage de la CCI 1,22 who notes '*A consistent feature of most of the arbitral awards examined is that the arbitrators go to great lengths to show that the applicable domestic law and the Principles provide for identical solutions'* This article quotes several awards (a selection: Partial award of 4 September 1996 in ICC case 8540, UNIDROIT Cases No. 6; award of 17 December 1996, Court of Arbitration affiliated to the Economic Chamber and Agrarian Chamber of the Czech
Republic, UNIDROIT Cases No. 8; award in an ad hoc arbitration in Helsinki, 1998, UNIDROIT Cases No. 15; preliminary award of 25 November 1994, Zurich Chamber of Commerce, UNIDROIT Cases No.16; award in ad hoc arbitration in Auckland, New Zealand, 1995, UNIDROIT Cases No. 17; final awarding ICC case 8240, (1999) 10:2 ICC ICArb. Bull. 60)
Dessemontet notes: *'Only a minority of the decisions studied (approximately 10 out of 40) mention that the Principles embody a solution divergent from the (sometimes unclear) domestic law.'*
[719] *Grupo Santa Monica Sports v. Real Club Deportivo de la Coruña*, Audiencia Provincial de A. Coruña (Seccion 4), 18.02.2013
Text available at: http://www.unilex.info/case.cfm?id=1694
[720] Ibid
[721] The Unilex database does not keep track of PECL cases specifically, but does mention cases where the PECL are used alongside the UNIDROIT Principles to supplement or interpret domestic law. There is no similar database for solely the PECL.

frequently. The UPICC and the PECL were first published within a year of each other and in those earlier years they are often used in conjunction. Some of the later cases refer solely to the UNIDROIT Principles. This seems a logical consequence of the way the PECL have developed.[722] Nevertheless, the PECL are used to interpret domestic contract law.[723] It is of course especially in the European context that this happens.

In 2008 the High Commercial Court of Ukraine issued an Official Note stating that the Incoterms, the UCP, and the 1994 edition of the UNIDROIT Principles enshrine trade customs under Ukrainian law.[724] Since the publication of this note multiple cases in the Ukraine have referred to these instruments (especially the UPICC) as international trade usages, customary law, and general principles of commercial law.[725] Most of the cases

[722] See chapter 3.5.4 for further information on the legal status of PECL

[723] See for instance, Carlos Vendrell Cervantes, 'Application of the Principles of European Contract Law' (2008) 16 Zeitschrift für Europäisches Privatrecht 534, where the author analyses a number of decisions of Spanish courts that used the PECL to interpret domestic contract law, as a doctrinal authoritative guide, or as point of comparison.
See also Danny Bush, 'The Principles of European Contract Law before the Supreme Court of the Netherlands' (2008) 16 Zeitschrift für Europäisches Privatrecht 549, which analyses the use of the PECL in courts in the Netherlands

[724] Ralf Michaels, 'The UNIDROIT Principles as Global Background Law,' (2014) 19 Uniform Law Review 643
Official Note of the High Commercial Court of Ukraine No.01-8/211, 07.04.2008

[725] For instance:
Specialized foreign trade company Progres, subsidiary company of the State Company Ukrspecexport v. Ministry of Economy of Ukraine Kyiv District Administrative Court 8/311, 12 December 2008, http://www.unilex.info/case.cfm?id=1737
FG Alpha v. TOV NVF Sintal, Kharkiv Regional Commercial Court 35/118-08, 23 September 2009 http://www.unilex.info/case.cfm?id=1739
Cherkassy Branch of OJSC Kredobank v. Individual entrepreneur 2 Cherkasy Regional Commercial Court 02/2625, 30 November 2009, http://www.unilex.info/case.cfm?id=1736
Dnipropetrovsk company Dnepryanka v. Inter-state Tax Administration of Dnipropetrovsk city and Department, Dnipropetrovsk Regional Administrative Court, 2-a-10084/09/0470, 21 June 2010 http://www.unilex.info/case.cfm?id=1706
TOV Ukrainian commercial vehicles v. Department of Transport and Communications of Chernihiv City Council High Commercial Court of Ukraine, 7/72, 24 November 2010 http://www.unilex.info/case.cfm?id=1707
Arcada PP v. Hobotovske enterprise Krahmaloprodukt High Commercial Court of Ukraine 42/90-10, 30 November 2010 http://www.unilex.info/case.cfm?id=1700
Public utility company Housing Managment of Kyiv city v. TOV Kyiv Telecommunication Networks Kyiv Commercial Court 5011-7/3803-2012 http://www.unilex.info/case.cfm?id=1729
OJSC Druzhkovskaya factory of metal products v. TOV Company Light-Tech High Commercial Court of Ukraine 5023/4701/12, 16th April, 2013 http://www.unilex.info/case.cfm?id=1711

concern internal contracts rather than international ones, and the UPICC, Incoterms, and UCP are used to interpret the applicable domestic (Ukrainian) law. A regional commercial court in a dispute between two Ukrainian companies referred to the applicable articles of the Ukrainian Civil Code, and noted that these were of a general nature, and that as the High Commercial Court of Ukraine officially endorsed the UPICC it would apply these to interpret the civil code.[726] This is one of several cases in which courts in the Ukraine apply the UPICC to interpret domestic law.[727]

Non-state rules are also used as a point of comparison, as evidence of international practice, and as principles of transnational commercial law. An example is the issue whether pre-contractual negotiations should be admitted as evidence under English law. English law has always been reticent on this issue. *Chartbrook Limited (Respondents) v Persimmon Homes Limited and Others (Appellants)* concerned a dispute between two construction companies with regards to a payment.[728] The Court of Appeal took a wider approach to admissibility of evidence external to the contract, which included pre-contractual negotiations. Lawrence Collins LJ stated that the policy reasons for this exclusionary rule are not self-evident and compelling. He quoted the UNIDROIT Principles (article 4.3) and the CISG (article 8) as

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Poltava oblavtodor v. TOV Kontakt-K, Dnipropetrovsk Regional Commercial Court 904/4611/13, 23 July 2013, http://www.unilex.info/case.cfm?id=1734

[726] *FG Alpha v. TOV NVF Sintal*, Kharkiv Regional Commercial Court 35/118-08, 23 September 2009 http://www.unilex.info/case.cfm?id=1739

[727] See for instance also:
TOV Ukrainian commercial vehicles v. Department of Transport and Communications of Chernihiv City Council High Commercial Court of Ukraine 7/72, 24 November 2010
http://www.unilex.info/case.cfm?id=1707

[728] *Chartbrook Limited v. Persimmon Homes Limited* 2008 EWCA Civ 183 Court of Appeal (Civil Division)
http://www.unilex.info/case.cfm?id=1373
The contract stipulated that Persimmon Homes would build apartments on land owned by Chartbrook and then sell these apartments. The payment Chartbrook would receive was broken down in two parts a) a minimum guaranteed residential value and b) a balancing additional residential payment. With regards to the latter the contract stated that this would be: *'23.4% of the price achieved for each residential unit in excess of the minimum guaranteed residential unit value less the costs and incentives.'* The dispute arose as Chartbrook believed that this payment would be net proceeds of the sale of each housing unit whereas Persimmon reasoned that Chartbrook would either receive either this payment or the minimum guaranteed residential value; whichever one was greater. This was discussed in the pre-contractual negotiations.

evidence of this rule not being acceptable in international contractual practice.[729] The case was appealed to the House of Lords which held the payment clause should be constructed so that it was clear to a reasonable person what was meant by it, and that pre-contractual negotiations should not be taken into account. On the subject of the CISG and the UNIDROIT Principles Hoffmann LJ stated:

'Supporters of the admissibility of pre-contractual negotiations draw attention to the fact that Continental legal systems seem to have little difficulty in taking them into account. Both the Unidroit Principles of International Commercial Contracts (1994 and 2004 revision) and the Principles of European Contract Law (1999) provide that in ascertaining the "common intention of the parties", regard shall be had to prior negotiations: articles 4.3 and 5.102 respectively. The same is true of the United Nations Convention on Contracts for the International Sale of Goods (1980). **But these instruments reflect the French philosophy of contractual interpretation, which is altogether different from that of English law**.' [730]

There are several things to note about this case. The court uses non-state rules as evidence to how a specific rule is seen in international practice to contrast this with domestic law. Collins LJ argued that the possibilities to include pre-contractual negotiations in contract interpretation should be enlarged. In this way he uses non-state rules to start a debate on domestic contract law principles. The other important point is Hoffmann LJ's opinion that the UPICC, PECL, and CISG are reflections of French contract philosophy. This indicates that he would not consider these instruments representative of an international trade community, practice, law, or philosophy. He places these instruments in a (French) civil law context. For him these instruments are thus not true international instruments that reflect accepted uniform international commercial practice and philosophy whereas the latter is clearly what the drafters of these instruments intended.[731] The view of Hoffmann LJ was both criticised and

[729] '*Nor is the exclusionary principle accepted in international instruments dealing with private law contracts, such as the UNIDROIT Principles of International Commercial Contracts (Art 4(3)) and the UN Convention on Contracts for the International Sale of Goods (1980).'*
And
'The UNIDROIT Principles and the UN Convention were also relied on in a lecture by Lord Nicholls arguing for a more flexible approach, reprinted as My Kingdom for a Horse: The Meaning of Words (2005) 121 LQR 577'

[730] *Chartbrook Limited (Respondents) v Persimmon Homes Limited* [2009] UKHL 38 House of Lords

[731] Indeed, commentators hold that there are aspects of the CISG which are much closer to the common law than to civil law. The CISG follows for instance the breach of contract law approach that comes from common law and not the cause orientated approach that is prevalent in civil law (Ingeborg Schwenzer, and Pascal Hachem, 'the CISG- Successes and Pitfalls' (2009) 57 The American Journal of Comparative Law 457, 462)

supported.[732] This case shows how non-state rules are used in domestic law cases to criticise, support, or broaden national legal practice.

Proforce Recruit Limited v. The Rugby Group Limited concerned the interpretation of what being a preferred supplier entails.[733] In her opinion Arden LJ wrote that consideration should be given to the possibility of admitting evidence from pre-contractual negotiations and she mentioned the CISG and the UPICC in this context:

'It may be appropriate to consider a number of international instruments applying to contracts. It is sufficient to take two examples. The UNIDROIT Principles of International Commercial Contracts give primacy to the common intention of the parties and on questions of interpretation requires regard to be had to all the circumstances, including the pre-contractual negotiations of the parties (art 4.3). The UN Convention on Contracts for the International Sale of Goods (1980) provides that a party's intention is in certain circumstances relevant, and in determining that intention regard is to be had to all relevant circumstances, including preliminary negotiations.[734]'

[732] For support of Lord Hofffmann's point see: Lord Hope of Craighead, 'The Role of the Judge in Developing Contract Law' (2011) 15 Jersey and Guernsey Law Review 6 which supports that the UNIDROIT Principles in the matter of pre-contractual negotiations run contrary to the common law for practical reasons (Lord Hoffman argued that it would be difficult to separate pre-contractual negotiation from statements of consensus and aspiration) as well as because of the fundamental matter of the absence of a general theory of good faith in English law.
Professor Eric Clive criticised Lord Hoffmann's position in a blog entry made on the University of Edinburgh blog on European Private News which is available at:
http://www.epln.law.ed.ac.uk/2010/04/22/interpretation-and-pre-contractual-negotiations-is-english-law-genetically-incompatible-with-european-private-law/
Last accessed:8 October 2015
Professor Clive argues that these instruments are not contrary to the common law because the roots of the ideology underlying these are not inconsistent with English common law. Professor Clive also indicates that Lord Hoffmann contradicts himself as he also admits that it would not be inconsistent with English legal theory on contractual interpretation to use certain pre-contractual communications.

[733] *Proforce Recruit Limited v. The Rugby Group Limited* 2006 EWCA Civ 69
This concerned a contract between two English companies regarding the supply of labour and cleaning equipment. The contract contained a clause that for the duration of the contract the supplier would have preferred supplier status. The contract did not contain any further clarification of what this exactly meant. The Rugby Group Ltd contracted a third party for some labour needs without consulting Proforce Recruitment. Rugby Group explained the preferred supplier status as concerning only the specific services laid out in the contract and did not imply any commitments beyond this and did not mean sole or exclusive. It only meant that the claimants enjoyed a recognised status. The supplier stated that the clause meant that they would have first right of refusal to any further needs of the customer and in preference to any other suppliers. The High Court made a summary judgment in favour of the customer and that the term did not imply sole supplier nor did it imply they had first right of refusal. The evidence with regards to pre-contractual negotiations could not be considered. The Court of Appeal held that pre-contractual negotiations can be used to interpret the clause and referred the case to trial. LJ Mummery said that the expression preferred supplier status has no obvious meaning and should therefore only be interpreted in the context of the whole agreement and all the surrounding circumstances.

[734] *Proforce Recruit Limited v. The Rugby Group Limited* 2006 EWCA Civ 69

In the case *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* this issue comes up again.[735] In her opinion Arden LJ writes that using pre-contractual negotiations to interpret the contract is a controversial issue and that this normally is not admitted although there are exceptions to the rule. She quotes *Proforce Recruit Ltd v. The Rugby* as an example. She states that it could be appropriate to consider the approach of international instruments such as the UPICC and the CISG. Arden LJ quotes several academic articles to demonstrate that these instruments are reflective of standard practice at the international level.[736] Although ultimately the court rejects the use of pre-contractual negotiations to interpret the contract in this case it does state that sometimes this could be admissible.

The important point to take from these cases is that non-state rules are used as a point of reference to illuminate standard practice and general principles in international commerce. These cases did not concern international contracts, but domestic contracts. Therefore, non-state rules find a role in the debate on national laws where they are used to illustrate certain points or as a reference material. Professor Ramberg notes how the UNIDROIT Principles

[735] *The Square Mile Partnership Ltd v Fitzmaurice McCall Ltd* [2006] EWCA Civ 1690 Court of Appeal (Civil Division), 18.12.2006
The claimant entered into contract with an intermediate holding company to purchase shares of a direct subsidiary of this company. The contract stated that 'accumulated net worth' of this subsidiary would be transferred to the holding company or elsewhere as directed by the intermediate holding company prior to completion of the contract. This transfer was made the day before to the defendant, the ultimate holding company, and the amount was calculated on the basis of the subsidiary's distributable dividends. The dispute concerned the interpretation of the expression 'accumulated net worth' in a clause According to the claimant this should be interpreted as referring only to profit whereas the defendant stated it referred to the net assets. The initial judgment was in favour of the defendant. The claimant appealed this decision and this was also rejected. The court reasoned that the expression should be interpreted in the context of the whole contract from which it became obvious that the clause would concern all the net assists of the subsidiary. The claimant argued that it was explained to him by the defendant that the amount that was transferred to the ultimate holding company was dividend.

[736] Arden LJ observed: '*The Proforce case has been the subject of academic discussion: see in particular A. Berg, Thrashing through the Undergrowth [2006] 122 LQR 354 and M.J. Bonell, The UNIDROIT Principles and CISG - Sources of Inspiration for English Courts? [2006] 11 Uniform Law Review 305. (The CISG is the UN Convention referred to in the quotation in the last paragraph). Mr Berg makes the important point that the meaning of commercial contracts needs to be clear, and that the admission of evidence as to pre-contractual negotiations (or post-contractual conduct) "will often make it more difficult and time-consuming for a party to a commercial contract to ascertain his legal position". Professor Bonell expresses the view that the approach in the UNIDROIT principles and the CISG reflect the trend at international level. Professor Bonell also refers to the decision of Gloster J in Svenska Petroleum V Government of Lithuania (2006) 1 Lloyd's Rep 181. Her decision was affirmed by this court ([2006] EWCA Civ 1529, Sir Anthony Clarke MR, and Scott Baker and Moore-Bick LJJ).* '
http://www.unilex.info/case.cfm?pid=2&do=case&id=1156&step=FullText

have helped her understand Swedish contract law better, and inspired her to start a database comparing and explaining the two.[737] This database is now frequently referred to by Swedish courts.[738] Non-state rules are used as a transnational commercial law 'doctrine.'

Non-state rules have several important functions in domestic law. Non-state rules are used to interpret or to fill in any gaps in domestic law. They take on the meaning of general principles of law applicable to international commercial contracts. Non-state rules are used to show that the rule in domestic law and international practice is similar. They are used as a point of comparative reference to further debates on national legal principles. Non-state rules are thus seen as an internationally accepted practice, standard, or philosophy of transnational commercial law. They take on the quality of legal opinion, scholarship, or doctrine in domestic courts. Their legal authority comes from their persuasive value.

5.4 The Application of Non-State Rules in Practice

The preceding parts of chapter 5 demonstrated that courts frequently apply non-state rules as part of the applicable law. This part examines how often non-state rules are applied as (one of) the applicable law(s) to the contract. Chapter 4 concluded that non-state rules are seldom applied directly as the lex contractus. The most important reason for this could be that most jurisdictions do not allow for this in court litigation. Yet, this is often possible in arbitration, which is used frequently as a dispute resolution mechanism in international commerce. Parties could choose non-state rules as the applicable law in arbitration in far more situations than they could in court litigation. Furthermore, non-state rules can be incorporated by reference in the contract. Chapter 3 discussed that support among the business community is one the ways to gauge the legal authority of non-state rules. One way to measure this support is to study how often they are used and applied.

[737] Christina Ramberg, 'The UNIDROIT Principles as a means of Interpreting Domestic Law' (2014) 19 Uniform Law Review 669, 674
Database available at: www.avtalslagen2010.se
[738] Ibid

This is difficult to measure because there is lack of comprehensive data. There is not a lot of empirical research. Furthermore, arbitral awards are often not published. Even if this information was available it would not give a complete understanding of the wishes of the parties as most jurisdictions do not allow for a choice of law for non-state rules outside of arbitration and this would prevent parties from choosing these in the first place. Additionally, this could only measure how often non-state rules come up in courts and tribunals. It would not measure how frequently they are chosen by the parties as the vast majority of contracts are executed without any litigious conflicts.

A lot of the data available is anecdotal and was collected on a small scale. Therefore, there should be some scepticism with regards to these conclusions. First, some analogous research. Different surveys have been done on how often parties exclude the CISG and for which reasons this is excluded. First of all, the results of the different surveys are conflicting and thus not very reliable.[739] A survey showed that 70.8% of contracts in the United States and 72.2% of contracts in Germany routinely exclude the CISG.[740] An older survey among some large companies in the Netherlands demonstrated that most of them exclude the CISG as well.[741] This same survey showed that smaller companies often do not exclude the CISG, unless legal advice was sought. Berger writes about a worldwide survey among attorneys which revealed that most of them would strongly advise against including the lex mercatoria and would advise to exclude international legal instruments (like the CISG).[742] Calleros states that companies in the US opt out of the CISG too often and that this is because of lack of

[739] Ingeborg Schwenzer and Pascal Hachem, 'the CISG- Successes and Pitfalls' (2009) 57 The American Journal of Comparative Law 457,463
Some of the figures that came out in different surveys is that in between 40% and 70% of the cases in Germany the CISG is excluded.
[740] Martin F. Koehler, Survey regarding the relevance of the United Nations Convention for the International Sale of Goods (CISG) in legal practice and the exclusion of its application,2006, available at www.cisg.law.pace.edu/cisg/biblio/koehler.html
[741] Jan M Smits, 'Problems of Uniform Sales Slaw- Why the CISG may not Promote International Trade' (2013) 1 Maastricht European Private Law Institute Working Paper (accessible at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2197468) 8
[742] Klaus Peter Berger, 'The New Law Merchant and the Global Market Place: a 21st Century View of International Commercial Law' (2000) 4 International Arbitration Law Review 92

familiarity with the CISG and a positive bias towards domestic law.[743] These conclusions on the exclusion of the CISG cannot be equalled 1 on 1 with a choice for non-state rules in general because when the CISG needs to be excluded this means that it is not part of the applicable law. The premise is thus not the same. What it does show is that there is a certain apprehension towards sources of law that have another origin than the state. Yet, in a different vein it can be seen that the general conditions and rules of trade associations often contain provisions excluding the CISG.[744] These general conditions are of course non-state rules themselves.

Excluding the CISG thus does not necessarily signify an apprehension towards non-state rules, but can also be because of a perceived clash with trade branch rules or to exclude any perturbing elements from the contract. Lack of familiarity is often cited as a reason to exclude the CISG. Again, this does not indicate hostility, but rather lack of knowledge.

Research on the application of the CISG has especially been done in the USA. There are several reasons as to why the CISG is not applied more often in the US.[745] One of the reasons

[743] Charles R Calleros, 'Towards Harmonization and Certainty in Choice of Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?' (2010) 28 Wisconsin International Law Journal 639, 642

[744] See for an example Grain and Feed Trade Association (GAFTA) contract:
http://www.gafta.com/write/MediaUploads/Contracts/2014/1_2014.pdf
Article 28
(Here English law is the applicable law so no strict need to exclude CISG)
An example from North American Export Grain Association (NAEGA)
http://www.openfield.co.uk/downloads/79_FOSFA_4A.pdf
Article 27
(New York law is the applicable law and CISG is excluded)
And for a FOFSA example:
http://www.openfield.co.uk/downloads/79_FOSFA_4A.pdf
Article 29

[745] A more general study on why parties opt out was conducted in the US, Germany and China among lawyers (Martin F Koehler and Guo Yujun, 'The Acceptance of the Unified Sales Law (CISG) in Different Legal Systems' (2008) 20 Pace International Law Review 45). Among the reasons mentioned for exclusion by attorneys were: business partner wants to use national law of client, business partner/client cannot be dissuaded from using national law, no advantage in applying uniform law, insufficient experience with CISG and, not enough case law available. In the US the most common answer given was that the CISG is not widely known and therefore there is not enough experience/case law.

is that parties opt out of the CISG as discussed in the previous section.[746] Other reasons are: courts using the gaps in the CISG to apply the lex fori and assuming that the parties have (implicitly) opted out of the CISG.[747] Ferrari notes that in the US courts seem to discard the CISG and apply the lex fori by relying on case law that allows for *'article 2 of the UCC to inform the court when the language of the CISG tracks that of the UCC.'*[748] Smythe holds that parties explore the gaps in the CISG to force the application of domestic law and that courts follow that tendency.[749] There is evidence to suggest that this is changing. Karen Halverson Cross did a Westlaw database search in 2006 which fielded around 48 decisions in the US involving the CISG whereby she noted that two-thirds of these decisions stemmed from the preceding 5 years.[750] Repeating the same database research in July 2015, 185 decisions are found. This means that in the past 9 years the number of cases has risen significantly and the trend that Halverson Cross notes is confirmed.[751] Therefore, even though the number of cases in the US is still quantitatively small it is on the rise. Perhaps this increasing openness towards international instruments indicates that the role of international commercial non-state rules could grow.

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[746] Karen Halverson Cross notes that there is no conclusive empirical research on this issue but that other evidence (such as model contracts excluding the CISG) does seem to suggest that there is a tendency to exclude the CISG. Karen Halverson Cross, 'Parol Evidence under the CISG: The 'Homeward Trend' Reconsidered' (2007) 68 Ohio State Law Journal 133,135)
Of course these model contract and standard terms are non-state rules so this is not due to an apprehension towards non-state rules.

[747] Franco Ferrari, 'Homeward Trend and Lex Forism in International Sales Law' [2009] International Business Law Journal 333,337

[748] Ibid,336
See also: Francesco G Mazzotta, 'Why Do Some American Courts Fail to get it Right?' (2005) 3 Loyola University Chicago International Review 85
John E Murray, 'the Neglect of the CISG: A Workable Solution' (1997-1998) 17 Journal of Law and Commerce 365
Examples of case law following this reasoning are: *Delchi Carrier SpA v. Rotorex Corp*., 71 F.3d 1024 (2d Cir. 1995) (N.D. Ill. May 25, 2003) and *Raw Materials, Inc. v. Manfred Forberich GmbH & Co*., KG, No. 03 C 1154, 2004 U.S. District (See Mazzotta's article for a full review of this case)

[749] Donald J Smythe, 'The Road to Nowhere: Caterpillar v Usinor and CISG Claims by Downstream Buyers Against Remote Sellers' (2011) 2 George Mason Journal of International Commercial Law 123, 149

[750] Karen Halverson Cross, 'Parol Evidence under the CISG: The 'Homeward Trend' Reconsidered' (2007) 68 Ohio State Law Journal 133
Some of these decisions are appeals to earlier cases

[751] And repeating the Westlaw database search once more in April 2016 201 cases are found. In the last 10 years there are on average 15 new cases every year on the CISG.
The vast majority of these are in District Courts (172). The largest amount can be found in the state of New York (followed by California, Illinois, and Florida)

In a survey on the UPICC, conducted in 1997, 27.3% of the participants stated that they had chosen the UPICC as the law of the contract with half of these having referred expressly to the UPICC and the other half using a formula such as general principles of law.[752] This number seems relatively high given how new the Principles were at that point. The survey was done among lawyers/arbitrators/professors who had expressed a previous interest in the UPICC. It would therefore be logical to assume that the respondents were pre-disposed to using the UPICC. Nevertheless, even if there was this bias it can still be concluded that the UPICC are used. The same research also showed that 25 respondents had relied upon the Principles in an arbitral award.[753] In 2011 Sarah Lake published an article based on a survey among law practitioners in Britain regarding the use of the UNIDROIT Principles.[754] The results showed that only 3% of British respondents had ever used the UPICC whereas internationally 31% of the respondents had used them at least once.[755] These results were compared with other legal instruments whereby of the British and international respondents respectively 22% and 49% had used the CISG, 4% and 5% the PECL, and 4% and 14% the Incoterms.[756]Although the authors' emphasis was on comparing the British and international results, these figures demonstrate that the UPICC are applied; the numbers might not be overwhelming, but the results show usage.

This trend is confirmed by the UNILEX database. In 2011 UNILEX reported 107 decisions of domestic courts and 159 arbitral awards that made reference to the UNIDROIT Principles.[757] Repeating the same search in 2016 the UNILEX database finds 206 decisions of domestic courts and 219 decisions of arbitral tribunals that make reference to the UNIDROIT

[752] Michael Joachim Bonell, 'UNIDROIT Principles in Practice: The Experience of the first two years' (1997) 2 Uniform Law Review 34,43
[753] Ibid
[754] Sarah Lake, 'An Empirical Study of the UNIDROIT Principles – International and British Responses' (2011) 16 Uniform Law Review 669,673
[755] Ibid
[756] Ibid,674
[757] Eleonora Finazzi Agrò, 'The Impact of the UNIDROIT Principles in International Dispute Resolution in Figures' (2011) 16 Uniform Law Review 719, 720

Principles.[758] This indicates that especially the usage of the Principles in domestic courts has risen substantially in the past four years.

Two remarks need to be made. UNILEX is not a complete database; the information for the database is found by researchers who usually work on a temporary basis for UNIDROIT. This means that the numbers in practice will be higher. The second issue is that UNILEX reports on every case where the UNIDROIT Principles are mentioned regardless of whether they played a deciding role in the case. In some cases, they might have been merely referenced by one of the parties. It can be concluded though that the usage of the UPICC is on the rise.

The above demonstrates that non-state rules are applied by the courts. It is unclear from the above data whether this is as the lex contractus, to fill any gaps in the applicable law, as contractual rules, or to interpret the applicable law. It does demonstrate that courts are not hostile to the application of non-state rules.

This non-hostility is confirmed by two surveys which were done on how the UPICC should be applied. In the first survey, conducted in Florida, most of the participating judges indicated that they would have no problem applying the UPICC at the request of the parties.[759] Some expressed reluctance because of lack of knowledge of the UPICC, but not out of principle. In a follow-up survey, conducted in several states, 27% of the responding judiciary indicated that they would perceive a choice of law clause for the UPICC as the responsibilities of the parties being solely determined by the Principles, 36% indicated the same, but with exception of applicable mandatory rules, 9% said that the applicable national law should be applied

[758] http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=13617
Last accessed: 3 February 2016

[759] Michael Wallace Gordon, 'Part II Some Thoughts on the Receptiveness of Contract Rules in the CISG and the UNIDROIT Principles as Reflected in One State's (Florida) Experience of (1) Law School Faculty, (2) Members of the Bar with an International Practice, and (3) Judges' (1998) 46 American Journal of Comparative Law Supplement 361, 369

supplemented by the UPICC, and 18% indicated that this would mean that the parties had not made a choice of law.[760] 82% of judges (in this survey) are thus not averse to applying the Principles and 27% are willing to apply these as the governing law. This indicates a favourable attitude towards the UPICC. As the numbers that participated in these surveys are limited the results should rather be taken as a general indication than as absolute fact. Moreover, the surveys were sent out to a large number of participants and it could be presumed that those who were already interested in the UPICC would be more likely to take the time to fill these out and send them back.

Standard terms of contract and model contracts are used consistently in the international business community and are therefore frequently chosen as contractual rules. This is true for both those promulgated by trade associations as well as for the UCP and the Incoterms. Bernstein quotes an arbitrator of the NGFA who states that arbitrators in the Association should look first at the terms of contract, then at the trade rules, then at trade practice, and only in last instance at any statutory law. This is confirmed by the actual decisions taken by NGFA arbitrators who adhere to this hierarchy.[761] This confirms the importance of standard terms and conditions as well as trade usages in the international business community (including arbitrators.)

Concluding, it can be said that lack of familiarity is the most important reason why parties opt out of international conventions. This is also the most important reason why courts fail to apply international conventions even when these are binding law. If this is equated with the use of codified non-state rules the attitude is thus not hostile, but merely apprehensive. The majority of the respondents in the different surveys felt they were not familiar with the

[760] Peter L Fitzgerald, 'The International Contracting Practices Survey Project: An Empirical Study of the Value and Utility of the CISG and the UNIDROIT Principles of International Commercial Contracts to Practitioners, Jurists, and Legal Academics in the United States' (2008) 27 Journal of Law and Commerce 1,60

[761] Lisa Bernstein, 'Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms' (1996) 144 University of Pennsylvania Law Review 1765, 1777

instruments and had no practical experience with them. Yet, the available data does show usage of codified non-state rules. They are used as the law of the contract, as contractual rules, and to interpret the applicable law.

5.5 Conclusion

This chapter stepped out of the traditional context of private international law in which the question of the application of non-state rules is usually treated and focused instead on the role non-state rules play in domestic law. It analysed different situations in which non-state rules are applied by courts.

Non-state rules can be applied if this is permitted by domestic law. And national laws do allow for this. Non-state rules are applied as trade usages, custom, and general principles which can be sources of law. This chapter used the examples of the UCC and the CISG, but they are not the only laws that accord an important place to trade usages. Trade usages and customary law are a source of law in many jurisdictions. Article 2807 of the Québécois civil code states that courts should acknowledge international customary law in their decisions.[762] In Colombia courts use non-state rules to interpret the applicable law.[763] In France the Civil Code states that contracts are not only binding in what is expressly included, but are also

[762] Article 2807 Code Civil du Québec : Le tribunal doit prendre connaissance d'office du droit en vigueur au Québec. Doivent cependant être allégués les textes d'application des lois en vigueur au Québec, qui ne sont pas publiés à la Gazette officielle du Québec ou d'une autre manière prévue par la loi, les traités et accords internationaux s'appliquant au Québec qui ne sont pas intégrés dans un texte de loi, ainsi que le droit international coutumier.

[763] *Rafael Alberto Martínez Luna y María Mercedes Bernal Cancino vs. Granbanco S.A*, Corte Suprema de Justicia, 21.02.2012
http://www.unilex.info/case.cfm?pid=2&do=case&id=1709&step=Abstract
Parties can choose non-state rules as the applicable law and the court can use these to interpret international legal instruments and national legal principles.
'Indispensable aclarar que las partes pueden regular el contrato mercantil internacional por sus reglas, en cuyo caso, aplican de preferencia a la ley nacional no imperativa, y el juzgador en su discreta labor hermenéutica de la ley o del acto dispositivo, podrá remitirse a ellos para interpretar e integrar instrumentos internacionales y preceptos legales internos.'

binding in all that follows from the contract: equity, trade usages, and law.[764] English common law treats usages as implied terms of the contract and thus recognises these.[765] The above is applicable in domestic contract situations just as much as in international contract situations.

Non-state rules are used to interpret the applicable domestic law or conventional law. These non-state rules would then be classified as general principles of law. This has extended to include codified non-state rules: especially the UPICC, but also the CISG, PECL, and the Incoterms. These are used as general principles of law or to find the concrete rules underlying the principles. Scholarly opinions and case law are used as guidelines to find these general principles.

Non-state rules are also used indirectly. Courts do not apply them, but use them as a comparative reference point of standard international commercial practice. This can be done to show that the national law and non-state rules propagate the same solution. This shows that national law is in accordance with international commercial practice. Or it could be that the applicable law has several rules and non-state rules are used to show that one of the solutions is the most appropriate in the circumstances as it best reflects international commercial practices. Non-state rules are also discussed by courts with the purpose to further debates on (national) legal principles.[766] Non-state rules provide a reference point for commonly accepted international practice, philosophy, law, or general principles. In this way they can raise awareness and influence courts or eventually legislators and policy makers. They are thus used and applied as legal scholarship, legal opinions, and 'doctrine.'

[764] Les conventions obligent non seulement à ce qui y est exprimé, mais encore à toutes les suites que l'équité, l'usage ou la loi donnent à l'obligation d'après sa nature
In France the CISG is also part of positive law so through this instrument, trade usages are also applicable
[765] See for instance: *Cunliffe-Owen v Teather & Greenwood* [1967] 1 WLR 1421
[766] Given the difference between court decisions in common law and civil law it is not surprising that the latter usage is found more often in common law cases as judges there often take a reflective approach in their opinions. In civil law countries one would look at case notes in journals to find the same usage of non-state rules.

Another way that non-state rules are applied indirectly is when they influence drafters of legal codes. This was not discussed in this chapter as the focus in this thesis is on the application by courts, but it is an important usage of non-state rules. This can be done in a direct way with model laws or in a more indirect way when legal drafters are influenced by non-state rules when designing new laws. An example of how non-state rules are used in this fashion is when the UPICC were used as a legislative guide in countries such as Estonia (the Estonian government declared that they considered the Principles as *'one of the most important and authoritative sources of inspiration,'* the Czech Republic, Russia, and Lithuania when these countries drafted new laws or updated existing laws.[767] That is not to say that provisions from the Principles were incorporated 1 on 1, but rather that they were considered and used as guidance to draft the law. The CISG has been used in the same way as well, for instance in China and in Scandinavia countries.

When article 5 of the UCC pertaining to letters of credits was revised it was recognised by the drafters that the UCP played a pivotal role in letter of credits transactions. Therefore, they specifically constructed the article with the UCP in mind and made sure that the two were as consistent as possible.[768] The UCP are non-state rules and as such would be disposed by any mandatory legal provisions. Yet, in practice this does not matter. The UCC not only allows for parties to include the UCP, but also makes sure there are no mandatory provisions that could conflict with their application.[769]

There are thus different uses for non-state rules in domestic law. Non-state rules can be domestic sources of law. Non-state rules can take on the role of implied terms of contract.

[767] Michael Joachim Bonell, 'UNIDROIT Principles in Practice: The Experience of the first two years' (1997) 2 Uniform Law Review 34,37

[768] For a thorough expose on this see: Kerry Lynn Mackintosh, 'Liberty, Trade, and the Uniform Commercial Code, When Should Default Rules Be Based on Business Practices?' (1996) 38 William & Mary Law Review 1465
The drafters stated that: *'to facilitate its [article 5] usefulness it is essential that US law be in harmony with international rules and practices'* and '*they [the rules] need to be substantively and procedurally consistent with international practices.'*
(American Law Institute, UCC Revised Article 5, Final Draft)

[769] Individual states can of course amend or introduce measures that contradict the UCP

Non-state rules are used to help interpret the applicable law or to fill in any gaps in the applicable law. It is precisely in these functions that non-state rules are applied frequently. It should be kept in mind that the extent of such usage depends on the state. Not just because the legislative systems are different in their recognition of non-state rules as sources of law, but also because legal scholarship and judicial reasoning differs. In some countries recourse to non-state rules for gap filling or interpretation is much more common than in other countries. The results from different surveys show that lack of familiarity and apprehension are perturbing factors that can discourage the usage and application of non-state rules. Nevertheless, the results of these surveys do show that non-state rules are indeed used by the business community and are applied by the courts. The extensiveness of this application is difficult to gauge, but it does happen and the application seems to be on the rise.

The previous chapter focused on when non-state rules can be applied and this chapter completed the analysis by focussing on when non-state rules are applied. Furthermore, this chapter already touched upon the question of how non-state rules are applied. The next chapter continues with an analysis of that particular issue and studies in more detail how courts apply non-state rules. The next chapter completes the analysis of the application of non-state rules.

Chapter 6: How Courts Apply Non-State Rules

6.1 Introductory Comments

The previous chapter discussed the application of non-state rules by courts outside the private international law context. Chapter 5 concluded that non-state rules are pervasive outside this context. Courts apply non-state rules as a source of the applicable state law, to interpret the applicable law, to fill in gaps in the applicable law, as contractual rules, and as legal scholarship/doctrine.

This penultimate chapter follows on from this and continues with the analysis of the application of non-state rules in order to better understand their legal authority. This chapter concentrates on how non-state rules are applied. The first part focuses on the link between arbitration and court litigation. When an arbitral award based on non-state rules is challenged or when its enforcement is sought this comes up in state courts. This part analyses how courts treat non-state rules in those cases. This could help to comprehend how courts apply non-state rules.

The second part analyses how non-state rules are applied by examining in depth how courts find the concrete rules to apply. There is a tendency for dispute resolution bodies, courts and arbitral tribunals, to apply codified non-state rules when the contract calls for the application of the lex mercatoria, trade usages, or general principles of law. This issue was already examined briefly in chapter 5.2 and 5.3 which concluded that codified non-state rules are used as trade usages, as the underlying principles of the CISG, or as general principles to

interpret the applicable law. Together with the previous chapter this chapter provides an analysis of how non-state rules are applied.

6.2 Non-State Rules and Arbitration

This part focuses on the connection between arbitration and court litigation. The main reason why this part is included is that when an arbitral award based on non-state rules is challenged this represents an opportunity to study how courts apply non-state rules. Furthermore, even if this thesis concentrates on court litigation the role of non-state rules in arbitration contributes to understanding the legal authority of non-state rules in transnational commercial law. This is because the arguments advanced by the parties, by attorneys, and by arbitrators on (the application of) non-state rules can shed light on how non-state rules are seen by different stakeholders in international commerce. It contributes to understanding in what capacity non-state rules are applied in arbitration: applicable law or contractual rules, at the initiative of the parties or in absence of a choice of law clause. Perception and usage are benchmarks against which the legal authority of non-state rules in the international community is measured.

It should be kept in mind that the state court belongs to a national, international, or European judicial order whereas the arbitrator is attached to a transnational order, which means they do not belong to the same legal order and therefore, the decisions of one do not necessarily affect those of the other.[770] It means that even if the application of non-state rules is permissible in one of these orders it is not necessarily so in the others. Therefore, one should be careful to draw any parallels between the application of non-state rules in arbitration and in state courts.

[770] Guillaume Busseuil, 'L'Avenir des Principes Unidroit Relatifs aux Contrats de Commerce International et des Principes Européens du Droit du Contrat : du Droit Mou ou Droit Dur ?' [2004] Centre de Droit Civil des Affaires et du Contentieux Economique 16 http://www.glose.org/CEDCACE4.pdf Last accessed: 27 February 2016

6.2.1. National Legislation on Arbitration and Non-State Rules

This first section discusses when non-state rules can be applied in arbitration. Arbitrators can render decisions in law or as amiable compositeur. In the latter case, the arbitrator is not bound to apply the provisions of a law.[771] If an arbitrator is acting as amiable compositeur he can apply non-state rules, but the legal authority of these would not be important. The arbitrator is not bound to apply any law in that case. The arbitrator can only act as amiable compositeur with the consent of the parties.[772] If this is the case the decision can be enforced under the New York Convention regime.[773] Lord Mustill draws attention to that the lex mercatoria and amiable composition are often mixed up.[774] If an arbitrator acts as amiable compositeur he is not obliged to follow any law, but can decide based on what he sees as fair and just, whereas if he applies the lex mercatoria he is applying a law and should follow it regardless of his personal convictions of whether it is fair and just.

The question whether the arbitrator can apply non-state rules if he is rendering a decision in law is more pertinent to the discussion here as this contributes to understanding the legal authority of non-state rules. Although there are differences between countries the overall tendency is to allow for non-state rules as the applicable law in arbitration. According to the civil procedural code of The Netherlands the arbitrator can apply any rule of law that he

[771] It is also possible for courts to render decisions as amiable compositeur if the legislation allows this. As an example, in France the judge can act as amiable compositeur if the parties request this (article 12.4 of the Civil Procedural Code (Le litige né, les parties peuvent aussi, dans les mêmes matières et sous la même condition, conférer au juge mission de statuer comme amiable compositeur, […])

[772] This is the case according to many national arbitration laws such as English Arbitration Act (Section 46.1 (b), the Swiss Private International Law Act (article 187.2), and the French Code of Civil Procedure (article 1497) as well as international arbitration rules such as those of the ICC (article 21.3).

[773] The New York Convention of 1958 on the Recognition and Enforcement of Foreign Arbitral Awards has 152 signatories as of September 2014 and is thus widely ratified http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

[774] Lord Justice Mustill, 'Contemporary Problems in International Commercial Arbitration: A Response' (1989) 17 International Business Lawyer 161,162
'Amiable composition and lex mercatoria have nothing in common at all, except that each has a name in a foreign language.'

deems appropriate.[775] De Ly mentions that the explanatory note explicitly states that arbitrators may apply the lex mercatoria, which it defines as accepted trade usages.[776] This definition was later extended to include accepted rules and general principles.[777] In the Netherlands it would thus be possible for parties to choose non-state rules as the applicable law or for the arbitrator to apply these in absence of a choice of law clause. In May 2015 the Dutch Supreme Court confirmed an arbitral award based on non-state rules.[778] The parties in this case had chosen as the applicable law *'the general legal rules and principles regarding international contractual obligations enjoying a wide international consensus, including the UNIDROIT Principles*.' The choice of law was accepted without question by the court.

French arbitration law is similar to Dutch arbitration law and the arbitrator decides the case according to the rules of law chosen by the parties or those he deems appropriate in absence of a choice of law clause.[779] The text uses the words *règles de droit* and not *lois*. The word *lois* refers to laws whereas the concept of droit is broader. Non-state rules can be used under this broader scope. The Italian Code of Civil Procedure states that the arbitrator shall render the decision according to the rules of law (*norme di diretto*), unless he has been given authorisation to settle as amiable compositeur.[780] The same difference between loi and droit also applies in Italian with *legge* and *diretto.*

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[775] Article 1504
1. The arbitral tribunal decides according to the rules of law.
2. If the parties have made a choice of law the arbitral tribunal decides according to the rules of law chosen by the parties. If the parties have not made a choice of law the arbitral tribunal decides the applicable rules of law.
3. The arbitral tribunal can act as amiable compositeur if instructed so by the parties.
4. In all cases the arbitral tribunal must take into consideration the applicable trade usages

http://maxius.nl/wetboek-van-burgerlijke-rechtsvordering/artikel1054

[776] Filip de Ly, *International Business Law and Lex Mercatoria, (*T.M.C Asser Instituut 1992) 250

[777] Ibid, 251

[778] *Bae Systems Plc v. Ministry of Defence and Support For Armed Forces of the Islamic Republic Of Iran*, Hoge Raad 22 May 2015, ECLI:NL:HR:2015:1272.
http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2015:1272

[779] Code de Procedure Civile : Article 1511 :
Le tribunal arbitral tranche le litige conformément aux règles de droit que les parties ont choisies ou, à défaut, conformément à celles qu'il estime appropriées. Il tient compte, dans tous les cas, des usages du commerce.

[780] Codice di Procedura Civile, Libro IV Dei Procedimenti Speciali, Titolo VIII: Dell'Arbitrato Art. 822.

In the USA the Federal Arbitration Act (FAA) does not consider the applicable law.[781] Section 2 of the FAA discusses reasons to invalidate an award. This section does not mention anything with regard to the applicable law as a reason to invalidate an award.[782] Section 10 discusses enforcement, but does not discuss the issue of the applicable law.[783]

The FAA does not include a general public policy defence, but federal courts have held that violation of public policy can make an award unenforceable.[784] The US Supreme Court has, as of now, not pronounced itself on whether the application of non-state rules is considered a violation of public policy.[785] Professor Symeonides's estimation is that, given the high threshold for declaring an arbitral award unenforceable, it can be assumed that the application of non-state rules in and of itself would not be sufficient ground to invalidate an award.[786] Curtin agrees with this analysis. [787]

Gli arbitri decidono secondo le norme di diritto, salvo che le parti abbiano disposto con qualsiasi espressione che gli arbitri pronunciano secondo equità.
http://www.altalex.com/index.php?idnot=33753

[781] The FAA was enacted in 1925 and applies in both state and federal courts. It was enacted by Congress which exercised its rights under the Commerce Clause. The FAA allows for binding arbitration if the parties have contractually bound themselves to this. If one of the parties fails to carry out an award the other party can get the award confirmed in court. The award would then become an enforceable judgment. Objections against an award can be made in court.

[782] 9 U.S. Code § 2 - Validity, irrevocability, and enforcement of agreements to arbitrate
A written provision [….] to settle by arbitration […] shall be valid, irrevocable, and enforceable, save upon such grounds as exist at law or in equity for the revocation of any contract.

[783] 9 U.S. Code § 10 - Same; vacation; grounds; rehearing
a) In any of the following cases the United States court in and for the district wherein the award was made may make an order vacating the award upon the application of any party to the arbitration—
(1) where the award was procured by corruption, fraud, or undue means;
(2) where there was evident partiality or corruption in the arbitrators, or either of them;
(3) where the arbitrators were guilty of misconduct in refusing to postpone the hearing, upon sufficient cause shown, or in refusing to hear evidence pertinent and material to the controversy; or of any other misbehavior by which the rights of any party have been prejudiced; or
(4) where the arbitrators exceeded their powers, or so imperfectly executed them that a mutual, final, and definite award upon the subject matter submitted was not made.

[784] Symeon C Symeonides, 'Contracts subject to Non-State Norms' (2006) 54 American Journal of Comparative Law 209,214

[785] Ibid

[786]Ibid

[787] Kenneth M Curtin, 'Contractual Expansion & Limitation of Judicial Review' (2000) 15 Dispute Resolution Journal 56, 59

In *Mitsubishi v Soler Chrysler-Plymouth* the Supreme Court stated that federal policy is in favour of arbitration; especially in the field of international commerce.[788] The Court confirmed that the arbitral tribunal does not owe any allegiance to the law of a particular state and is free to apply a law of its choosing.[789] The favourable attitude towards arbitration coupled with the acknowledgment that arbitration does not belong to the legal order of any state strongly supports the assessment of scholars that the simple application of non-state rules is not enough to violate public policy.

In England in 1983 the court of appeal declared in *Bank Mellat v Helleiniki Techniki SA* that '*Our jurisprudence does not recognise the concept of arbitral procedures floating in the transnational firmament unconnected with any municipal system of law.'*[790] Thus even in arbitral proceedings a connection to a state law would be required.

This view changed over the years. In *DST v Rakoil* enforcement of an award, rendered in Switzerland, based on the lex mercatoria was sought and granted despite the arbitrator not acting as amiable compositeur.[791] This concerned an oil exploration agreement between an

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[788] *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985)
https://supreme.justia.com/cases/federal/us/473/614/
'The strong presumption in favor of freely negotiated contractual choice-of-forum provisions is reinforced here by the federal policy in favor of arbitral dispute resolution, a policy that applies with special force in the field of international commerce.'
This case involved a dispute on distribution rights to vehicles manufactured by Mitsubishi and bearing Chrysler and Mitsubishi trademarks. The agreement contained a Japanese arbitration clause and a choice of law for Swiss law. Soler brought an anti-trust claim to a US district court on the grounds that this issue was not arbitrable and Mitsubishi requested the court to compel arbitration as agreed by the parties. The Supreme Court held that the issue was arbitrable. The Supreme Court decided that the needs of international commerce mandate predictability and that arbitration should thus proceed as intended by the contract.

[789] *Mitsubishi v. Soler Chrysler-Plymouth*, 473 U.S. 614 (1985)

[790] *Bank Mellat v. Helleiniki Techniki* [1983] 3 WLR 783 (CA)
This was also affirmed in *Amin Rasheed Shipping Corporation v Kuwait Insurance Company* [1983] 2 All. E.R. 884:
'Contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations.'

[791] *Deutsche Schachtbau – und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co* [1987] 3 WLR 1023 (CA) known as *DST v. Rakoil*
Lord Donaldson M.R.:

enterprise in the UAE and a German Company. The contract contained a choice of forum clause for ICC arbitration, but no choice of law clause. The arbitrators decided on internationally accepted principles of law as the applicable law. The tribunal awarded damages to DST. DST brought proceedings for enforcement in England where Rakoil had assets. Rakoil appealed on the basis that English public policy prevented the enforcement of an award made on the application of *'unspecified, possibly ill-defined, internationally accepted principles of law.'* The appeal was rejected.[792]

Donaldson M.R:
I agree... that parties can validly provide for some other system of law to be applied to an arbitration tribunal. Thus, it may be . . . that the parties could validly agree that a part, or then whole, of their legal relationships should be decided by the arbitral tribunal on the basis of a foreign system of law, or perhaps on the basis of principles of international law... I see no reason why an arbitral tribunal in England should not, in a proper case, where the parties have so agreed, apply foreign or international law

The court thus recognised that an award based on principles of international law could be enforced and that this is not necessarily against public policy. The influence of this case is debatable as it was argued that the court was not concerned with the issue of the applicable law, but only with enforcement of an award made in a foreign arbitral tribunal where applying non-state rules as the applicable law is allowed.[793] Nonetheless, as the quote above shows, the court considered that a choice for non-state rules could be permissible in an arbitral tribunal in England as well.

'The parties have left the proper law to be decided by the arbitrators and have not in terms confined their choice to national systems of law. I can see no basis of concluding that the arbitrators' choice of proper law— a common denominator of principles underlying the laws of the various nations governing contractual relations— is out with the scope of the choice which the parties left to the arbitrators'
(This case eventually went to the House of Lords but this particular issue was not considered further.)

[792] DST obtained the order for an unrelated third party to pay what they owed to Rakoil to DST. The case went to the House of Lords as R'as Al Khaimah (owner of Rakoil) began a case against the third party for the payments due to Rakoil. As this proved successful the House of Lords did not make the garnishee order absolute so that the third party would not incur the risk of having to pay for its debts twice (*Shell International Petroleum Co. Ltd. (Sitco) (UK) v. Deutsche Schachtbauund Tiefbohrgesellschaft MbH (DST*) (FR Germany), [1989] 2 A.C.375) This case has no impact on the earlier decision nor is it relevant to the discussion here

[793] Michael Joachim Bonell, *An International Restatement of Contract Law: the UNIDROIT Principles of International Commercial Contracts* (2nd edition, Transnational Publishers 1997), 149

Changes came with the English Arbitration Act of 1996. This Act uses the word law instead of rules of law unlike some of the other jurisdictions discussed.[794] Despite this the Act allows for non-state rules to be chosen according to section 46 (1) (b): *'the arbitral tribunal shall decide the dispute...if the parties so agree, in accordance with such other considerations as are agreed by them determined by the tribunal.'* What these other considerations are is not discussed, but the article seems wide enough to include non-state rules. In the well-known case of *Channel Tunnel Group Ltd v Balfour Beatty Construction Ltd* the applicable law was the principles common to French law and English law and this choice was accepted by the courts without question.[795]

In the words of Shackleton: *'In England, an express choice by the parties of lex mercatoria will be given effect, but will not be viewed under the new Arbitration Act as choice of an applicable law and it would appear that any implied choice by the parties of lex mercatoria as the applicable law, either alone or in addition to a designated municipal law, cannot be given effect.'*[796] The express will of the parties will thus be given effect, but the exact legal status of this choice is not clear. Section 46(3) excludes the application of non-state rules without an express choice made by the parties.[797] The arbitrator cannot apply non-state rules in absence of a choice of law clause. Non-state rules thus do not seem to have the status of law under the Act, but they can be chosen by the parties to the contract.

The civil law jurisdictions discussed here have similar rules when it comes to arbitration and non-state rules: parties are allowed to choose non-state rules as the applicable law, and in

[794] English Arbitration Act 1996, Article 46
(1) The arbitral tribunal shall decide the dispute—
(a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
(b)if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
[795] *Channel Tunnel Group Ltd and Another v Balfour Beatty Construction Ltd and Others*, [1993] AC 334 CA
[796] Stewart S Shackleton, 'The Applicable Law in International Arbitration under the New English Arbitration Act 1996' (1997) 13 Arbitration International 375, 379
[797] English Arbitration Act 1996 article 46 (3)
If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

absence of a choice of law clause the arbitrator can apply non-state rules. The English Arbitration Act allows parties to choose non-state rules, but it does not allow the arbitrator to apply these in absence of an express choice by the parties. The case law of *DST v Rakoil* suggests that the application of non-state rules by the arbitrator in absence of a choice of law clause could be valid if that arbitration took place in a forum which allows for this.[798] Finally, US federal legislation does not discuss the validity of non-state rules as the applicable law. Commentators seem in agreement that given the high threshold to declare an arbitral award non-valid combined with the principle that the arbitral tribunal owes no allegiance to any legal regime; the simple application of non-state rules should not be enough to nullify an award.

6.2.2 International Legislation on Arbitration and Non-State Rules

The arbitration rules of the ICC refer in article 21.1 to 'rules of law' and in article 21.2 the applicability of relevant trade usages is specifically mentioned.[799] This is similarly worded to the civil law jurisdictions discussed in the previous section. The UNCITRAL Arbitration Rules use the wording *rules of law*, but they specify that this is restricted to the choice made by the parties.[800] When the arbitral tribunal decides the applicable law, the UNCITRAL Rules use the word law: '*the arbitration tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties,*

[798] And as the UK is a party to the New York Convention enforcement and recognition of a foreign arbitral award would fall under the scope of the convention

[799] Article 21
1. The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate.
2 The arbitral tribunal shall take account of the provisions of the contract, if any, between the parties and of any relevant trade usages.
3 The arbitral tribunal shall assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such powers.
http://www.iccwbo.org/products-and-services/arbitration-and-adr/arbitration/icc-rules-of-arbitration/

[800] The UNCITRAL Arbitration Rules (as revised in 2010) Article 35.1
http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf

the arbitral tribunal shall apply the law which it determines to be appropriate.'[801] Therefore, if the applicable law is determined by the arbitral tribunal it can only choose a law and not rules of law. This seems to infer a state law. This is close to the position of English law. *The Rules of Procedure of the inter-American Arbitration Commission* use the term law throughout.[802] This would not necessarily preclude the application of non-state rules as this would depend on how the word 'law' is interpreted. This could be interpreted in such a way as to allow for non-state rules to be chosen and to be applied.

If one studies the earlier incarnations of the ICC and UNCITRAL guidelines the progressive development towards a wider acceptance of possible choices of law can be observed. The Arbitration Rules of the ICC in their previous version read *'the parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.'*[803] It does not use the wording 'rules of law' or a similar formula. The 1976 version of the UNCITRAL arbitration rules stated that *'the tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'*.[804] This again uses the term law instead of rules of law. Non-state rules fall under the category rules of law, but it could be argued that they are also law. Under the

[801] Ibid

[802] Rules of Procedure of the inter-American Arbitration Commission (1988) as amended in 2002
Article 35
1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules that it considers applicable.
[…]
3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.
https://www.law.cornell.edu/cfr/text/22/part-194/appendix-A

[803] International Chamber of Commerce, Rules of Conciliation and Arbitration - (Old) Conciliation and amended Arbitration Rules in force as from January 1, 1988 until December 31, 1997
http://www.jus.uio.no/lm/icc.conciliation.arbitration.rules.1988/doc.html

[804] UNCITRAL Arbitration Rules (1976 version)
http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf

older versions of these arbitration rules there were cases when non-state rules were applied in arbitration. Parties are free to choose the arbitral rules of their choosing, so they can opt for rules that allow the arbitrator to apply non-state rules if that is what they want.

In 1963 Cavin LJ stated that '*it is therefore perfectly legitimate to find in such a clause evidence of the intention of the parties not to apply the strict rules of a particular system but rather to rely upon the rules of law based upon reason, which are common to civilized nations.*'[805] Party autonomy is larger in arbitration than in court litigation. Even jurisdictions that have restrictive party autonomy such as Brazil allow parties to choose non-state rules as the applicable law in arbitration.[806] The agency of the arbitral tribunals to apply non-state rules in the absence of a choice of law is larger as well, although this is not universal as there are jurisdictions that do not accept this.

The most important reason why states allow greater freedom in arbitration is that the arbitrator does not operate in the national legal order and arbitral awards have no influence on state law. Consequently, it cannot be said that if non-state rules can be applied in arbitration this is because the law in general endorses the application of non-state rules. It rather flows from a positive attitude towards the concept of arbitration as a dispute resolution mechanism that should be given more freedom in form and substance.

An additional reason is that if parties choose a non-state mechanism, they could be more predisposed to resolving their dispute with the use of non-state rules. This means that the arbitrator should be given the freedom to apply non-state rules. Yet, as Symeonides also argues, this seems a bit of a presumption.[807] It assumes certain reasons why parties would choose arbitration. There are several advantages to arbitration of which the most important

[805] *Sapphire International Petroleums Ltd. V. National Iranian Oil Company* (1963) 35 International Law Reports 136 http://translex.uni-koeln.de/261600

[806] Lauro Game Jr, 'Prospects for the UNIDROIT Principles in Brazil' (2011) 16 Uniform Law Review 613 640

[807] Symeon C Symeonides, 'Party Autonomy and Private-Law Making in Private Law: The Lex Mercatoria that Isn't' published in *Liber Amicorum Konstantinos D Kerameus* (Sakkoulas/Kluwer Press, 2006) 20

are the confidentiality of the proceedings and a speedier procedure (although this last one is less true now that demand for arbitration has increased). It is not because the parties choose a non-state forum that they necessarily wish to have non-state rules applied to their conflict.

That is not to say that parties never choose arbitration for that reason. Merchants do choose non-state rules as the applicable law in arbitration with some regularity as evidence throughout this thesis has shown. Non-state rules can be considered a neutral alternative if no choice of state law can be made as was discussed in chapter 2.6. When the parties do not include a choice of law clause this can be because they could not agree on the applicable law.[808] Parties could in that case be more satisfied if the arbitrator applies non-state rules than a state law because of the neutrality of the first. Lalive notes that in many state-company contracts there is no choice of law clause and these contracts often rely on the application of the lex mercatoria or its elements.[809] Thus, the flexibility in choice of law is welcomed. There is a certain symmetry in that non-state rules can be applied when using a non-state dispute resolution body.

6.2.3 Arbitration, Non-State Rules and, Court Litigation

This section looks at the connection between arbitration and litigation in the context of non-state rules.[810]Arbitral awards can usually be challenged in the state where the arbitration took place (depending on the arbitration law of said state). Another way that arbitration cases come up in court is when enforcement of an arbitral award is sought by one of the parties. This would usually come up in the state where enforcement is sought.

[808] David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law* (Martinus Nijhoff 2008) 47/48

[809] Jean-Flavien Lalive, 'Contracts between a State or a State Agency and a Foreign Company' (1964), 13 International and Comparative Law Quarterly 987, 988

[810] It should be noted that the exequatur of foreign court decisions based on non-state rules could also come up, but this is not discussed here.

Arbitral awards can be challenged on several grounds. The UNCITRAL Model Law on International Commercial Arbitration permits to challenge an award on the following grounds: if one the parties was incapacitated, if proper notice was not given, if the dispute does not fall under the scope of arbitration, if the composition of the tribunal or the procedure did not meet the criteria set out by the parties (unless these criteria were unlawful as determined by the law applicable to the arbitration procedure), if the court finds that the matter of the dispute is not arbitrable, or if the award is in conflict with international public policy.[811] This model law is specifically used here as an example because legislation based on this has been adopted by 72 states.[812] The application of non-state rules could be challenged if this did not meet the procedural process criteria or if their usage conflicts with international public policy.

The New York Convention uses similar grounds as the UNCITRAL Model Law on when an award can be challenged.[813] An award based on non-state rules could be refused enforcement under the New York Convention on grounds of international public policy or non-respect of procedure. The arbitral award in *The Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc* was disputed in court by Cubic Defense systems.[814] They contested enforcement on the grounds that the arbitral tribunal had exceeded the terms of submission by issuing a ruling based upon legal theories not contemplated/asserted by the parties. The court decided that*: 'The Tribunal's reference to and application of the* UNIDROIT *Principles and principles such as good faith and fair dealing do not violate Article V(1) (C) [of the 1958 New York Convention on the Recognition*

[811] The UNCITRAL Model Law on International Commercial Arbitration of 1985 (with amendments as adopted in 2006) Article 34
http://www.uncitral.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf
[812] The UNCITRAL Model Law on International Commercial Arbitration has been adopted by 72 states:
http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration_status.html
[813] The New York Convention of the Recognition and Enforcement of Foreign Arbitral Awards (1958) Article V, http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/XXII_1_e.pdf
[814] *The Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc*, United States District Court, S.D. California, 7 December 1998
http://www.unilex.info/case.cfm?pid=2&id=652&do=case

and Enforcement of Foreign Arbitral Awards.] '[815]Therefore, the simple application of non-state rules is not grounds enough to refuse to enforce an award.

The English Arbitration Act of 1996 in its sections 68 and 69 gives wider grounds for challenging the award: this can be done for serious irregularities (section 68) and points of law (section 69). The grounds mentioned in section 68 are: failure by the tribunal to comply with their general duties, the tribunal exceeding its powers, not conducting the procedure as agreed by the parties, not dealing with all the issues, uncertainty with regards to effect of the award, fraud, irregularity in proceedings, or contrariety to public policy. Section 69 allows for an award to be challenged on points of law which can only be done if the rights of one of the parties are substantially affected, if the question is one the arbitration tribunal was asked to answer, and that either it is clear that the tribunal was wrong or that the question is one of such general public importance that a court decision would be prudent.[816] The application of non-state rules could be challenged under section 68. For an appeal under section 69 to be successful the threshold is much higher and only questions of English law can be challenged: *'given the restriction on Court intervention where a law other than English law is applied, arbitrators may yet enjoy some freedom from sanction for the application of forms of law unrecognised in England, including lex mercatoria or general principles of law'.*[817] Note that England is a party to the New York Convention so if the enforcement of a foreign award is challenged this would fall under the Conventional regime.

The challenge or enforcement of an arbitral award becomes relevant for the legal authority of non-state rules when it is the particular issue of choice of law that is being challenged. This is precisely why challenges to arbitral awards where the parties made a choice of law for non-

[815] Ibid
[816] English Arbitration Act of 1996, articles 67, 68 and 69
[817] Stewart S Shackleton, 'The Applicable Law in International Arbitration under the New English Arbitration Act 1996' (1997) 13 Arbitration International 375,389

state rules are not as relevant to this debate. [818] If parties choose non-state rules as the applicable law they usually would not challenge an award on this particular issue. They might disagree with the interpretation of the non-state rules by the tribunal, but not with the use of non-state rules itself seeing as the defence argument would be flimsy if the initiative for this usage came from the parties. Furthermore, the grounds on which an award can be challenged are limited. An award can be challenged if the criteria of procedure laid out by the parties have not been respected. Therefore, if an arbitrator applies non-state rules at the request of the parties it would be difficult to challenge that the criteria of procedure have not been respected on this particular issue.

If the arbitrator applies non-state rules without being stipulated to do so, this could be grounds to challenge an award on the premise of non-respect of procedure. That is not to say that the challenge would be successful, but the issue could come up in courts. The pivotal question concerns the validity of the use of non-state rules as law or rules of law. This could help understand the legal authority of non-state rules in courts. Nonetheless this question is not considered that frequently which leads to a tentative conclusion that generally the application of non-state rules is acceptable for the parties to the contract.

There are several classic cases that deal with this issue. In the *Fougerolles* case the arbitral court applied general principles in absence of a choice of law clause.[819] This case concerned an agency agreement under which Fougerolles was engaged as an intermediary to negotiate a contract for its principal. The respondents terminated the agency contract before the claimant was able to conclude the negotiations. Fougerolles sued the bank for unlawful termination.

[818] These types of cases say little to nothing about the actual status of non-state rules in courts of law. Examples of these type of cases would be:
Koda v. Carnival Corp
http://www.unilex.info/case.cfm?pid=2&id=1528&do=case
Amanda Matthews v. Princess Cruise Lines, Ltd
http://www.unilex.info/case.cfm?pid=2&id=1631&do=case

[819] *Fougerolles (France) v. Banque de Proche Orient (Lebanon)*, Cour de Cassation, 9/12 1981 [1982] Revue de l'Arbitrage183 and [1982] Journal Droit International (Clunet) 931

The arbitral tribunal based their award on the general principles of obligation applicable in international trade and awarded partial damages to the plaintiff. The respondents opposed enforcement on the ground that in applying general principles of law the arbitral tribunal had acted as amiable compositeur and thus exceeded its mission according to article 1028-1 of the then applicable procedural code. This argument was rejected by the Court of Cassation which said that by applying general principles of international trade the arbitrators had complied with the duty imposed on them to define the applicable law.[820] This is thus a recognition of the legal authority of non-state rules as the applicable law in arbitration.

This decision is reflected even more clearly in the 1991 *Valenciana* Case.[821] The respondent objected to the enforcement of an award based on the lex mercatoria by arguing that the arbitrator had acted as amiable compositeur without authorisation. Again, this was denied by the Court of Cassation which decided that the arbitrator had not overstepped its mission and had rendered a decision in law. The court decided that the applicable law was the usages of international commerce also known as the lex mercatoria thereby equating the lex mercatoria with trade usages.[822] This decision is an important recognition of the lex mercatoria as a valid choice of law and greatly validates the claim that the lex mercatoria is a real body of law. These decisions recognise the lex mercatoria, trade usages, and general principles as possessing the legal authority of law (in the context of arbitral proceedings.) They are thus more than contractual rules and perhaps even more than rules of law.

Another example is *Norsolor S.A. (France) v Pabalk Ticaret Ltd. (Turkey).*[823] A dispute arose between the French company Norsolor and its Turkish agent Pabalk over the cancellation of an agency contract for marketing. Pabalk claimed lost commissions and other costs before the ICC tribunal. The tribunal awarded damages to Pabalk. There was no choice of law clause

[820] Ibid
[821] *Valenciana de Cementos Portland SA v. Primary Coal Inc*, Cour de Cassation chambre civile, 1991 Bull. Civ. 1 No. 1354, 22/10/1991
[822] Paul Lagarde 'Note Cassation Civil 1e 22/10/1991' [1992] Revue de l'Arbitrage 457
[823] *Société Pabalk Ticaret Limited Sirkeli v. Norsolor S.A.* 26/10/1979

and the tribunal applied the lex mercatoria, and especially the principles of good faith and fair dealing. Pabalk initiated legal action in France to have the award enforced whereas Norsolor sought legal action in Austria (where the arbitral tribunal was located) to have the award set aside.

The trial court in Paris granted execution of the award. Norsolor appealed on the basis that the arbitral tribunal had exceeded the scope of its mission by acting as amiable compositeur without having a mandate to do so.[824] The court ruled that the arbitrators had conformed with the rules applicable to the arbitration (Article 13 of ICC Rules) in choosing and applying a law.[825] This was under an older version of the ICC rules which did not distinguish yet between rules of law and law as the current version does. The court therefore considered the lex mercatoria as law. The Court of Appeal in Paris decided to stay the enforcement of the award because of the simultaneous procedures in Vienna (see below) and after the Vienna Court of Appeal had set the award partly aside, decided that this should preclude enforcement in France. The question of the applicable law was not discussed in the appeal. The case went to the Court of Cassation which condemned the view of the Court of Appeal of not considering whether or not French law would have allowed enforcement of the award.[826]

The Austrian court upheld the award. The Vienna Court of Appeal reversed the decision with regards to damages and costs, and held that the lex mercatoria was a world-wide law of uncertain validity with no connection to any national legal order. The reference to the lex mercatoria could be seen as a violation of ICC rule 13(3). Thus the exact opposite of what the French court said. This decision was reversed by the highest court in Austria on the grounds

[824] This specific article of the code de procedure civil was abolished in 1980 and was then absorbed in a new version of the Code de Procédure Civil. In the current version this is article 1497
Philippe Kahn, 'Note Norsolor c/ Pabalk Ticaret Ltd Sirketi' (1981) 108 Revue de l'Arbitrage
[825] ICC Rules of Conciliation and Arbitration1975 13 (3)
The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute. In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.
[826] *Société Pabalk Ticaret Limited Sirkeli v. Norsolor S.A* 83-11.355 Cour d Cassation 09/10/1984 http://www.legifrance.gouv.fr/affichJuriJudi.do?idTexte=JURITEXT000007014185

that the invocation of the lex mercatoria resulted in the application of the principle of good faith which is inherent in civil law systems, and not contradictory to any mandatory provisions in France or Turkey.[827]

Several issues came into play in this case. In France only the trial court ruled on the question of whether the lex mercatoria can be considered law and gave an affirmative answer to this question. The Vienna Court of Appeal evidently questioned the validity of the lex mercatoria as law. The highest Austrian court revoked this decision, but said very little about the lex mercatoria itself. It only stated that the legal principles invoked were reflective of the same principles that exist in France and Turkey and could thus be applied. It consequently does not recognise the lex mercatoria as a law nor does it denounce it. In short of these six decisions only two say intrinsically something about the lex mercatoria as law: The French trial court and the Vienna Court of Appeal (which hold contradictory views). The above demonstrates that even when the question of non-state rules comes up in enforcements/appeals of arbitral awards it is not always explored thoroughly.

French courts thus recognise the application of the lex mercatoria as law. Although this recognises the legal authority of the lex mercatoria as law it does not entail that it could be the applicable law outside of arbitration. The precedent of *Messageries-Maritimes* states that an international contract should always be attached to a state law and this invalidates the lex mercatoria as a choice of law in court proceedings.[828] However, these decisions do entail the recognition of the lex mercatoria as possessing the quality and authority of law. As arbitrators and state courts are in different legal orders the recognition of non-state rules as a valid choice of law in arbitration would have no effect on state courts. Arbitration law is different

[827] Recht der Internationalen Wirtschaft 29, 86, Supreme Court, 18/11/1982
[828] *Messageries Maritimes*, Cour De Cassation, (Ch. Civ., Sect. Civ.), Henri Battifol, 'Note sur Arrêt Messageries Maritimes' [1950] Revue Critique Droit International Privé 609
'Tout contrat international est nécessairement rattaché à la loi d'un Etat'

from private international law and by recognising an award based on non-state rules the court applies its arbitral procedural rules and not its private international law.

The conclusions that can be drawn based on the above are:

a) National arbitration law as well as international arbitration rules allow parties to choose non-state rules.
b) Parties can choose non-state rules in arbitration in the majority of jurisdictions.
c) In absence of a choice of law clause arbitrators can apply non-state rules, but not all arbitration laws allow this.
d) If an arbitrator is stating as amiable compositeur the legal authority of non-state rules does not matter as the arbitrator does not have to follow any law.
e) State courts do enforce awards where non-state rules are the applicable law. The simple application of these is not found contrary to public policy.
f) The application of non-state rules can be challenged on public policy issues and on non-respect of arbitral procedure.
g) If the arbitrator is applying non-state rules at the request of the parties, it would be difficult to challenge an award on non-respect of arbitral procedure.
h) Therefore, the application of non-state rules could be challenged on this ground if these were applied in absence of a choice of law clause
i) That is not to say that such a challenge will be successful. Arbitral laws and rules can allow for non-state rules to be applied in absence of a choice of law clause and courts have enforced awards where this was challenged.
j) If the arbitral rules allow for the application of rules of law or differentiate between law and rules of law, then this allows non-state rules to be applied. The legal nature of non-state rules is recognised, but on different grounds than a state law.
k) Occasionally decisions of courts go further than this. This has especially been the case in France where through the precedents of *Norsolor*, *Fougerolles*, and

Valenciana it can be concluded that the lex mercatoria (trade usages and general principles) has the authority of law and not just of rules of law.

l) The enforcement of arbitral awards based on non-state rules generally says more about arbitral procedural rules than about the legal authority of non-state rules.

m) Aside from learning more about how courts apply non-state rules, through arbitration, the place non-state rules have in the international community and thus in transnational commercial law can be better understood. Their inclusion in the contract, their application by arbitrators, and the acceptance of this application all contribute to understanding the support that non-state rules have in the international business community and how they are perceived by this community. These are important factors in determining the legal authority of non-state rules in transnational commercial law.

6.3 The Application of Codified Non-States Rules as Lex Mercatoria

Uncodified non-state rules can be acknowledged as sources of domestic law and they can be included in a choice of law clause. This can be done as contractual rules or as the applicable law depending on the forum. Different formulas are used to describe uncodified non-state rules. These terms are for instance, lex mercatoria, general principles of international trade law, principles of international commerce, general principles of international private law, principles of good faith and fair dealing, trade usages, and accepted trade practices. These formulas seem to be used interchangeably. It is not always clear what is meant with a specific formula and whether this was used to differentiate from other definitions. Rivkin notes that the parties often do not use the term lex mercatoria, but rather the specific elements of the lex mercatoria and that ultimately the meaning is the same.[829] The elements of the lex mercatoria are trade usages and general principles of law. The term lex mercatoria is used here to

[829] David W Rivkin, 'Enforceability of Arbitral Awards Based on Lex Mercatoria' (1993) 9Arbitration International 67,68

facilitate reading, but it is important to keep in mind that this refers to the lex mercatoria as a whole and to its individual elements given that in practice these are often assimilated to one another.

6.3.1 Establishing the Content of the Lex Mercatoria

In chapter 2.4 the lex mercatoria was analysed. It was identified that one of the key issues is that there is no standard definition of what the lex mercatoria is. It was concluded that the most compelling definition of the lex mercatoria is that it consists of trade usages and general principles of transnational commercial law. Finding the exact, concrete content can be difficult. If the lex mercatoria or its elements are applied the arbitrator or the court would need to begin by defining the parameters to use. If the court turns to scholarly writings, it would emerge that there is no consensus. The second issue is that there are no clear guidelines on how to find the concrete rules and principles that should be applied. The court would thus need to decide what the lex mercatoria is, what its content is, and what concrete rules it should apply.[830]

How would a court find the sources of the lex mercatoria? Juenger refers to commentary of scholars, (arbitral) case reviews, and standard contract terms as key driving forces behind the lex mercatoria.[831] These elements could thus form a starting point for the court in order to discover the content of the lex mercatoria. Yet, even if this assortment of sources would constitute an exhaustible list this already shows the impracticality of this task. The amount of scholarly writing on this topic is immense, arbitral awards are often not published (completely), and there are many different standard contract terms. It would take considerable time and research to determine which of these should be prioritised. For a court, which is

[830] Note the analysis in chapter 5.2 and 5.3 with regards to the interpretation of trade usages and general principles. This discussion also concluded that finding the actual concrete content of these concepts can be challenging for courts.
[831] Friedrich K Juenger, 'The lex mercatoria and private international law' (2000) 60 Louisiana Law Review 1133

always limited by restraints of time and budget, it would be a daunting task to come up with any concrete rules through using these elements. This is without taking into account that these elements are not necessarily the only ones or even the correct ones.[832] In applying the lex mercatoria arbitrators and judges mainly rely on laws from legal systems with which they are familiar.[833] This 'homeward trend' has also been noted with the application of the CISG and it is understandable as it reduces time.[834] Furthermore, it is very difficult if not impossible to get away from one's personal framework and the lenses through which one sees the law.

> 'For problems with determining the existence of any purported principle of lex mercatoria, just look at its sources: practices followed since time immemorial, or at least since the Roman ius gentium; ancient cases in dusty tomes; writings of erudite scholars who passed away about the time the steam engine was revolutionizing industry. There is also the current literature in law reviews and academic publications, in a variety of languages. As a collection of commercial practices, the content of lex mercatoria has not been discoverable in any one single place. Furthermore, those partial listings that did exist were not found in the normal places to which judges and arbitrators (and lawyers) turn. The occasional law review article is no substitute for a code or, in common law jurisdictions, line of judicial opinions.'[835]

The above demonstrates the difficulties that courts face when applying the lex mercatoria or its elements. The use of case law is limited as in most jurisdictions there is not a lot available. Accessing foreign decisions can be time consuming and thus impractical. Using arbitral awards as case law is problematic. Even if some awards are published not all awards are, and those that are published are not always published in their entirety.[836] Therefore, the case law is incomplete and it could not be said how incomplete as what is not published is not known. It is not clear whether the published decisions accurately reflect the majority of decisions. Furthermore, the legal reasoning is not always published and it can thus not be ascertained why the arbitrators came to the conclusions they made. Without having all or the majority of awards published creating a definite, authoritative lex mercatoria case law based on arbitral awards is thus problematic. This is not to say that arbitral case law has no value, but there

[832] Chapter 2.4 discussed several different concepts of the lex mercatoria and its sources
[833] Lord Justice Mustill, 'Contemporary Problems in International Commercial Arbitration: A Response' (1989) 17 International Business Lawyer 161,163
[834] See chapter 5.3.1
[835] Barton S Selden, 'Lex Mercatoria in European and US Trade Practice: Time to Take a Closer Look' (1995) 2 Annual Survey International and Comparative Law 111,119
[836] See for instance Bernardo M Cremades and Steven L Plehn, 'The New Lex Mercatoria and the Harmonization of the laws of International Commercial Transactions' (1983-1984) 2 Boston University International Law Journal 317,336

should be a certain amount of apprehension in using it. An example of a case law database is the Trans-Lex project which can be found online at http://www.trans-lex.org/.[837] This database uses case law and scholarly writings to extract principles of the lex mercatoria with references to specific arbitral awards. This type of database could aid courts in determining the contents of the lex mercatoria, but it should be kept in mind that the authoritative value of these collections is not clear.

Cremades and Plehn propose the formation of an arbitral institution where arbitrators follow precedent, and where there is an appellate procedure. All in all, this would be a court system for arbitral awards.[838] This builds on an earlier similar idea by Schmitthoff who proposed the creation of such an institution with an appellate procedure, uniform interpretation, and publication of (anonymised) awards.[839] This could create a comprehensive body of case law for the lex mercatoria that could be used by arbitrators inside and outside the institution as well as by state courts. The drawbacks are that this would only be one tribunal in addition to the existing ones which means the case law might be less comprehensive than hoped for, and that the institutionalised format of this court could work as a deterrent. On top of this there is the question of whether a formalised lex mercatoria would be desirable. Is it not indeed that the flexibility that comes from an ill-defined content constitutes an integral part of the lex mercatoria? Cremades and Plehn also recognise that the lex mercatoria needs a certain degree

[837] Translex is a research and codification platform for transnational law. The database contains articles, court decisions, arbitral awards and legislatives texts. It also contains a set of transnational law principles (TransLex principles) which are based on the aforementioned sources. The database was founded and developed by Professor Klaus Peter Berger. The list contains 1355 Principles as of May 2015.
http://www.trans-lex.org/

[838] Bernardo M Cremades and Steven L Plehn, 'The New Lex Mercatoria and the Harmonization of the laws of International Commercial Transactions' (1983-1984) 2 Boston University International Law Journal 317,337

[839] Clive M Schmitthoff, 'The Unification or Harmonisation of Law by Means of Standard Contracts and General Conditions' (1986) 17 International & Comparative Law Quarterly 551,567

of disorganisation to be useful to merchants.[840] This inherent nature makes it difficult to define uncodified non-state rules unequivocally without changing their essence.[841]

What stands out from this discussion is that the exact content of uncodified non-state rules is not easy to uncover.[842] Therefore, this would leave the court a certain conundrum on how to actually find and apply the lex mercatoria. If a court has to apply something which is formulated as lex mercatoria, international principles of commercial law, or accepted trade practices, then what will exactly happen? How will the court find the concrete rules to apply? A full comparative research study would be impractical as the above section discusses, applying domestic law principles and trade usages is not desirable, and using precedent impossible.

The answer that courts have found to this conundrum is that they apply codified non-state rules in lieu of the lex mercatoria, general principles of commercial law, trade usages, or another such formula. Chapter 5.2 and 5.3 already touched upon the application of codified non-state rules as trade usages and as means of interpreting the domestic law. This part of chapter 6 analyses this further. There are four ways codified non-state rules are applied in this fashion: they are used as a guide to finding the lex mercatoria (or its elements), as evidence for the unwritten lex mercatoria (or its elements), as an expression of the lex mercatoria (or its elements), or as being the lex mercatoria (or its elements).

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[840] Bernardo M Cremades and Steven L Plehn, 'The New Lex Mercatoria and the Harmonization of the laws of International Commercial Transactions' (1983-1984) 2 Boston University International Law Journal 317,347

[841] As was observed in chapters 2 and 3 the definition of the lex mercatoria as consisting of unwritten trade usages and practices as well as general principles would be the most acceptable definition of the lex mercatoria. This would thus result in excluding conventions, codified non-state rules, and codified contract terms. If one were to include these aspects in the lex mercatoria then the idea of the lex mercatoria having a certain necessity for being vague is less relevant. However, even if one was to use a broader definition of the lex mercatoria then the arguments about the lex mercatoria being difficult to define would still stand as the myriad of available sources would be even greater, even if the sources would be more precise it would be more difficult to select the relevant ones.

[842] This specific argument is discussed by Celia Wasserstein Fassberg in 'Lex Mercatoria – Hoist with its Own Petard?' (2004) 5 Chicago Journal of International Law 67 who argues that codifying the lex mercatoria will entail the decline of the lex mercatoria

In the first scenario codified non-state rules serve to uncover the hidden unwritten lex mercatoria. In the second scenario they are evidence for the uncodified rules. The codified rules are not themselves a source of the lex mercatoria in these two scenarios. In third scenario the codified non-state rules are a source of the lex mercatoria. In the fourth scenario the set of codified non-state rules is assimilated with the lex mercatoria or one of its elements.

The advantages for tribunals and courts in using codified non-state rules are clear. They are easy to locate. They are written down somewhere. They contain specific articles. A more substantive argument is that these are the result of comparative research and are thus meant to be an accurate reflection of common current transnational commercial law practices. This application has especially been observed with the UNIDROIT Principles and the CISG and to a lesser extent with the PECL. The next two sections look at the application of the UPICC and the CISG in lieu of the lex mercatoria or one of its elements.

6.3.2 Using Codified Non-State Rules as Lex Mercatoria: The example of the UNIDROIT Principles

The Preamble to the UPICC mentions six different uses:

1. They shall be applied when the parties have agreed that their contract be governed by them.

2. They may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria,* or the like.

3. They may be applied when the parties have not chosen any law to govern their contract.

4. They may be used to interpret or supplement international uniform law instruments.

5. They may be used to interpret or supplement domestic law.

6. They may serve as a model for national and international legislators. [843]

[843] UNIDROIT Principles of International Commercial Contracts 2010, Pre-amble

Through the second function the Principles already pre-meditated that they could be used as lex mercatoria. There was an agenda to push for an acceptance as lex mercatoria.[844] Witteborg notes that as there are no quotation marks surrounding the term lex mercatoria the UPICC acknowledges the existence of this as a given.[845] It is not clear from the pre-amble whether the UNIDROIT Principles consider themselves as a guide to finding the lex mercatoria, as a reflection of the lex mercatoria, or as an expression of the lex mercatoria. They have been used in all these ways.

The UPICC are used as a guide to establish the lex mercatoria. In an ad hoc arbitration in New York between a Canadian company (service provider) and the United Nations (buyer) the parties agreed that the law governing the dispute should be the '*generally accepted principles of international commercial law.'* The tribunal decided that to define these generally accepted principles it would refer to the UPICC.[846] As this award is not fully published it is not sure for which reasons the tribunal decided this or whether the UPICC were the only instrument used. However, based on the published abstract it seems that the tribunal was primarily guided by the Principles. Here the UPICC are used as a guide to define the general principles of international commercial law.

In a dispute between a French company and an Illinoisan company both parties argued that their own law should be applied and that as a subsidiary alternative general principles of law should be applied. The tribunal decided that there were not enough connecting factors to a specific domestic law and that it would base its decision on the general principles of law or the lex mercatoria. The tribunal then stated that several ICC cases had considered the

[844] Michael Joachim Bonell, *An International Restatement of Contract Law: the UNIDROIT Principles of International Commercial Contracts* (2nd edition, Transnational Publishers 1997), 29
[845] Nika Witteborg, 'Les Principes d'UNIDROIT Relatifs aux Contrats de Commerce International comme Source de Connaissance du Droit' (2006) Conférence 38th Séminaire Commun des Facultés de Droit de l'Université de Montpellier et de l'Université de Heidelberg 6
http://www.ipr.uni-heidelberg.de/md/jura/ipr/montpellier/vortraege/38witteborg.pdf
Last accessed: 4 March 2016
[846] Ad hoc Arbitration, Parties Unknown, New York (Unpublished),
http://www.unilex.info/case.cfm?pid=2&do=case&id=756&step=Abstract

UNIDROIT Principles as the best approach to understand the general principles of law and that it would follow this reasoning.[847] The UPICC would be applied *'as a primary set of guidelines in determining international rules of law applicable to the parties' contract*', but the tribunal would also '*duly consider the lex mercatoria in its two fundamental principles, i.e. the standards of good faith which the parties should observe when performing the contract and the rule of pacta sunt servanda*.' In this dispute the tribunal made a distinction between the UPICC and the fundamental principles of the lex mercatoria. The UPICC are used as a guide to determine the international rules of law, which are apparently not the same as the fundamental principles of the lex mercatoria in the view of the tribunal.

The UPICC are used as a reflection of the lex mercatoria. In 2000 a Court of Appeal in New Zealand stated that the UPICC are a '*document which is in the nature of a restatement of the commercial contract law of the world.* '[848] In another case an English company (BAE) dealing in anti-missile systems and the Iranian government concluded nine contracts for the supply of equipment. After the Islamic Revolution the contracts were terminated on the initiative of the new Iranian government. BAE decided to sue for damages while the Iranian Ministry of Defence requested restitution of advance payments made. The contracts contained an arbitral clause, but the only reference to the applicable law was that settlement should be according to natural justice. The arbitral tribunal interpreted natural justice to '*exclude the application of any specific domestic law and to have their contracts governed by general principles and*

[847] ICC Award No. 13012 (2004)
http://www.unilex.info/case.cfm?id=1409

[848] *Hideo Yoshimoto v Canterbury Golf International Ltd* [2000] Court of Appeal New Zealand, 2000 NZCA 350
http://www.unilex.info/case.cfm?id=828
This case concerned a sale of shares in a golf course development between a Japanese businessman and a New Zealand corporation. The issue concerned the payment of the last instalment for the shares which the corporation refused to pay because a specific clause in the contract had not been met according to the corporation. The issue was whether the clause should be interpreted literally or liberally. The New Zealand Court of Appeal stated that a liberal interpretation would be in accordance with Article 8 of the CISG (in force in New Zealand) and articles 4.1 to 4.3 of the UNIDROIT Principles ('a *document which is in the nature of a restatement of the commercial contract law of the world [and which] refines and expands the principles contained in the United Nations Convention.'*). Despite this the Court chose the literal interpretation for reasons that the Privy Council in England would not allow for the more liberal interpretation on the grounds that a) the CISG is not adopted in England and b) the English common law does not support this liberal interpretation.

rules which, though not enshrined in any specific national legal system, are specially adapted to the needs of international transactions and enjoy wide international consensus.'[849] In a first partial final award the Tribunal stated that '*the contracts should be interpreted in accordance to, the UNIDROIT Principles with respect to all matters falling within the scope of such Principles*.'[850] In subsequent partial awards the Tribunal applied the UPICC on several points.

In the final partial award four years later the tribunal referred to the UPICC on several points, but did not consider them '*in all cases as the expression of generally accepted principles of law.'*'[851] It is not clear from the judgment whether the tribunal meant something different by the word expression than by their earlier use of the word reflection. BAE sought the annulment of the four Partial Final Awards, but the court confirmed these.[852] The UPICC were thus applied as a reflection of general principles of law, but according to the tribunal they are not a reflection on every single point. The tribunal thus distinguishes between, on the hand the UPICC, and on the other hand the general principles of law whilst at the same time acknowledging an overlap between the two.

[849] ICC Award No.7110 (1999)
As quoted in: Michael Joachim Bonell, 'UNIDROIT Principles: A Significant Recognition by a United States District Court' (1999) 4 Uniform Law Review 651,653
[850] *Bae Systems Plc, U.K. Vs Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran*, ICC Award No.7110 (1995)
[851] Michael Joachim Bonell, 'UNIDROIT Principles: 'A Significant Recognition by a United States District Court' (1999) 4 Uniform Law Review 651,654
As an example with regards to question of the whether it was excusable for the claimant to not pay for reasons amounting to force majeure/hardship the corresponding articles of the UNIDROIT Principles (6.2.1-6.2.3) were not mentioned and the tribunal said that '*changed circumstances are not part of widely recognised and generally accepted legal principles.'*
[852] *Bae Systems Plc, U.K. Vs Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran*, Rechtbank 'S Gravenhage, 2011,
http://www.unilex.info/case.cfm?id=1592
One of these grounds was that the Arbitral Tribunal had exceeded its mission by not referring to the limitation periods as included in the UNIDROIT Principles 2004. The Iranian government stated that the 2004 Principles should not be applied retroactively which the courts agreed with. It was thus not the actual application of the UPICC which was objected to but the specific version of the Principles. (The case went to the High Council in the Netherlands in the end. See: *Bae Systems Plc V Ministry of Defence and Support for Armed Forces of the Islamic Republic of Iran*, Hoge Raad 22 May 2015, ECLI:NL:HR:2015:1272.
http://deeplink.rechtspraak.nl/uitspraak?id=ECLI:NL:HR:2015:1272)

In a contract between a Romanian seller and an English buyer a dispute arose.[853] The choice of law clause stated: *'this contract is governed by international law.'* During the arbitration the parties disagreed on what this meant. The Romanian claimant stated that it meant *'general principles of law and the lex mercatoria which meant in accordance with Article 1.101 (3) of the Principles of European Contract Law and paragraph 3 of the Preamble of the UNIDROIT Principles that the dispute should be governed by the Principles of European Contract Law to be interpreted in the light of the UNIDROIT Principles.'* The English claimant stated that English law was applicable. The tribunal decided that by referring to international law the parties wished to exclude the application of a national law. International law should be understood as the lex mercatoria and general principles, and these are reflected in the UPICC.

In an ICSID arbitration the Tribunal cited the UPICC in support of the ILC Draft Articles on Responsibility of States for Internationally Wrongful Acts and justified this reference by stating that '*it would be possible to illustrate these general principles from several other national systems (both common law and civilian), but it is unnecessary to do so here because, first, such principles are broadly re-stated in the UNIDROIT Principles* and, *second, the Tribunal is in no doubt that similar principles form part of international law, as expressed in the ILC Articles.'* [854] The UPICC are thus a restatement of law and a reflection of general principles of law.

In the ICC case *The Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc*. the UPICC were used to supplement the

[853] ICC Award No. 12111 (2003)
http://www.unilex.info/case.cfm?id=956
[854] *Gemplus&Talsud v Mexico*, International Centre for Settlement of Investment Disputes (2010)
http://www.unilex.info/case.cfm?id=1819
(abstract)
Full text available at:
http://www.italaw.com/sites/default/files/case-documents/ita0357.pdf
In at least seven more cases between 2007 and 2002 ICSID referred to the UNIDROIT Principles as reflections or expressions of principles of law
(See www.unilex.com)

applicable state law.[855] This case concerned the enforcement of an arbitral award based on Iranian law supplemented by *'general principles of international law, including the lex mercatoria and trade usages.'* The arbitral tribunal decided on the UPICC to guide them to these: *'as to the contents of such rules, the Tribunal shall be guided by the Principles of International Commercial Contracts.'* The tribunal referred to the Principles on most points when it rendered the award except from which moment on interest should be awarded. The tribunal doubted that the solution provided for by the UPICC formed part of general accepted principles of international law.[856]

The award was disputed in court by Cubic Defense systems on the grounds that the tribunal had exceeded its mission by referring to the UPICC.[857] Bonell notes that what was objected to by Cubic Defense systems was not the application of general principles of international law and trade usages, but specifically the recourse to the UNIDROIT Principles.[858] Therefore, one of the questions in dispute was whether the UPICC could be seen as a reflection/expression of these general principles and trade usages. The court enforced the award. This ruling seems to be a confirmation of the assumption of the tribunal that the UPICC are indeed a reflection of the general principles of law and the lex mercatoria.

The UNIDROIT Principles are used as an expression of the lex mercatoria. The United Nations Compensation Commission referred to the UPICC as '*principles of international commercial contract law'* and when deciding an issue in '*conformity with general principles*

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[855] *The Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems* ICC Award No. 7365 (1997)
http://www.unilex.info/case.cfm?pid=2&do=case&ID=653

[856] An another reason for the tribunal to make this decision was that the solution provided by the UPICC ran counter to corresponding article 721 of the Iranian Code of Civil Procedure.
Michael Joachim Bonell, 'UNIDROIT Principles: A Significant Recognition by a United States District Court' (1999) 4 Uniform Law Review 651,662

[857] *The Ministry of Defence and Support for the Armed Forces of the Islamic Republic of Iran v Cubic Defense Systems, Inc*, United States District Court, S.D. California, 7 December 1998
http://www.unilex.info/case.cfm?pid=2&id=652&do=case

[858] Michael Joachim Bonell, 'UNIDROIT Principles: a Significant Recognition by a United States District Court' (1999) 4 Uniform Law Review 651,662

of law' referred to the UPICC.[859] In a case between an Italian company and a governmental agency of a Middle Eastern country the tribunal decided that, in absence of a choice of law clause, it would base its decision on '*terms of the contract, supplemented by general principles of trade as embodied in the lex mercatoria.'* In the final award the tribunal referred to provisions of the UNIDROIT Principles.[860] The tribunal offered no reason for its reference to the UPICC, but based on the wording it seems it considers them a source of the lex mercatoria.

In a contract between a French company and a Costa Rican company in 2001 the parties agreed that any dispute should be resolved *'on the basis of good faith and fair usages and with regard to the soundest commercial practices and friendly terms.'*[861] The tribunal applied the UNIDROIT Principles as it considered these '*the central component of the general rules and principles regulating international contractual obligations and enjoying wide international consensus.'* The UPICC are thus a source of general rules and principles of international commercial law.

A dispute arose between a Russian company and a German company that had concluded a contract for the marketing of goods produced by the respondent.[862] The contract stipulated that disputes should be settled in accordance with the general principles of the lex mercatoria. There was a further provision that all terms were subject to the legislation of both Germany and the Russian Federation. The tribunal stated that by making both legal systems applicable

[859] United Nations Compensation Commission, Panel of the Commissioners, Panel F1, Recommendation S/AC.26
http://www.unilex.info/case.cfm?id=639
Commission was set up to *'process claims and pay compensation for losses and damage suffered as a direct result of Iraq's unlawful invasion and occupation of Kuwait in 1990-91'*
[860] ICC Award No. 8261 (1996)
http://www.unilex.info/case.cfm?pid=2&do=case&id=624&step=Keywords)
[861] Parties Unknown, Ad Hoc Arbitration (Costa Rica), 30.04.2001
http://www.unilex.info/case.cfm?id=1100
[862] Parties Unknown, International Arbitration Court at the Chamber of Commerce and Industry of the Russian Federation, 11/2002, http://www.unilex.info/case.cfm?id=857

this was tantamount to the absence of a choice of law. The tribunal decided to apply the UPICC as an expression of the general principles of the lex mercatoria.

The Civil Chamber of the Venezuelan supreme court ruled in a case between a Venezuelan company and a Dutch company that international contracts are governed by the law with which they are the most closely connected and that to determine this law all objective and subjective elements of the contract should be taken into account on top of '*the general principles of international commercial law recognised by international organisations.* '[863] The Court specifically mentioned the UPICC as an example of these general principles. Again, the UPICC are seen as an expression of the lex mercatoria.

Some tribunals have been more cautious in linking the UNIDROIT Principles to the lex mercatoria. In another award the ICC Tribunal decided to apply the general principles of law in absence of a choice of law clause.[864] The tribunal stated that '*those general principles and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned a wide acceptance and international consensus in the international business community, including notions which are said to form part of a lex mercatoria, also taking into account any relevant trade usages as well as the UNIDROIT Principles, as far as they can be considered to reflect generally accepted principles and rules.*' The tribunal thus applied the UPICC in a more cautious way than was done in the preceding awards. The tribunal justified this choice by stating the UPICC *'contain in essence a restatement of those principes directeurs that have enjoyed universal acceptance and, moreover, are at the heart of those most fundamental notions which have consistently been applied in arbitral*

[863] *Banque Artesia Nederland, N.V., V. Corp Banca, Banco Universal C.A V*, Civil Chamber of the Venezuelan Supreme Court, 02/21/2004 English language abstract:
http://www.unilex.info/case.cfm?id=1867
Original Spanish langue text:
http://www.tsj.gov.ve/decisiones/scc/diciembre/172223-RC.000738-21214-2014-14-257.HTML
[864] ICC Award No. 7375 (1996)
http://www.unilex.info/case.cfm?pid=2&id=625&do=case

practice.'[865] The tribunal followed this by stating that the UPICC had not *'yet stood the test of detailed scrutiny in all their aspects, some of their individual provisions might not reflect international consensus.'* This award was rendered only two years after the UPICC were published which explains the more cautious language used. This demonstrates as well that the UPICC were accepted as lex mercatoria remarkably early on.

A dispute arose from a contract containing a choice of law clause for Spanish law.[866] The contractor argued that the contract should be renegotiated for hardship reasons in accordance with UNIDROIT Principles articles 6.2.2 and 6.2.3. These were applicable according to the claimant because they are trade usages which the tribunal should take into account under the ICC arbitration rules. The tribunal decided that the UPICC were not applicable because they should only be applied when the parties have expressly agreed to do so or where the contract refers to the lex mercatoria, general principles of law, or similar formulation as this is in accordance with the pre-amble of the UPICC. As in this case Spanish law was applicable the UPICC should not be applied. Furthermore, the tribunal argued, the provisions of the UNIDROIT Principles on hardship are not the current practice in international trade and cannot be considered as trade usages. This decision recognises that the UPICC can be applied as lex mercatoria or general principles of law, but did not consider them as trade usages at the time when the award was rendered.

These cases demonstrate that there are several ways in which the UPICC are linked to the lex mercatoria and its two main components: general principles of laws and trade usages. The UPICC are seen as a guide, a reflection, a primary reflection, and as an expression of the lex mercatoria. The weakest of these criteria is a guide. If the UNIDROIT Principles are used as a guide, this can mean different things. A guide could be something someone refers to on occasion or it could be a strong guiding force. It also means that the UNIDROIT Principles

[865] Ibid
[866] ICC Award No. 8873 (1997)
http://www.unilex.info/case.cfm?id=641

themselves are not a source of the lex mercatoria, but that they merely serve as aid to discover what the lex mercatoria is. The second strongest usage is that of the UPICC as a reflection. If they are the primary reflection it means that they are the key text that reflects the lex mercatoria. They are therefore the most important piece of evidence of the substance of the lex mercatoria or its elements. If they are a reflection, they are just one of more pieces of evidence. As a reflection of the lex mercatoria the UPICC themselves are not lex mercatoria. They are evidence of the lex mercatoria. They are not the source.

The UNIDROIT Principles are also applied as an expression of the lex mercatoria. They are seen as a source of the lex mercatoria. Their authority does not derive from other sources, but they are the authority in their own right. Finally, in some cases the lex mercatoria and the UPICC are likened without any further explanation and it almost seems as if the UPICC are just equated with the lex mercatoria. It is not sure whether tribunals and courts actually intend this or if they just phrase it poorly and only meant that the UPICC are a reflection or expression of the lex mercatoria. The latter is far more likely.

If the UPICC are considered part of lex mercatoria, then this could mean that case law that recognises the lex mercatoria as law (such as *Valenciana de Cementos Portland SA v Primary Coal Inc)* thus also indirectly recognises the UPICC as law. In chapter 2.4 it was established that the UPICC are not part of the lex mercatoria under the most acceptable definition of the latter. Yet, the trend that emerges in practice strongly links the UPICC to the lex mercatoria. It can thus be concluded that there is a divergence between the theoretical reasoning and the practice. The results also show that the UPICC were used as lex mercatoria very soon after their initial publication and continue to be applied in this fashion. The earlier cases show some more reticence when referring to the UPICC which demonstrates a gradually furthering acceptance of the UPICC as lex mercatoria.

6.3.3 Using the CISG as Lex Mercatoria

This section discusses the application of the CISG as lex mercatoria. The CISG is ratified by 86 states which means that it is the applicable law to international sale of goods in more than half the world, and an even higher proportion of trade is covered by the Convention.[867] The application of the CISG as lex mercatoria could only occur in sale of goods contracts. Furthermore, the CISG does not contain general contract principles (contrary to the UPICC.) Therefore, it is less ideal than the UPICC to use in such capacity. Despite this the CISG is regularly applied as a reflection or expression of the lex mercatoria. The CISG is also applied as evidence of customary international law.[868] Philippe Kahn notes that this assimilation of conventional law with the lex mercatoria is problematic as it reduces the content of the latter to conventional texts, which usually promote utilitarian and technical solutions.[869]

In a case before the Iran-US Claims Tribunal which was subject to both the laws of Iran and the US the CISG was found to reflect the *'recognised international law of commercial contracts*.'[870] In this case the buyer (Iran) and the seller (a US company) concluded a contract for a sale of electronic communication equipment. The buyer did not pay the agreed price. To mitigate the damage, the seller sold some of the equipment on to a third party, after having informed the buyer of this intention. On mitigation of damages American law and Iranian law differed. The tribunal ruled that the seller did have this right in the US and that this right was '*consistent with recognized international law of commercial contracts'* as observed from

[867] 70% to 80% in 2006 (Ingeborg Schwenzer, and Pascal Hachem, 'the CISG- Successes and Pitfalls' (2009) 57 The American Journal of Comparative Law 457,457)
[868] Larry A DiMatteo, *International Contracting: Law and Practice* (Wolter Kluwer Law & Business 2013) 235
[869] Philippe Kahn, 'Les Conventions Internationales de Droit Uniforme devant les Tribunaux Arbitraux' (2000) 5 Uniform Law Review 121,126
[870] *Watkins-Johnson Co. & Watkins-Johnson Ltd. v. The Islamic Republic of Iran & Bank Saderat Iran* 28.07.1989 Iran-United States Claims Tribunal, number 370 (429-370-1), http://www.unilex.info/case.cfm?id=38
The CISG is applicable in the USA and came in force there in 1988. However, due to the article 1.1(b) reservation the US made under article 95 the CISG would not have been applicable in this particular case. Iran has not (yet) joined the CISG. Furthermore, events occurred before the CISG entered into force.

CISG article 88. The tribunal thus acknowledges the CISG as the recognised international law of commercial contracts. The tribunal did not give a reason on why this is the case.

In an ICC Arbitration the seller claimed that, despite the CISG not being applicable by law, it should be applied as lex mercatoria. This claim was rejected mainly on grounds that the issues raised in the case would not be covered by the CISG, but the court did state that *'apart from the fact that it is highly disputed whether such theory is viable and whether it would withstand the scrutiny of a state court eventually reviewing this interim award….[Seller] points out that the application of the lex mercatoria would be tantamount to the application of the Vienna Convention, i.e., the United Nations Convention on Contracts for the International Sale of Goods of 11 April 1980. This is certainly true.'*[871] Two points should be noted. First of all, the court notes that in this particular case the application of the lex mercatoria might not stand up to the scrutiny of the court, probably because an earlier interim award decided that all arbitral proceedings in this case should be governed by one and the same law. The second point is that the tribunal confirms the claim of the seller that applying the lex mercatoria is tantamount to applying the CISG. Therefore, the tribunal sees the CISG as an important (even defining) expression or reflection of the lex mercatoria.

The CISG is applied as a reflection of the lex mercatoria. In an arbitral award in 1996 the contract did not contain an applicable law clause, but the parties did refer to the INCOTERMS and the UCP.[872] Based on this, the tribunal concluded that the wish of the parties was for the contract to be governed by trade usages and accepted principles of international trade. In its decision the tribunal referred to the CISG and the UPICC as evidence for admitted practices in international trade for any issues not regulated by the INCOTERMS and the UCP. In a 1998 arbitral award where Italian law was applied the

[871] ICC Award No. 6149 (1990)
http://cisgw3.law.pace.edu/cases/906149i1.html
[872] ICC Award No. 8052 (1996)
http://www.unilex.info/case.cfm?id=395

tribunal referred to the CISG and the UPICC as *'normative texts that can be considered helpful in the interpretation of foreign contracts.'*[873]

In a 1989 ICC Arbitration, regarding the conformity of goods, the applicable law was the law of the country of the seller.[874] In accordance with the ICC rules the tribunal took into account the relevant trade usages. The Tribunal stated that '*there is no better source to determine the prevailing trade usages than the terms of the United Nations Convention on the International Sales of Goods'* and that '*the Vienna Convention, which has been given effect to in 17 countries* [at the time], *may be fairly taken to reflect the generally recognized usages regarding the matter of the non-conformity of goods in international sales.'* The CISG was not ratified in the countries of the seller or the buyer, and was applied as a reflection of current trade usages on non-conformity of goods.

The CISG is applied as an expression of the lex mercatoria or one of its elements. In a 1999 arbitral award the tribunal applied general standards and rules of international contracting.[875] The tribunal held that the CISG embodies the universal principles of contract law and that it should therefore be applied.[876]

In a 1994 ICC Arbitration concerning lack of conformity of goods, where the contract did not contain a choice of law clause, the tribunal decided that the dispute would be governed by general principles of international commercial practice. The tribunal stated that for the present case those principles are '*most aptly contained in the United Nations Convention for the International Sales of Goods.*'[877] The sentence 'present case' ensures that no general

[873] ICC Award No. 8909 (1998)
http://www.unilex.info/case.cfm?id=401
[874] ICC Award No. 5713 (1989)
http://www.unilex.info/case.cfm?pid=1&do=case&id=16&step=FullText
[875]ICC Award No. 9474 (1999)
http://www.unilex.info/case.cfm?id=716
[876] Of the UNIDROIT Principles and the PECL the tribunal said it would apply these for any issues not covered by the CISG as these express general standards and rules of commercial law.
[877] ICC Award No.7331(1994)

conclusions can be taken away from this. The court argued that: '*the dominant theme of the Vienna Convention is the role of the contract construed in the light of commercial practice and usage, which was produced by agreement among States resulting from collaboration sustained for over a decade.'* There are thus two core arguments: the narrative of the CISG fits the present case and that as the CISG is the result of a reflective long-term cooperation between states it is as an adequate expression of the general principles of international commercial practice. This award was rendered in the same year as the UPICC were published. This could explain why the tribunal used the phrase 'present case' as it might have been aware of the UPICC and upcoming PECL and therefore wished to exercise some caution.

The CISG is therefore applied as a reflection of the lex mercatoria and as an expression of the lex mercatoria. The CISG is seen in one case as being the recognised transnational commercial law and in another case the application of the lex mercatoria is described as being tantamount with the application of the CISG. These two cases date from 1989 and 1990 and precede the publication of the UPICC and the PECL. It is questionable whether the tribunals would use the same wording with regards to the CISG now that the landscape of codified non-state rules is more diffuse than it was in 1990. It is interesting to note that most of the newer cases refer to the UNIDROIT Principles more readily than they do to the CISG. Consequently, the UPICC have now taken the leading role in defining the lex mercatoria. Most of the cases using the CISG as lex mercatoria date from the period before the UNIDROIT Principles were published. In newer cases both the CISG and the UPICC are applied or the court refers solely to the UPICC.

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http://www.unilex.info/case.cfm?pid=1&do=case&id=140&step=Abstract
The Tribunal agrees with Defendant that general principles of international commercial practice including the principle of good faith, should govern the dispute. The Tribunal believes that for the present dispute, such principles and accepted usages are most aptly contained in the United Nations Convention on Contracts for the International Sale of Goods.

6.3.4 Interpreting the Lex Mercatoria through Codified Non-State Rules

In reviewing these cases it can be concluded that there is a trend to assimilate the application of unwritten non-state rules with codified non-state rules. They are applied as a reflection, as an expression (source), or as guide of the lex mercatoria. This trend can mostly be observed in arbitration as non-state rules are applied more frequently as the applicable law in arbitral tribunals. As the examples used in this chapter demonstrate state courts also follow this trend. The above analysis confirms that it is especially in B2G contracts that the lex mercatoria or its elements are used as the applicable law.

As the above analysis reveals this assimilation of codified non-state rules and the lex mercatoria has especially been noticed with the UPICC and the CISG. This can be explained by several factors. The PECL is the only other instrument which is comparable in scope, but for the reasons explained in chapter 3.5.4 the PECL have not had the same recognition as the former two instruments. Blasé confirms that the PECL have received significantly less acknowledgment than the UPICC, both in theory and in practice.[878] Furthermore, the PECL are a regional instrument so to consider them as an expression/reflection of a global lex mercatoria would be problematic. They can be seen as an expression/reflection of a regional lex mercatoria.[879] The PECL cover consumer contracts in addition to B2B contracts whereas the lex mercatoria concerns only the dealings between merchants so this could be an issue.[880] These doubts about the position of the PECL were reflected in a ruling from an ICC Arbitral Tribunal where the applicable law was the lex mercatoria. The claimant argued that this

[878] Friedrich Blasé, 'Leaving the Shadow for the Test of Practice – On the Future of the Principles of European Contract Law' (1999) 3 Vindobona Journal of International Commercial Law and Arbitration 3,6

[879] There are other regional organisations that could aid in creating a regional lex mercatoria as well. In West and Central Africa there is for instance the OHADA (Organisation pour l'Harmonisation en Afrique du Droit des Affaires) which consists of 17 West African states which has the goal to harmonise business law. They accomplish this mainly through the design of model laws, creating of legal doctrine and collecting case law.

[880] Symeon C Symeonides, 'Party Autonomy and Private-Law Making in Private Law: The Lex Mercatoria that Isn't' published in *Liber Amicorum Konstantinos D Kerameus* (Sakkoulas/Kluwer Press, 2006) 6
Available at: http://papers.ssrn.com/sol3/Papers.cfm?abstract_id=946007

meant the application of the UPICC and the PECL. The tribunal agreed with regards to the UNIDROIT Principles, but stated with regards to the PECL: '*they constitute an academic research, at this stage not largely well-known to the international business community and are a preliminary step to the drafting of a future European Code of Contracts, not enacted yet.*'[881]

Nonetheless, the PECL have been used in some cases as an expression/reflection of the lex mercatoria and its elements: often in conjunction with the UNIDROIT Principles. Courts and tribunals quote these instruments together to show that these propagate the same solution. Using several internationally recognised instruments that express the same solution makes for an even more persuasive case, for if different experts agree it is more likely that this is indeed a generally recognised principle of law.[882] Other projects, such as the trans-lex project, which distils principles of trade from different sources, do not have the same recognition as the UPICC, the CISG, and the PECL. The Incoterms and UCP only cover limited areas, but in those they might be used as an expression or reflection of the lex mercatoria. Chapter 3.5.2 and 3.5.3 discussed that these instruments are mostly considered contractual terms. The Incoterms could stand up as trade usages and indeed, as chapter 5.2 discusses, they have been used as such. Therefore, it could be considered that they too could be an expression/reflection of the lex mercatoria.

Codified non-state rules are thus used as a reflection or as an expression of uncodified non-state rules. This distinction is not always made clear by courts and tribunals. It is not clear whether tribunals and courts actually distinguish between the concepts or that they use the words expression and reflection interchangeably without attaching a great value to these words. Whether or not the assimilation of the UPICC and similar instruments to the lex

[881] ICC Award No. 12111 (2003)
http://www.unilex.info/case.cfm?id=956
[882] Michael Joachim Bonell and Ole Lando, 'Future Prospects of the Unification of Contract Law in Europe and Worldwide' (2013) 18 Uniform Law Review 17,23

mercatoria is progress is debatable. By using codified non-state rules to define the lex mercatoria it risks losing its flexibility and becomes assimilated to codified and conventional laws.[883] This would change the nature and essence of the lex mercatoria.

On the other hand, the fact that tribunals apply codified non-state rules as a reflection/expression of the lex mercatoria shows that there is a real demand for a clear and concise lex mercatoria. In a 2003 arbitration case the tribunal stated that the UPICC were preferable to other anational principles and rules because they are much more precise.[884] Parties seldom seem to object to the use of codified non-state rules as lex mercatoria even though they rarely include these codified non-state rules in a choice of law clause.

When acting as amiable compositeur the court or tribunal is not bound to follow any law. He can judge the case according to what he determines is just and right. When applying the lex mercatoria or its elements the court is applying a law.[885] If this law is not clear, then the division between amiable composition and the lex mercatoria becomes more opaque. Respecting principles of good faith, good will, and pacta sunt servanda does not stand in the way of the court/tribunal imposing their own reasoning on the case. The court fills in the blanks by making use of the lex fori or relying on their own sense of justice, or a combination of the two. When the court applies codified non-state rules as a reflection/expression of the lex mercatoria these are a much clearer and stronger guiding force to finding the concrete rules. Another advantage of using codified non-state rules in lieu of the uncodified elements of the lex mercatoria is the enhanced predictability and certainty for both the court and the parties.

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[883] Ralf Michaels, 'The True Lex Mercatoria: Law Beyond the State' (2007) 14 Indiana Journal of Global Studies 447, 462

[884] ICC Award No. 11575 (2003)
http://www.unilex.info/case.cfm?id=1417

[885] Lord Justice Mustill, 'Contemporary Problems in International Commercial Arbitration: A Response' (1989) 17 International Business Lawyer 161,162

6.4 Conclusion

The different legal orders in which the judge and the arbitrator operate means that the application of non-state rules in arbitration says little about the possibilities to apply non-state rules in state courts. However, it is possible that an enforcement or challenge of the arbitral award indicates the stance of the court on the value of non-state rules as law. It is important to be careful as most cases say little about non-state rules intrinsically, but rather more about the application of arbitral procedural laws. There are some well-documented cases that explicitly discuss the intrinsic legal authority of non-state rules. These cases can help with understanding how non-state rules are applied and interpreted by state courts.

One further function arbitral awards have is that they can shed led light on the acceptance of non-state rules by professionals (merchants, arbitrators). If non-state rules are chosen or applied with some frequency, this indicates a degree of support among the merchant community. Arbitral awards can in this way contribute to the formation of custom and usages which in turn can be applied by courts. These awards can be used by courts to find the substance of uncodified non-state rules or as evidence of the acceptance of a non-state rule as a trade usage. The support non-state rules have is one of the factors that is used to determine their legal authority in the international community and in transnational commercial law.

The previous chapter showed that courts can apply non-state rules and indeed frequently do so. An aspect that emerged is that the lex mercatoria, general principles of law, principles of commercial law, trade usages, and commercial practices are terms which are used interchangeably. Kahn notes that when a reference is made in contracts to general principles of commercial law what is generally meant is the lex mercatoria.[886] There is thus confusion between the lex mercatoria and its elements (general principles and trade usages). This should

[886] Philippe Kahn, 'Les Conventions Internationales de Droit Uniforme devant les Tribunaux Arbitraux' (2000) 5 Uniform Law Review 121,125

be kept in mind when reading cases and arbitral awards. As the three are assimilated to one another it can be assumed that what applies to the elements of the lex mercatoria also applies to the lex mercatoria as a whole.

Chapters 3 and 5 discussed that these uncodified non-state rules can be sources of domestic law. Furthermore, they are applied more frequently by arbitral tribunals and they are included more regularly in choice of law clauses than codified non-state rules are. This brings up the next important point how do courts apply these rules in practice? These rules are unwritten. They are therefore not easy to uncover. Case law is limited and arbitral awards are not always published. A full comparative research costs time. Having experts testify on trade usages and general principles of law is costly.

Precisely because of these difficulties it can be observed that codified non-state rules are applied in lieu of non-codified non-state rules and that these are strongly interlinked. Codified non-state rules are applied as reflecting, expressing, or being the lex mercatoria, trade usages, custom, and general principles of law. This can be observed for the UPICC and to a lesser extent the CISG and the PECL. The Incoterms are also used as evidence or an expression of international trade usages. These codified non-state rules are easy to research. Selden notes: '*the great importance of the* [UNIDROIT] *Principles is that the volume exists. It can be taken to court, it can be referred to page and article number, and persons who are referred to its provisions can locate and review them without difficulty.*'[887]

In cases where codified non-state rules are applied as lex mercatoria it is often not justified where the authority of these rules comes from. Are these seen as a reflection of the lex mercatoria or as a guide to finding this? In that case they are the written evidence of the unwritten rules where the authority lies. Are they an expression of the lex mercatoria? In that

[887] Barton S Selden, 'Lex Mercatoria in European and US Trade Practice: Time to Take a Closer Look' (1995) 2 Annual Survey International and Comparative Law 111, 122 He then writes that '*this alone is a great contribution towards making lex mercatoria definitive and provable.'*

case they are an intrinsic part of the lex mercatoria and derive their authority from being a source of this. These questions are usually not answered in the court's analyses. Usually courts do not explain why the specific codified non-state rules are seen as a reflection or expression of the lex mercatoria. There is no fundamental debate on what the lex mercatoria is in the majority of the decisions. Philippe Kahn asks whether adjudicators when they apply conventional law as lex mercatoria believe that they are applying general principles of commercial law rather than a law between signatory states.[888] In case law the answers to these questions cannot be found easily. The most probable reason for this is that these questions are not considered by courts and tribunals in any depth. As from many arbitral awards only abstracts are published it could very well be that those questions are taken in account, but have gone unreported.

There is thus a synergy where uncodified non-state rules feed in to the elaboration of codified non-state rules. Through the application of codified non-state rules these gain in prominence and in turn become the standard of accepted trade usages and general principles. Uncodified trade usages and principles are gradually changed through the use of codified-non state rules. The two categories are no longer easy to separate. Codified non-state rules are based partly on uncodified trade usages and principles. Part of their acceptance derives from a previous acceptance of these trade usages and general principles as sources of law. As codified non-state rules can be used as evidence of uncodified non-state rules it becomes difficult to separate what is the (original) source and what is the evidence of this source. Codified non-state rules are gaining in importance.[889]

The main objection to this development is that codified non-state rules are not based solely on existing trade usages and general principles of law. The UNIDROIT Principles and PECL

[888] Philippe Kahn, 'Les Conventions Internationales de Droit Uniforme devant les Tribunaux Arbitraux' (2000) 5 Uniform Law Review 121,127

[889] Olugbenga Bamodu, 'Exploring the Interrelationships of Transnational Commercial Law: 'the New Lex Mercatoria' and International Commercial Arbitration' (1998) 1 African Journal of International and Comparative Law 37,59

are both based on comparative legal research and take much of their substance from domestic laws. The drafters changed and innovated on this research.[890] These instruments therefore represent the view of their drafters as well as being general principles of international commercial law. The CISG is a convention made along lowest common denominator policy lines which reflects more the politics of states than the practices of merchants. Codified non-state rules and uncodified non-state rules thus have a different nature. Despite this different nature they are intrinsically linked, and especially through their application in practice this linkage is strengthened and furthered.

This goal of this chapter was to understand how courts apply non-state rules. This chapter analysed how courts treat non-state rules as the applicable law when enforcement of an arbitral award is sought or challenged. It concludes that state courts are favourable to enforce awards based on non-state rules. However, this should be interpreted as a favourable attitude towards arbitration in general rather than specifically towards non-state rules. Courts and tribunals apply non-state rules with some regularity as the applicable law, either at the request of the parties or in absence of a choice of law clause. Courts and contractual parties show a preference for uncodified non-state rules as the applicable law. To find the concrete rules courts apply codified non-state rules. Courts thus link the two together. Through knowing how courts apply non-state rules it can be understood how courts see non-state rules and this leads to a better understanding of their legal authority. The next chapter is the concluding chapter. This takes the conclusion from this chapter 5 and from all the preceding chapters to analyse in full the legal authority of non-state rules.

[890] Astreinte is included in the UNIDROIT Principles but cannot be seen as an international trade usage for example (Charles R Calleros, 'Towards Harmonization and Certainty in Choice of Law Rules for International Contracts: Should the U.S. Adopt the Equivalent of Rome I?' (2010) 28 Wisconsin International Law Journal 639, 649)

Chapter 7: The Legal Authority of Non-State Rules: Present and Future

7.1 Introductory Thoughts

The introduction asked two key questions, what is the legal authority of non-state rules and how can this legal authority be ascertained? After exploring the legal nature of non-state rules in chapters 2 and 3 the thesis established several benchmarks through which this legal authority can be understood. Two other prominent questions that are at the core of measuring the legal authority of non-state rules arose from those two chapters. When are non-state rules applied? How are non-state rules applied? These questions were answered in chapters 4, 5, and 6. This concluding chapter now takes the analyses made in the previous chapters and answers the key questions of this thesis in full. The first part of this chapter examines the conclusions from the analyses in the previous chapters. The first section concerns the benchmarks against which the legal authority of non-state rules can be measured, the second section examines the application of non-state rules as the most important of these benchmarks, and the third section discusses how non-state rules are applied which leads to a fuller understanding of how the legal authority of non-state rules can be established and understood.

The second part of the conclusion examines whether a more progressive application of non-state rules can be expected in the near future and what the next steps in this process could or should be. As a caveat, it should be noted that this thesis focused on three main case studies (the US, France, and England) so the conclusions reflect mainly on these countries. Although this research includes reflections on other legislations it is evident that time and space not

permitting many jurisdictions have been left out of the research. These jurisdictions might have different approaches to the application of non-state rules and these approaches were not incorporated into this research. Any reader should hence be careful to draw any conclusions beyond the jurisdictions and the legislative instruments specifically mentioned in this thesis.

7.2 The Legal Authority of Non-State Rules

Non-State rules in international commercial law can be divided into six categories:

- General Principles of Law. This category crosses the borders between international commercial law, international public law, and domestic law. General principles of law in international law are defined as those principles which are common to most legal systems according to article 38 of the ICJ. These principles tend to be broad and are intended for state relations, which is why they are not necessarily a good fit for private commercial relations. General principles are also a source of domestic law and in that capacity they serve as the underlying principles of national law. General principles of transnational commercial law find their inspiration in both of these. They have been developed by merchants, international organisations, arbitral tribunals, and courts to fit the specific needs of international commerce. They are uncodified.

- Custom, trade usages, and practices. These three belong to the same category as they share the same characteristics. Practices have the weakest legal authority of these three. There are two different types of trade practices. The first are those practices between two or more parties that regularly do business together. These would not have any value beyond the particular contractual relationship although they can be binding within that specific relationship. This can be equated with course of dealing. The second are practices that exist within a trade or locality. They would occur with some regularity, but not so often as to be considered trade usages. Practices can develop into usages.

Trade usages have stronger legal authority. Usages are unique to specific trading branches, ports, regions, or sectors. They can be binding even when the parties are not aware of them. A sense of (moral) obligation is not necessary for a practice to be declared a trade usage. Only the regular observance of the practice as noted by the court/tribunal determines whether it is binding as a trade usage.

Finally, usages can develop into custom. Customs are those usages that occur regularly over a longer period of time and space and that are followed because it is believed they have obligatory force. Regular practice and opinio iuris are both necessary if a trade usage is to be declared custom.

It should be noted that the three terms are often used interchangeably by courts, practitioners, and in scholarly writing. It is also not clear when a practice becomes a usage or when a usage becomes a custom. There are many commonalities between the three. Practices, trade usages, and custom are unwritten, flexible, and can change over time/sector/place. They can be a source of law in domestic law and in conventional law. They are uncodified.

- International conventions are elaborated by international organisations. They are international in origin. They are binding upon ratification, they can counter mandatory laws, they are expensive to draft, difficult to update, and they are often drawn up along lowest common denominator policy lines. Once they are ratified by a state and enter into force they become part of the domestic law of that specific state. If they are not ratified or have not entered into force, they would be considered non-state rules and their legal authority would be similar to that of a restatement of law (see below).

- Restatements of law whose elaboration has been initiated by an international organisation. These would include the UNIDROIT Principles of International Commercial Law and the Principles of European Contract Law. These instruments

represent a codification of existing principles of commercial law across different countries and regions. The drafters did not merely codify existing principles and trade usages, but also innovated on existing solutions which means that the end result is more than a restatement of the current international commercial law practice. The end result is a new product. This category can have transnational legal authority through application in arbitration and incorporation in contracts. They have no standing in domestic legislation, unless they can be considered as general principles of law or trade usages. In some jurisdictions they can be chosen as the applicable law of the contract. Their legal authority would then be similar to that of a foreign law in private international law.

- Model laws have limited authority on their own. At best they would have the same authority as a restatement of law. They can be adopted by states and become part of domestic law. Differently from conventions model laws can be adapted during adoption, and therefore do not necessarily resemble the original model law completely. The newly adopted law becomes absorbed in the domestic law. The original model law remains as a non-state law. Model laws are aimed at legislators. They could be used in the same way as a restatement of law is used. As they are usually not designed for this purpose this usage is rare.

- Model contracts and standard contract terms. These are developed by international organisations and by trade branch associations. They are incorporated in the contract by the parties. They are often inspired by existing trade usages. In some trade branches standard terms of contract are used very frequently. In domestic law these are often considered as simple contractual rules. Their legal authority mainly stems from their incorporation in the contract although they can be considered as trade usages in some cases.

- Guidelines, travaux préparatoires, scholarly reflections, arbitral case law digests, and other similar works can be considered as international commercial law doctrine or scholarship. Doctrine is meant in the civil law sense of this term. These documents are prepared by a myriad of stakeholders including international organisations, trade associations, domestic legislations, practitioners, scholars, and private working groups. Their legal authority is diffuse. Overall it is considered weak, but if the organisation behind the work is a prominent one this can increase their influence. Furthermore, some conventions explicitly or implicitly refer to the travaux préparatoires as means of interpretation. Guidelines can have legal authority if they are incorporated in the contract or if they are used by courts as scholarly doctrine (which is a (secondary) source of law in some jurisdictions.)

The expression lex mercatoria can be used to denominate all six of these categories or the two categories that are unwritten non-state rules: general principles and practices/usages/custom. This was discussed in chapter 2. The conclusion was that the lex mercatoria should be restricted to uncodified rules of transnational origin. The term lex mercatoria should thus be limited to the first two categories. The elements of the lex mercatoria can be recognised as sources of law in domestic law. Codified non-state rules (the remaining four categories) usually have no direct standing in domestic law. They can have legal authority if they are incorporated in the contract (restatements, guidelines, conventions, and standard contract terms), they are ratified by a state (conventions), adopted by a state (model laws), or used by courts to interpret or fill any gaps in the applicable law (all of these).

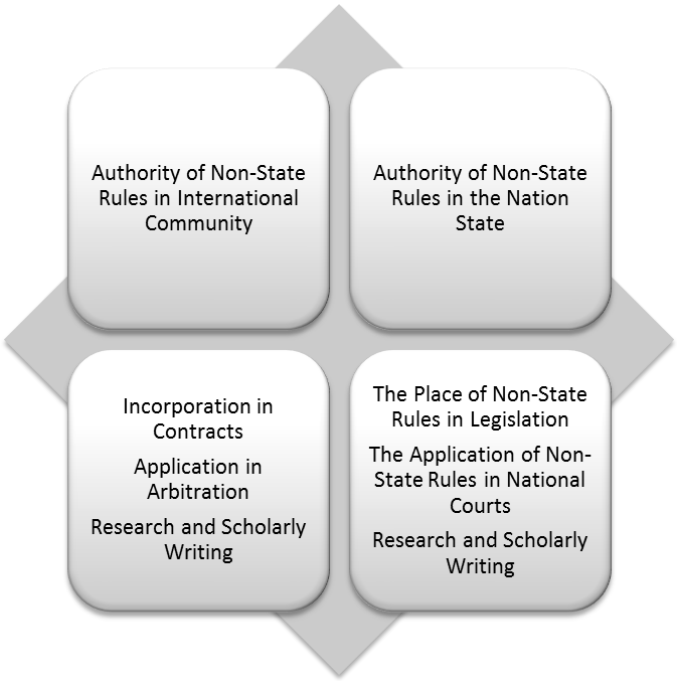
The legal authority of non-state rules shifts between situations. Firstly, different jurisdictions treat, apply, and use non-state rules in different ways. Secondly much of commercial law consists of variable rules. These can be displaced if the parties so choose. This means that in specific cases a rule with a weaker legal authority that has no standing in domestic law can overrule a binding legal measure if it has been incorporated in the contract. Chapter 3 concluded that to determine the authority of non-state rules resorting to a traditional hierarchy

of sources of law would not be appropriate as the results would not necessarily concur with the actual place non-state rules have in international commercial law.

Non-state rules have authority in two spheres: national (domestic commercial law) and international (transnational commercial law). Non-state rules can have legal authority in domestic law when they are applied as contractual rules, sources of the applicable law, the applicable law itself, to interpret the applicable law, or as legal scholarship/doctrine. The particular authority depends on the legislation of a particular jurisdiction.

Non-state rules can have authority in the international community. This international community is a diffuse phenomenon. It consists of merchants, arbitrators, and (international) organisations. The legal authority of non-state rules in that community differs from sector to sector and from region to region. It can be measured by looking at usage in contracts by merchants, the application by arbitrators, and the support from international organisations. The legal authority of non-state rules in the international community cannot be hierarchised easily. The above elements contribute to establishing the authority of non-state rules in the international community (and in transnational commercial law) and work together without one of these necessarily carrying greater weight than the others.

Non-state rules are a harmonisation measure that favours a bottom up approach. Through their usage they gain legal authority. In order to understand this legal authority, it is important to look at both the theory (what does the legislation say about when they can be used?) and the practice (When are they actually used?). The first can be measured by looking at legislation (when can they be applied?) and the second by looking at the actual application (when are they applied? & how are they applied?). The results could differ between the international community and a given (domestic) jurisdiction.



To determine the legal authority of a specific non-state rule one can look at the promulgator of the rule (international organisation, business community), the support it has (incorporation in contracts, legalisation), the content (analysis by legal professionals and scholars), and the application of the rule (by courts and arbitrators).

Chapter 3 concluded that the most important factor to measure the legal authority of non-state rules by is their application (when and how are non-state rules applied?) and through this understand the support they have (When can they be applied? How are they perceived and used by the international business community?) This is because of the inherent nature of non-state rules: they are not imposed, but are (at least initially) used without any coerciveness from the state. The origin and the content of the rule, whilst important, would thus take a back seat compared to their usage. This usage can be determined by studying the application of non-state rules in theory and in practice. This application measures both how the state (the courts) see non-state rules and how the parties to the contracts see them. The remainder of the thesis therefore concentrated on the application of non-state rules. By focusing on the application in state courts it is possible to analyse the legal authority of non-state rules in domestic law and through this understand their legal value in the international community.

7.3 The Application of Non-State Rules and their Legal Authority

As discussed in the previous section the legal authority of non-state rules is largely measured by their application in courts. Subsequently, it is important to analyse in which ways non-state rules can be applied and how this application measures their legal authority. In descending order of legal authority these types of application are:

- Non-state rules are applied in the absence of a choice of law clause by the court. This would place non-state rules on par with (foreign) state law. Courts could apply non-state rules in this way if their private international law allows for this. This happens in arbitration, but there do not seem to be any jurisdictions that allow for this in court litigation.

- Non-state rules are included in a choice of law clause as the applicable law to the contract and they are applied in that capacity by the court. Several jurisdictions allow for this, but they are in the minority. Non-state rules are applied independently as law. Non-state rules have a status grosso modo equal to foreign law in private international law. This authority is less far reaching than that of foreign law because they cannot be applied as the putative applicable law.

- Non-state rules are applied by the court as part of the applicable domestic law. The applicable domestic law recognises (certain) non-state rules as a source of law. Thus, when the court applies this law it has the possibility to apply non-state rules. Non-state rules are not applied independently, but through the applicable state law. Non-state rules have the authority of sources of law in domestic law. They could be considered as primary sources of law or secondary sources of law depending on the jurisdiction.

- Non-state rules are applied by courts to interpret the applicable law or to fill any gaps in that law without the parties having requested this. The court applies non-state rules

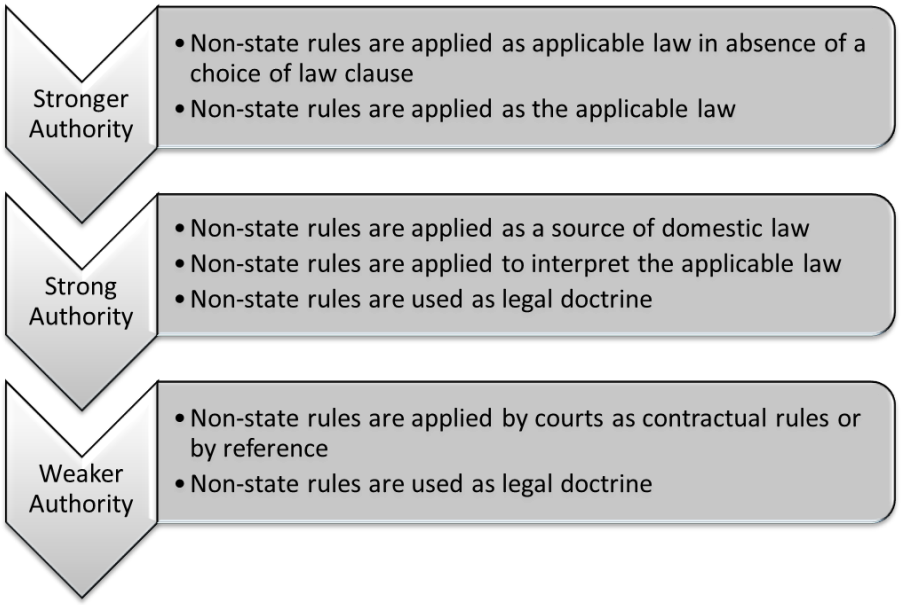
in a subsidiary capacity through the applicable law. Their legal authority would be equal to that of scholarly doctrine or general principles of commercial law depending on the jurisdiction.

- Non-state rules are included in the contract by reference and replace variable rules of the law, but they are not the applicable law. Non-state rules are applied as contractual rules in a subsidiary capacity at the request of the parties. They have the legal authority of contractual terms.

- Non-state rules are applied as legal scholarship or legal doctrine. Courts do not actually apply non-state rules, but refer to them. This can be, for instance, to show that the applicable law uses the same solution as is internationally accepted practice. Non-state rules in that case are the evidence of international commercial law practices. They have the legal authority of scholarship/doctrine.

- A final application that should be mentioned is when the enforcement of an arbitral award, where non-state rules were the applicable law, is requested or appealed. In those cases, courts apply procedural law that could indicate whether under the specific circumstances the application of non-state rules was valid. The court hence does not apply non-state rules. The same would be true when the exequatur of a foreign judgement based on non-state rules is requested. The legal authority in those cases would be comparable with that of foreign law under arbitral procedural rules. As arbitrators do not state in the same legal order as the courts of a state do it is difficult to measure the exact legal authority of this type of application. It can contribute to understanding how courts perceive non-state rules and in that way it can help to measure their legal authority.

The below image explains how the legal authority of non-state rules can be perceived depending on the type of application:



When non-state rules are applied as the law of contract they are applied autonomously and directly as (transnational) law or rules of law. The legal authority comes from the instrument itself. When non-state rules are applied to interpret the applicable law or as sources of domestic law they are applied in an indirect way as part of the applicable law. They derive their legal authority from their status in domestic law. Finally, when non-state rules are applied as contractual rules their legal authority comes from the contract. The law recognises that the parties have the freedom to shape their contract. Therefore, the legal authority of this type of application can be considered weaker even if in practice the effect of these rules would be pivotal for the contract and these could play the deciding role in solving contractual disputes.

When courts use non-state rules as normative legal scholarship the authority of the rules is more uncertain. The court is not applying non-state rules in a direct way, but cites the non-state rule as evidence, as a standard, as accepted practices, or common principles. They would have persuasive value that could be authoritative. Non-state rules in that capacity serve as legal doctrine in the way civil law defines it. Although in general the legal authority of this

usage is weaker this would depend on the jurisdiction. In some jurisdictions legal scholarship/doctrine is applied more often than in others and it can be considered a primary or secondary source of law. This is the reason why it can be found in two categories in the above graph.

The above mainly relates to understanding the legal authority of non-state rules in domestic law and provides benchmarks against which this legal authority can be measured in this context. The application of non-state rules can also help to understand the legal authority of non-state rules in the international community, but this order would be slightly different. As discussed it is more difficult to hierarchise this legal authority in the international community as the power balance between the different stakeholders is not clearly defined, nor is there an existing legal framework against which this authority can be measured. One of the ways to measure this legal authority would be to look at usage by merchants (which can partly be understood through the application of non-state rules in arbitral tribunals and in state courts.) Therefore, a tentative classification in terms of legal authority could be made as follows. This is again in descending order of legal authority.

- Non-state rules are used as the applicable law of the contract. The parties to the contract value the specific non-state rules to the extent that they believe these represent the best law for the transaction. Non-state rules have the value of law for the parties.

- Non-state rules are applied by arbitral tribunals in the absence of a choice of law clause. Non-state rules are applied on par with a state law. They are trusted to function as the best possible applicable law by the tribunal. They have the value of law for the tribunal.

- Non-state rules are included in the contract by reference. Non-state rules are not the applicable law, but they can shape the contract to a large extent. They are thus valued by the contracting parties as bringing something to the contract that state law does

not do. The parties trust the non-state rules to function as contractual terms or to serve to interpret their contract as accepted international commercial practice.

- Non-state rules are applied by arbitral tribunals in addition to a state law. Non-state rules are used to fill gaps, to interpret, or as reference material. They do not necessarily play a leading role in solving the dispute, but some value is attached to them although the exact value would differ from case to case. Non-state rules are considered acceptable international commercial practice or international commercial law doctrine.

(International) organisations and other groups contribute to understanding the legal authority of non-state rules in the international community in several ways:

- When (international) organisations draft non-state rules this demonstrates that this instrument has the support of the organisation. The authoritative value of the rule increases if the organisation is more prominent. This contributes to understanding the place of non-state rules as internationally accepted commercial practices and as scholarly doctrine.
- The endorsement of non-state rules by (international) organisations through reference to these in their own legal instruments, recommending their use, or otherwise supporting the instrument (s). The strength of the endorsement and the prominence of the organisation would influence the authoritative value. This also works the other way around when an (international) organisation discourages the use of (certain) non-state rules this could carry persuasive value as well. An example of this would be when trade associations actively discourage the application of the CISG through inserting a clause in their model contracts excluding its application. This contributes to understanding the role non-state rules play as internationally accepted commercial practices and principles.

Most of the scholarly attention has been given to the possibilities for the parties to choose non-state rules as the applicable law of the contract and the application of non-state rules in absence of a choice of law clause. This would constitute a direct application of non-state rules. Yet, in practice it can be concluded, as evidenced by the analysis in the previous chapters, that the number of cases dealing with non-state rules as the applicable law is limited outside of arbitration. For instance, the UPICC have never been enforced as a direct choice of law before a state court as far as is known.[891] This is mainly because the number of jurisdictions that allow parties to choose non-state rules as the lex contractus is limited. Yet, even in the jurisdictions where this is allowed this choice does not appear to occur frequently as the lack of case law and available empirical data demonstrates.[892] It can be concluded that non-state rules are most often applied to interpret the applicable law or as a source of the applicable law. Consequently, their role in (international) contract law is greater than in private international law, despite most of the scholarship focussing on the latter.

7.4 The Application of Codified Non-State Rules as Lex Mercatoria

One of the important conclusions that can be drawn regarding how non-state rules are applied is that codified non-state rules are often applied as an expression or a reflection of uncodified non-state rules. Trade usages and general principles of law can be sources of domestic law. Codified non-state rules do not have the same recognition as they do not have a direct standing as a source of domestic law. In practice, there is substantial interaction between codified non-state rules and uncodified non-state rules.

[891] Ralf Michaels,'Non-State Law in The Hague Principles of Choice of Law in International Contracts' (2014) 6 http://papers.ssrn.com/sol3/papers.cfm?abstract_id=2386186

[892] As the available empirical data and case law is limited any conclusions should be drawn carefully and it should be conceded that the usage of non-state rules as the applicable law could be larger in practice than this data shows.

When courts or arbitral tribunals apply the lex mercatoria or its elements (trade usages or general principles of law) there is a need to determine their actual substance. These uncodified non-state rules are imprecise. There are multiple possibilities of what these could entail and determining which of these possibilities is the most correct is difficult and time consuming. The time per case being limited the court either interprets these according to the lex fori, their own sense of justice, or they turn to codified non-state rules. These codified instruments are easy to research. They come in the form of a book or digital material. They are often accompanied by material on how they should be applied and interpreted. This represents a substantial advantage.

There are four ways in which codified non-state rules are applied in this fashion.

- As a guideline to finding the lex mercatoria. The court uses codified non-state rules to find underlying commercial law principles and trade usages.

- As a reflection of the lex mercatoria. Codified non-state rules are applied as evidence of the lex mercatoria. They are not a source of the lex mercatoria, but they reflect the lex mercatoria.

- As an expression of the lex mercatoria. Codified non-state rules form an intrinsic part of the lex mercatoria. They are a source of the lex mercatoria.

- As being the lex mercatoria. The specific instrument is applied as lex mercatoria without further indication that the lex mercatoria is more than just this specific instrument.

From the case analysis in chapter 6 it was concluded that in practice courts do not always make the distinction between these four different ways of applying codified non-state rules. For instance, when a court applies the UPICC as the lex mercatoria it is doubtful whether the court wants to imply that these constitute the whole of the lex mercatoria. Even if the court does formulate it in this fashion, this is most likely not what the court means. The most

common application is that codified non-state rules are applied as a reflection or as an expression of the lex mercatoria. Most cases, as was seen in chapter 6, do not rationalise why the choice was made to apply codified non-state rules as the lex mercatoria. The court might state that general principles of law are the applicable law and that these are best reflected or expressed by the CISG or the UPICC. Yet, why this is the best reflection or expression is not explained any further. That leaves the question whether tribunals and courts make a conscientious distinction between the terms expression and reflection.

There is a certain amount of justification to apply codified non-state rules in this way. Instruments like the Incoterms and the UPICC start from the premise that they attempt to codify and solidify existing unwritten usages and principles. Consequently, there is an intrinsic linkage between the lex mercatoria and codified non-state rules. Yet at the same time although unwritten usages and general principles of law are the starting point of these codifications the end result is different from these. This has several reasons. The first is that the exact content of uncodified non-state rules is difficult to uncover. There are diverging opinions on the substance. The second reason is that the drafters make choices during the process. They discover differing practices and norms and they innovate on these. So whilst existing uncodified non-state rules have an impact on the codification the end result is still a different product. This makes it doubtful whether applying codified non-state rules as a reflection of the lex mercatoria is the right direction to take.

If codified non-state rules are not a precise reflection, then perhaps application of these as an expression of the lex mercatoria would be better. That brings up the question of whether codified non-state rules do not have a nature which is so different from the lex mercatoria that it would be difficult to justify that they are part of this. After all, the lex mercatoria is unwritten and spontaneous in origin. Two characteristics that codified non-state rules do not share. This makes it difficult to claim that codified non-state rules are a source of the lex mercatoria.

It should be asked what the expectation of the parties is in such cases. Enquiries fielded that when parties choose non-state rules as the applicable law they most commonly refer to general principles of law, international principles of law, lex mercatoria, or another such formula.[893] This article dates from 2000 and the specific enquiries were done in the 1990s. It could be that since these enquiries were conducted there has been a shift towards codified non-state rules. If this enquiry is taken as a starting point it can be concluded that parties do not necessarily expect codified non-state rules to be applied as they show a preference for uncodified non-state rules. After all, if the parties wanted for instance the UPICC as the applicable law to the contract they could just have included that in their choice of law clause.

Yet, it could be countermanded that when arbitral tribunals or courts do decide to apply codified non-state rules as a reflection or expression of the lex mercatoria this seems to be accepted by the parties judging from the limited number of appeals made on this specific point. However, the reason why not many appeals are made is not necessarily because parties agree with the usage of codified non-state rules as a reflection/expression of uncodified non-state rules. An arbitration clause is often included for confidentiality reasons so it might be for strategic reasons that the award is not appealed. Furthermore, parties might not be unhappy with the result or legal counsel advises against an appeal based on this issue.

Another concern with applying codified non-state rules in lieu of the lex mercatoria is that this could lead to ossification of non-state rules and loss of flexibility which is one of the main characteristics of the lex mercatoria. Although codified non-state rules can be amended and updated (as can be observed with the UNIDROIT Principles) this does not always happen (as can be seen with the PECL which have been waylaid in a fashion and the CISG which is a convention and thus not amended easily.) Kahn states that the assimilation of the lex

[893] Michael Joachim Bonell, 'The UNIDROIT Principles and Transnational Law' [2000] 5 Uniform Law Review 199,204

mercatoria and conventions could make the latter more formalistic although he adds as a caveat that arbitral tribunals probably do not contemplate this in their application.[894]

Despite these concerns there is a clear trend towards applying codified non-state rules in this way. Bonell writes that one of the reasons why courts can be reluctant to apply non-state rules is that these are not clearly defined, but that with the UPICC this has now changed as these provide a clear framework.[895] This would hold true for other codified non-state rules as well. They provide advantages for courts in terms of accessibility and unambiguity. Consequently, it would seem that that it would be difficult to persuade courts from continuing in this direction.

If non-state rules truly gain legitimacy and authority through their application, then dissuading courts from using codified non-state rules would also countermand the nature of non-state rules. Furthermore, using codified non-state rules would prevent courts using the lex fori and their own sense of justice as elements of the lex mercatoria. The risk of the arbitrator or court settling as amiable compositeur without authorisation is present when the content of the lex mercatoria is imprecise and unclear. This issue thus has different sides: '*Clearly, the twin needs of uniformity and flexibility can never be wholly reconciled.'* [896]

A solution presents itself. If courts and arbitral tribunals continue to apply non-state rules as elements of the lex mercatoria and if the parties accept this application, then this constitutes an acceptance of these codified non-state rules which gain legal authority in transnational commercial law in this way. This means that a particular non-state rule or set of rules can develop itself to become a trade usage or general principle of law. As the lex mercatoria

[894] Philippe Kahn, 'Les Conventions Internationales de Droit Uniforme devant les Tribunaux Arbitraux' (2000) 5 Uniform Law Review 121,127
[895] Michael Joachim Bonell, 'The UNIDROIT Principles and Transnational Law' [2000] 5 Uniform Law Review 199, 216
[896] Marco Torsello, 'Reservations to International Uniform Commercial Law Conventions' (2000) 5 Uniform Law Review 85, 86

consists of unwritten rules these codified non-state rules could not be part of the lex mercatoria. Yet, if the codified non-state rules have shaped trade usages or general principles they could be said to constitute an adequate reflection of the lex mercatoria. Thus, what was not true in origin becomes true through regular application over a longer period of time. It would be incorrect to name codified non-state rules as a source of the lex mercatoria, but individual non-state rules could develop into a reflection of the lex mercatoria and its elements.

It can be observed from this thesis that there is a heavy emphasis on the UNIDROIT Principles. When one reads through the preceding chapters it is noticeable that many of the cases use the UPICC as the primary example as thus much scholarly research. Thus, rather than being chosen as the lex contractus, the UPICC have found usage as an expression/reflexion of the elements of the lex mercatoria.[897] Other instruments that are used in this way are the CISG, the PECL, and the Incoterms. Although the CISG has the oldest papers of the three and is binding law in many countries, it is limited to international sales law and it does not contain general principles of contract law. Furthermore, the CISG dates from 1980 and has not been amended since. Therefore, it does not have the same flexibility and actuality as the UPICC has. The PECL are a regional instrument and have not been amended in any depth since their publication. The Incoterms are used as trade usages, but they only cover a limited area of law. Hence it is clear why the UPICC take the leading role in this. Codified standard terms and conditions (either by the ICC or by trade associations) are especially popular as contractual terms and they are frequently chosen by the parties. Far more frequently than the UPICC are chosen. They thus have the support of the international business community.

[897] The UNILEX database indicates that their most frequent usage is to interpret domestic law and the second most common usage is their application as lex mercatoria.

Through the application of codified non-state rules as a reflection of uncodified non-state rules both become more intrinsically linked. That linkage already existed previously. Trade practices can become usages. Usages may become custom. General principles might be distilled from trade usages and custom. General principles of law and trade usages can form the basis for codified non-state rules. Codified non-state rules influence new instruments. The ULIS and ULFIS inspired the CISG. The CISG in turn formed an inspiration for the PECL and the UPICC. The PECL were a strong influence on the CFR which in turn influenced the CESL. The CESL was used as the basis for two new proposed Directives on e-commerce. Through their application as elements of the lex mercatoria codified non-state rules influence, change, and shape uncodified non-state rules. Non-state rules also influence domestic laws. This can happen directly when for instance a model law is adopted by a state, but also indirectly when they are used as comparative research by legal drafters or become part of scholarly doctrine.

Consequently, although non-state rules are composed of several distinct categories they are also a whole. Perhaps they are not a coherent whole, but they are a whole nonetheless. They are a whole in the sense that there is interaction between rules which leads to a strong mutual influence and co-dependency. They share a common objective: securing and facilitating international commercial relations. They share the same anational origin and the same ways of measuring and understanding their legal authority: support in the international community, support in domestic law, incorporation in contracts, and most importantly, application by state courts and by arbitral tribunals.

7.5 A More Elaborate Role for Non-State Rules

Currently in most jurisdictions it is not possible to choose non-state rules as the governing law of the contract nor would it be possible for the court to apply these in absence of a choice of law clause. Is this something which is likely to change in the near future? In order for the

court to apply non-state rules in absence of a choice of law clause private international law would need to be overhauled, including the underlying principles and theories. This does not seem a likely development. Nor an advisable one as chances are that it would decrease certainty and predictability as to establishing the applicable law.

Enlarging party autonomy to include non-state rules has more potential. This is already possible in certain jurisdictions as was discussed in this thesis (Oregon, Louisiana, Venezuela, Paraguay, Mexico, and Colombia are the examples mentioned throughout this work.) The publication of The Hague Principles on Choice of Law in International Contracts could also potentially be a positive development. As these have already been adopted in Paraguay the beginning is promising. In the United States work has begun on the Restatement (Third) of the Conflicts of Law. It is not yet known whether this will address the possibility for a choice of law for non-state rules as the work is in its preliminary stages. If this does happen it would be an important development. In Europe, there are currently no plans to amend the Rome I legislation to allow for this in express terms. So, although there are jurisdictions that allow for parties to choose non-state rules as the lex contractus there is no strong trend towards enlarging private international law to allow for this.

As this research shows the issue of extending party autonomy is of subsidiary importance. The demand to have the possibility to choose non-state rules as the applicable law in court litigation seems to be low although it is difficult to draw any real conclusions as parties would not choose it in the first place if it is not permissible. In arbitration, this choice is made more regularly, but this cannot be equated one on one with the potential interest for this in court litigation. Parties might choose non-state rules as the applicable law in arbitration because they want to stay away from any legal system. Furthermore, parties can already choose non-state rules as contractual terms and these can play a deciding role in the contract as they would outweigh any variable rules of the applicable domestic law. Standard terms and

conditions play an important role in international commerce and these are frequently included in contracts.

So, should party autonomy be enlarged to include non-state rules? As was discussed in chapter 4 the objections raised against extending party autonomy to include non-state rules can be negated. The issue does seem to be of subsidiary importance as the demand seems limited so it is not recommended to re-draft legislative instruments just for this reason as the cost-benefit analysis would not be favourable. However, when private international law is updated anyway (as is now the case in the US with the Restatement (Third) of the Conflicts of Law) it would be recommendable to consider this issue and enlarge party autonomy to allow a choice of law for non-state rules.[898] The articles on choice of law in The Hague Principles could be taken as model. This would be advantageous as consistent usage of The Hague Principles on Choice of Law will, as intended, lead to a more harmonised concept of choice of law worldwide which would increase security and predictability for international commerce.

It was concluded that courts struggle with the application of uncodified non-state rules. Courts apply codified non-state rules as expression or reflection (of elements) of the lex mercatoria. It is unclear whether there are reasons beyond pragmatic ones behind this development. Therefore, a next step could be to develop guidelines for the application and interpretation of non-state rules; both as the applicable law and when these are applied as part of the applicable law. This would assist courts to find the concrete rule behind the principle and lead to a more uniform application of non-state rules. This would countermand uncertainty for the parties in how non-state rules are applied. For instance, it has been

[898] As the Restatement also concerns internal contracts and consumer contracts the use of non-state rules as a choice of law could be limited to international commercial contracts.

proposed that the UNIDROIT Principles should be used to help interpret the CISG and that this usage should be endorsed by UNCITRAL.[899]

Measures like that could increase certainty although there are two dangers: ossification of rules and thus losing flexibility and if different such initiatives exist, it would countermand certainty. These two hazards would have to be considered when developing any kind of transnational legal measures. Although development of policy is often considered the first answer when confronted with any issues a lot is to be said for a slightly more laissez-faire method as this fits the nature of non-state rules which gain their status through usage and application in practice.

Yet, that does leave the question of where guidance can be found on how to apply non-state rules without having to engage in a lengthy research project for which courts and tribunals do not have the time. In keeping with the nature of non-state rules, instead of developing a binding legal instrument, it might be suggested that a restatement of law or model law would be the better approach. Of the two the preference should be for the restatement as it will gain its authority from its usage in practice instead of its adoption by the state. A restatement of law can suggest guidelines to courts and tribunals on how uncodified non-state rules should be applied and interpreted. If the restatement finds favour it will be used and in this way it would gain legal authority and contribute to a harmonised and clearer interpretation of non-state rules.

It could be argued that the UPICC already fulfil this function to some extent, but the UPICC are but one instrument among many. They are also a substantive legal instrument. The guidelines that could be developed would be procedural in nature and provide rules on how non-state rules should be discovered and applied. This would prevent courts and arbitral

[899] Michael J Dennis, 'Modernizing and Harmonizing International Contract Law: The CISG and the UNIDROIT Principles Continue to Provide the Best Way Forward' (2014) 19 Uniform Law Review 114

tribunals from interpreting non-state rules through the lex fori. The lex mercatoria should be flexible, but neither should its application and interpretation be left entirely to what the adjudicator believes to be fair and just. This would not preclude the use of codified non-state rules as a reflection of the elements of the lex mercatoria, but provide guidelines on how these could be used.

Even though harmonisation of law is not the focus in this thesis this concept is close to this discussion. Whether or not non-state rules really bring about harmonisation is a question left for another time as this falls outside the scope of this thesis. Yet, a few brief conclusions can be made on the subject of harmonisation and non-state rules. It was seen in this research that the main method of application of non-state rules is through (domestic) contract law. Non-state rules are applied by virtue of the applicable state law and are interpreted through the concepts of that law. This means that their application would not necessarily contribute to any transnational legal harmonisation as the application and interpretation remains within the national legal sphere.

The application of codified non-state rules as elements of the lex mercatoria on the other hand does contribute to harmonisation of transnational commercial law. If courts apply elements of the lex mercatoria without resorting to codified non-state rules there is a risk of greater divergence. If courts consistently apply codified non-state rules that are developed by international organisations as the lex mercatoria then this would lead to a more harmonised interpretation. Transnational guidelines on how non-state rules can be applied and interpreted would also contribute to this harmonisation. Although as discussed there are disadvantages to applying codified non-state rules as lex mercatoria the advantage is that it does contribute to the harmonisation of international commercial law as it allows for a more consistent and similar application of the lex mercatoria across countries.

7.6 Concluding Remarks

The goal of this thesis is to measure the legal authority of non-state rules in international commercial contracts. Its originality lies in providing a framework and benchmarks through which this legal authority can be understood. This legal authority exists in the international (transnational) sphere and in the national sphere. The research shows that the legal authority of non-state rules does not fit into a traditional hierarchy of sources of law. It can be established by looking at different factors: promulgator, substance, support, and application. It is especially the last factor which plays a deciding role. By studying the application of non-state rules in state courts their legal authority in domestic law can be understood. Through understanding this legal authority in domestic law conclusions can be drawn with regards to their legal authority in the international community and thus in transnational commercial law.

Much scholarly focus has been on the issue of party autonomy and non-state rules. As non-state rules cannot be chosen as the law of the contract in most jurisdictions this leads to an easy conclusion that non-state rules play a marginal role in international commerce. However, this is misleading as there are other situations in which non-state rules are applied more frequently.

First, when non-state rules are used as contractual terms at the behest of the parties, secondly when they are applied as a source of the applicable law, and thirdly when they are used to interpret the applicable law. Far from marginal non-state rules therefore occupy an important position in international commercial law. Legislations prefer uncodified non-state rules such as trade usages and general principles of law. Yet, when courts apply these uncodified non-state rules they will resort to codified non-state rules to go from the general principle to the practical application. One can question whether this is the right development because of the intrinsic differences between these two types of rules, but practical reasons ensure that this usage of codified non-state rules will continue. In the end this means that codified non-state

rules will become a reflection of the lex mercatoria even in those cases where currently they are not. Standard terms and conditions elaborated by trade associations are often chosen by parties as contractual rules, but these are seldom applied as elements of the lex mercatoria. That is reserved for those codified non-state rules elaborated by international organisations.

It can be concluded that non-state rules are pervasive in international commercial law. They are used and applied frequently. They can have legal authority as the applicable law to the contract, as sources of domestic law, as legal doctrine/scholarship, and as terms of the contract. They can be considered as law, rules of law, contractual rules, and/or normative practices depending on the situation.

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