

NON-STATE RULES: A GLOBALISED APPROACH FOR TRANSNATIONAL COMMERCIAL TRANSACTIONS

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Abstract: Globalization has reshaped law-making processes, shifting normative power from state authorities to non-state actors such as private institutions, international organizations, and academic groups. This article explores the application of non-state law in transnational commercial transactions, analyzing its nature, scope, and interaction with state legal systems. It examines how non-state rules, including *lex mercatoria*, soft law instruments, and private codifications, contribute to the harmonization of international commercial law. Particular attention is given to the role of non-state law in litigation and arbitration, its function as a supplementary and interpretative tool, and the challenges it faces in terms of legitimacy and enforceability. The article argues that despite concerns regarding its authority and democratic legitimacy, non-state law plays an essential role in addressing the complexities of international commerce by providing neutral, flexible, and specialized legal frameworks. Ultimately, it advocates for broader recognition and use of non-state law to enhance legal certainty and efficiency in global trade.

Resumé: Globalizace zásadně proměnila procesy tvorby práva, přičemž došlo k posunu normativní moci od státních orgánů k nestátním aktérům, jako jsou soukromé instituce, mezinárodní organizace a akademické skupiny. Tento článek se zabývá aplikací nestátního práva v rámci nadnárodních obchodních transakcí a analyzuje jeho povahu, rozsah a interakci se státními právními systémy. Zkoumá, jak nestátní pravidla – včetně *lex mercatoria*, nástrojů měkkého práva (soft law) a soukromých kodifikací – přispívají k harmonizaci mezinárodního obchodního práva. Zvláštní pozornost je věnována roli nestátního práva v soudním a rozhodčím řízení, jeho funkci jako doplňkového a interpretačního nástroje a výzvam, jimž čelí z hlediska legitimacy a vymahatelnosti. Článek argumentuje, že navzdory obavám ohledně jeho autority a demokratické legitimacy hraje nestátní právo zásadní úlohu při řešení složitostí mezinárodního obchodu, neboť poskytuje neutrální, flexibilní a specializované právní rámce. V závěru článek obhajuje širší uznání a využívání nestátního práva jako prostředku ke zvýšení právní jistoty a efektivity v globálním obchodě.

Key words: Non-state law; Conflict of law; Soft law; *Lex mercatoria*; UNIDROIT Principles; Harmonisatio; Globalization; Commercial contracts; International Commercial Law

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1. Introduction

Globalization is a very well-known, but hard to define concept and it is intrinsically connected to the modern theory of transnational commercial law. This phenomenon is altering the law-making processes and transforming the relationship between normative and sub-normative systems, by determining the birth of multiple centres of power and consequentially the creation of supranational normative regimes and subsystems.¹ To put it into simple terms, Globalization is the idea of “*Economic, financial, trade, and communications integration moving worldwide*”,² a very general definition, which nevertheless provides a good starting point to help us understand why an increasing number of non-state actors are becoming more and more relevant in the law-making process and in the redefinition and development of a transitional commercial law. Private codifications and academic restatements are maybe the most evident example of the shift of power – from the state towards the global institutions and the private sphere – which is occurring in the current globalized society to fulfil the immanent need of a set of rules to enable modern economic actors to overcome legal cultural differences and transcend geographic borders.³ This obstacle becomes more and more relevant with the spread of globalization, albeit with the increase of economic relationships among citizens of different countries and, above all, among enterprises that are involved in transnational commerce and have to face the difficulties of dealing with different systems and foreign legal cultures.⁴ Therefore, private institutions, international organizations and academic groups have tried, in the past half a century, to answer the market need for transitional regulation, by becoming “*creators and shapers of law*”⁵ themselves, thus giving rise to the phenomenon of privatization of law, and the creation of a modern non-state law.

In this scenario, the State is not the sole owner of the law-making process and this power is being shattered and exercised by various communities,⁶ above all, the merchant community, which has been spontaneously developing a transnational body of commercial rules (the so called *lex mercatoria*) to answer and accommodate the needs of the market. This trend finds a perfect lodging within the framework of global legal pluralism, which asserts the presence of diverse legal systems originating from both state entities and non-state collectives.⁷ Even though the literature has stressed many times that independent institution assuming a law-making role is not a novelty,⁸ it is important to understand the consequences of the rise of

¹ DEL ÁNGEL IGLESIAS VÁZQUEZ, M., Globalización, Globalización Jurídica, Global Law y Derecho Internacional Privado = Globalization, Legal Globalization, Global Law and Private International Law, in *Cuad. derecho transnac.*, 2017, p. 218.

² GLOBALIZATION Definition & Legal Meaning, in Your Free Online Legal Dictionary • Featuring Black’s Law Dictionary, 2nd Ed., <https://thelawdictionary.org/globalization/#:~:text=GLOBALIZATION%20Definition%20%26%20Legal%20Meaning&text=Economic%2C%20financial%2C%20trade%2C%20and%20communications%20integration%20moving%20worldwide>.

³ FERRARI, F., PIL and CISG: Friends or Foes?, in *Internationales Handelsrecht*, 2012, p. 90 <https://www.degruyter.com/document/doi/10.1515/ihr.2012.12.3.89/html> (last visited May 11, 2024).

⁴ GALGANO, F., Il diritto uniforme: la vendita internazionale, in *Atlante di diritto privato comparato*, 2011, Zanichelli, 5th ed.

⁵ MICHAELS, R., JANSEN, N., Private Law Beyond the State? Europeanization, Globalization, Privatization*, in *The American Journal of Comparative Law*, 2006, p. 868.

⁶ MICHAELS, R., The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge From Global Legal Pluralism, in *The Wayne Law Review*, 2005, p. 1212.

⁷ MICHAELS, R., *supra* note 6.

⁸ BERMAN, P. S., From International Law to Law and Globalization, in *The Columbia journal of transnational law*, 2005, pp. 508–509.

non-state law and the reactions of the international communities to this phenomenon, which is quickly becoming an essential element of transnational commercial law. Of particular significance is to assess the relationship between these private orders and the State, especially, under international private law, trying to establish the relevance of the former within choice-of-law regulations.

This article aims to analyse what non-state rules are, what is their nature and what elements constitute them (2), to create an overview of their functions and their application under private international law, both in litigation and arbitration of transnational commercial disputes (3) and to draw some conclusion on their future development (4).

2. Non-state law elements

What is non-state law? A specific definition for this collective is not easy to find, especially considering the variety of elements that constitutes it and makes this framework particularly complex, the different theories and opinions of the scholars on the topic⁹ and the fact that an improper definition could lead to misjudgements and mistakes in the application of the relevant norms.¹⁰ Under the concept of non-state law, different texts, principles and rules find shelter, and share the commonality of being created and issued from non-state actors' production and not through legislative activities of state organs. These rules, even if not guarded and enforced by the state, are upheld by the authoritative nature of their non-state promoters, which are usually academic groups, international organizations or cultural or religious body.¹¹ Therefore, the literature tends to define non-state law based on its origins, as all the rules, principles and similar norms, which emanate from an origin other than a state legislator,¹² where the term "State" should be construed as to also include regional and municipal authorities. All these elements, referred to the commercial law field, together with more traditional sources of law, merge into the broader concept of "transnational commercial law", which encompasses all principles and regulations on international commerce, common and shared among multiple legal systems.¹³ Another important notion is that of "*lex mercatoria*", which falls under the umbrella of non-state law – because of its origin and nature – and refers to the uncodified segment of transnational commercial law, including fundamental principles, customary commercial practices and international public policy.¹⁴

If we do not consider religious norms and territorial minorities' regulations, the category of non-state law encompasses a variety of norms and principles: treaty law, merchant law, restatements, customary law, private codifications, usages, general principles, model law, model clauses and conventions.¹⁵ All these elements, that have the common characteristic of

⁹ See, among others, HOEKSTRA, J., *Non-State Rules in International Commercial Law: Contracts, Legal Authority, and Application*, 2021, Routledge.

¹⁰ CUI, K., Research on the Application of Non-State Law in the Field of International Commerce, in *Beijing Law Review* 14, 2023, p. 741.

¹¹ ABBOTT, K.W., SNIDAL, D., Hard and Soft Law in International Governance, in *International Organization*, 2000, issue 3, p. 428–429.

¹² HOEKSTRA, J., *supra* note 9, p. 19

¹³ GOODE, R., Usage and Its Reception in Transnational Commercial Law, in *International & Comparative Law Quarterly*, 1997, p. 2.

¹⁴ GOODE, R., *supra* note 13, p. 3.

¹⁵ HOEKSTRA, J., *supra* note 9, p. 26.

not belonging to any particular sovereignty,¹⁶ can be divided into two main groups: codified and uncoded rules.¹⁷

To the first category belong all those rules that are crystalized in a written document, which can be issued by an organization, an academic group, an international convention, or a specific community. We can find many examples of these rules in the field of commercial law. Starting from the international conventions, which are an essential element of non-state law, the most famous in this field is the CISG, the United Nations Convention on Contracts for the International Sale of Goods, signed on 19th of April, 1980 and adopted to the present day by 92 contracting States.¹⁸ International conventions are considered “hard-law”, since, once ratified and adopted by the states they become domestic law and are therefore binding. They can be stipulated on a bilateral, regional or multilateral level, and they are considered an essential – and proper – source¹⁹ of non-state law, since they usually answer to very real, specific and urgent needs of the international trade.²⁰ The CISG was developed by UNCITRAL, the United Nations Commission On International Trade Law,²¹ to be applied to international sale of goods contracts which fall into its scope, to ensure predictability and certainty in transnational transactions and to overcome the differences between foreign legal systems.²² Other important elements of codified non-state law are the UNIDROIT Principles of International Commercial Contracts²³ and the Principles of European Contract Law,²⁴ both soft law instruments, drafted by two different groups of scholars, which envisage a compilation of neutral principles for international contract law and attempt to fill the gap between the different legal systems, especially between the common and civil law approaches.²⁵ They tend to pursue this objective by bringing together tradition and innovation and mixing the so called “common core” or “restatement” approach with a formulation leaning towards the most convincing and appropriate solutions to suit cross border transactions.²⁶ Together

¹⁶ TANG, Z. S., Non-State Law in Party Autonomy – a European Perspective, in *International Journal of Private Law*, 2012, p. 23.

¹⁷ HOEKSTRA, J., supra note 9, pp. 69-86.

¹⁸ <https://cisg-online.org/cisg-contracting-states#:~:text=The%201980%20Vienna%20Sales%20Convention,adopted%20by%2097%20Contracting%20States.>

¹⁹ In this case we believe that it is proper to refer to the CISG as a source of non-state law, considering its binding nature. See also AVTONOMOV, A., International and National in Contemporary Private Law, in *Laws*, 2023, p. 8.

²⁰ TANG, Z. S., supra note 16, p. 24.

²¹ <https://uncitral.un.org/>

²² FERRARI, F., supra note 3, p. 89.

²³ The UNIDROIT Principles of International Commercial Contracts, were first issued in 1994 by the International Institute for the Unification of Private Law (UNIDROIT), and they offer a comprehensive set of rules for international commercial contracts, aimed at harmonizing and modernizing international contract law across different juridical systems. <https://www.unidroit.org/instruments/commercial-contracts/unidroit-principles-2016/>.

²⁴ The Principles of European Contract Law (PECL) were developed in the late 1990s by the Commission on European Contract Law (the Lando Commission) and their objective is to unify contract law within the European Union, by providing a framework which was intended to serve as a draft for a future European Civil Code. https://www.trans-lex.org/400200/_/pecl/.

²⁵ BRODERMANN, E., The Growing Importance of the UNIDROIT Principles in Europe – A Review in Light of Market Needs, the Role of Law and the 2005 Rome I Proposal, in *Uniform Law Review – Revue de droit uniforme*, 2006, p. 11.

²⁶ BONELL, M.J., The Law Governing International Commercial Contracts and the Actual Role of the Unidroit Principles, in *Uniform Law Review*, 2018, p. 22.

with the Draft Common Frame of Reference,²⁷ the Principles of Latin American Contract Law (PLACL)²⁸ and the various restatements of law in the US²⁹ – despite the fact that their nature is not that of a binding instrument – they are considered an important point of reference when it comes to the transnational commercial law landscape, because of their broad-spectrum purpose and functions. Among the codified non-state law elements, it is also possible to find model contracts, model terms, such as the INCOTERMS,³⁰ which have been known and used by the commercial community since their first development by the ICC in 1923 or the Uniform Custom and Practice (UCP), published in 1936, and model laws, guidelines, legal opinions and other similar documents.³¹

The second category, the uncodified non-state law rules, includes different types of rules, which all share an important common characteristic: they are often recognized as a domestic source of law in many legal systems.³² In this group we can find those rules, unwritten laws, practices, trade usages and general principles,³³ spontaneously created by the merchant community,³⁴ which have evolved from transnational commercial practice and have heavily influenced international commerce and commercial law³⁵ and gained force of law because of their enhanced legal authority through repetitive use. One of the primary challenges associated with uncodified elements of non-state law lies in establishing their existence. This difficulty stems from divergent views within the legal community regarding the definitions of usages and general principles. The absence of clear definitional criteria complicates efforts to delineate and classify these instruments. Nonetheless, some scholars argue that this issue is likely to diminish progressively as comparative legal research continues to evolve.³⁶

²⁷ The Draft Common Frame of Reference (DCFR) is a comprehensive academic proposal, developed by a group of European legal scholars and practitioners under the auspices of the European Commission, aimed at harmonizing private law across the European Union. This project, published in 2009, was expected to serve as a foundational text for the potential creation of a unified European Civil Code, by providing a coherent and systematic set of principles and definitions that could be used as a reference by national legislators.

²⁸ https://www.trans-lex.org/400750/_/principles-of-latin-american-contract-law/

²⁹ HOEKSTRA, J., *supra* note 9, p. 6. The author also underlines that the main difference between the US Law Restatements and the UNIDROIT Principles is that the former is based on existing caselaw and is therefore more persuasive than the latter, which is merely the result of a comparative study.

³⁰ <https://iccwbo.org/business-solutions/incoterms-rules/>

³¹ HOEKSTRA, J., *supra* note 9, p. 8.

³² PAUKNEROVA, M., PFEIFFER, M., Use of UNIDROIT Principles of International Commercial Contracts to Interpret and Supplement Czech Contract Law, in *The Lawyer Quarterly*, 2018, p. 453.

³³ Goode defines trade usages as “a practice or pattern of behaviour among merchants established by repetition which has in some degree acquired normative force. [...] Usages that express very broad norms of behaviour may, if extended beyond a given type of international contractual activity, become elevated into general principles of law or become embodied in international convention and lose their distinctive status as usages of trade – i.e. *pacta sunt servanda*.” Another very discussed category is the general principles of law, which do not originate spontaneously, but are rather the fruit of the international and/or domestic legal order. They are to be distinguished from the general principles mentioned in art. 38 of the Statute of the international court of justice and also from the domestic general principles which are strictly connected to the national legal order, even though they often overlap with the object of our analysis. Examples of general principles of law are the good faith principle, the principle of reasonableness, of *pacta sunt servanda* and of *rebus sic stantibus* and others.

³⁴ HOEKSTRA, J., *supra* note 9, p. 23.

³⁵ TANG, Z. S., *supra* note 16, p. 24.

³⁶ LANDO, O., The Lex Mercatoria in International Commercial Arbitration, in *International & Comparative Law Quarterly*, 1985, p. 751.

An important element which we need to introduce while discussing uncodified non-state rules is the fleeting concept of *lex mercatoria*.³⁷ The term *lex mercatoria* is generally defined as a *uniform*, or better, *harmonized* mass of rules whose existence is accepted by the commercial community across different legal systems. This group of norms and principles is constructed as having different meanings and content and often overlaps with the concept of non-state law – especially of its uncodified elements – which is applied in transnational commercial law.³⁸ There are three views on the topic:³⁹ a first stricter view equates *lex mercatoria* to the set of uncodified non-state rules which were mentioned above, to what the roman called the *ius non scriptum*, and therefore identifies its essence in its “uncodified, non-statutory, and non-conventional”⁴⁰ nature. An intermediate position encloses in this category usages, practices, arbitral awards, general principles, model contracts, restatement of law, therefore the whole universe of non-state law, while the most extensive one⁴¹ includes also international public law, international conventions, and even European law⁴² on the subject of transnational commercial law.⁴³

The core characteristic of non-state commercial law is that it easily adapts to the context of the transactions, since it formed exactly from the need of specialized and technic norms in this fields and it addresses specific commercial and transnational issues, which are usually not taken into consideration under domestic law. Many authors have tried to define non-state legislation, especially referring to its soft-law component, and an interesting perspective is that of Abbot and Snidal,⁴⁴ which underline how soft law can be defined as a form of legislation lacking or weakened in at least one of the following three dimensions: obligation, precision and delegation.⁴⁵ In general, this body of rules is heterogenous, variegated and layered, even though coherent, in terms of substantial content and discipline, considering that the very reason why these norms emerged is that they were needed by the commercial actors and the market itself.⁴⁶

³⁷ Many have attempted to define what *lex mercatoria* is, if it even exists and what its functions are, even if with scarce and differing results; see, among others, BERGER, K. P., *The creeping Codification of the Lex Mercatoria*, Kluwer Law International 1999, 102. It is also interesting how the literature separates the “old” *lex mercatoria*, developed in the early middle age and the “new” *lex mercatoria*, emerged during the 20th century and considered as a revival of the medieval one, spurred as a result of globalization.

³⁸ RIZKY, A., SUNARDI, SETIONO J., *Lex Mercatoria as Substantive Applicable Law of International Sale and Purchase Contracts*, in *International Journal of Law and Politics Studies*, 2023, p. 81.

³⁹ HOEKSTRA, J., *supra* note 9, pp. 26 and ff.

⁴⁰ GOODE, R., *supra* note 13, p. 2.

⁴¹ LANDO, O., *supra* note 36, pp. 748 and following.

⁴² DALHUISEN, J.H., *Dalhuisen on Transnational and Comparative Commercial, Financial and Trade Law Volume 1: The Transnationalisation of Commercial and Financial Law, The New Lex Mercatoria and Its Sources*, 2022, <http://www.bloomsburycollections.com/book/dalhuisen-on-transnational-and-comparative-commercial-financial-and-trade-law-volume-1-volume-1-the-transnationalisation-of-commercial-and-financial-law-the-new-lex-mercatoria-and-its-sources> (last visited Feb 25, 2024), p. 169.

⁴³ According to some authors this view is the least popular; see, among others HOEKSTRA, J., *supra* note 9, p. 26.

⁴⁴ ABBOTT, K.W., SNIDAL, D., *supra* note 11, pp. 424 and following.

⁴⁵ The authors refer to (i) the binding effect of these rules and the relevant obligations of parties to respect them; (ii) the fact that the content of non-state rules is, in fact, flexible, fluid and hard to frame; (iii) the marginal and indirect (through financing) – if not completely non-existent – involvement of the state in the creation of these rules.

⁴⁶ GARRO, A.M., *The Gap-Filling Role of the Unidroit Principles in International Sales Law: Some Comments on the Interplay between the Principles and the CISG*, in *Tulane Law Review*, 1995, pp. 1149 and following.

In order to analyse the current role and application of non-state rules in transnational commercial law, it is necessary to first understand the legitimacy of this collective. In fact, non-state law is often underrated and criticized, because of its lack of “legitimacy” which derives from its non-state origin and, therefore, from the absence of democratic participation in its creation.⁴⁷ This argument is, however, not strong enough to entirely disqualify non-state law, merely in the light of a democratic deficiency, since legal authority does not exclusively derive from the state origin of the norms⁴⁸ and a rule cannot be denied legal authority “*purely on the grounds 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*”⁴⁹. The state does not exist on its own, in an empty space, on the contrary it coexists with and depends on the legal, cultural, political and social orders which multiply on the local, regional and international level. For these reasons, the application of non-state rules depends on (and simultaneously increases) their legal authority and, as opposed to the legislative authority of state law, the legal authority of non-state law always comes *a posteriori*, through recognition.⁵⁰ This recognition can originate from the state, the courts,⁵¹ the parties – as it is the case with model clauses or laws recalled in contractual terms, a specific community – for example customary law and merchant law, or it could even derive from academic acceptance⁵² and more in general from the recognition of the legal professions.⁵³ This is especially true when we are trying to understand and measure legal authority of the non-state rules on an international and transnational level, taking in consideration the vast number of stakeholder and the lack of a final and single authority to ratify and confirm its legitimacy.⁵⁴

3. An overview of the current non-state law framework and its application against domestic state law

Non-state law has multiple functions and aims, also in consideration of the variety of elements that are grouped under this label, and there are many controversial opinions on some of its uses, especially, on its application as governing law. Therefore, non-state law is generally considered to have a supplementary, interpretative, and integratory function, rather than a proper regulatory one, leaving the substantial regulation to the state law, outspring of the lawful democratic process.⁵⁵ However, it is possible to have a first clear overview of the functions of non-state law by looking at the preambles and commentaries

⁴⁷ DALHUISEN, J.H., supra note 42, pp. 128 and following.

⁴⁸ HOEKSTRA, J., supra note 9, p. 31.

⁴⁹ OSER, D., *The Unidroit Principles of International Commercial Contracts: A Governing Law?*, Martinus Nijhoff Publishers, 2008, p. 122.

⁵⁰ GOODE, R., supra note 13, p. 46.

⁵¹ Even though courts tend to not recognize soft law rules as binding and directly applicable, a pattern can be identified in recent times in the attitude of the judges to motivate any detachment from the soft law principles and explain why it was needed, especially in European soft law. See, ALBERTI J., CROCI F., *L'impatto del soft law dell'Unione europea nei giudizi interni: un'analisi sul campo*, in *Il Diritto dell'Unione Europea*, 2020, p. 271.

⁵² DALHUISEN, J.H., supra note 42, p. 57.

⁵³ JANSEN, N., *The Making of Legal Authority: Non-Legislative Codifications*, in *Historical and Comparative Perspective*, 2010, <https://academic.oup.com/book/11318> (last visited Apr 7, 2024), p. 41.

⁵⁴ HOEKSTRA, J., supra note 9, p. 33 who points out that the recognition on a domestic level is easier, considering that we can just look at the sources of law.

⁵⁵ ALBERTI, J., CROCI, F., supra note 51, p. 312.

of its codified components, especially under the UNIDROIT Principles of International Commercial Contracts. The UPICC preamble clearly suggests a number of purposes which this instrument could pursue:⁵⁶ they could serve as a restatement of law (§ 1 of the preamble of the Unidroit Principles of Commercial Contracts), it could be used as a model law for national and international legislators and as a guide for contracts by private parties (§ 5–7 of the preamble), it may be applied as applicable norm, when selected by the parties or in absence of an applicable law (§ 2–4 of the preamble), and finally they could serve as a background law.⁵⁷ Other instruments, add new functions and purposes the list, such as that of an “optional” instrument,⁵⁸ a mean for a better interpretation of domestic law or contractual terms, An educational resource for European, comparative, and domestic contract law⁵⁹ or a cornerstone for the upcoming process of harmonization and unification of commercial contract law.⁶⁰

Focusing on its function as applicable law, under private international law and considering only litigation, the choice of non-state law as an applicable law is seldom permitted and the parties’ freedom of choice is limited to a domestic law.⁶¹ Therefore non-state law, especially its codified element, can be only incorporated by reference in the contract and has the same strength of a contract term.⁶² Domestic private international law frameworks⁶³ rarely permit the application of non-state law as the governing law in transnational commercial disputes, and only few states allow for non-state law to be applied in litigation as a governing law in transnational commercial transactions.⁶⁴ Nonetheless, select case law reveals a modest but emerging willingness among national courts to consider its application.⁶⁵

⁵⁶ VOGENAUER, S., KLEINHEISTERKAMP, J., *Commentary On The UNIDROIT Principles Of International Commercial Contracts (PICC)*, International Institute For The Unification Of Private Law Eds., 2nd Edition., 2015, p. 36.

⁵⁷ VOGENAUER, S., KLEINHEISTERKAMP, J., *supra* note 56, p. 39. In the commentary, it is stated that the PICC play the role of a “general part” of the transnational law of obligations, by being incomplete and leaving space for domestic legislation, mandatory rules and party autonomy to integrate, complete and fill the contract.

⁵⁸ This concept was first officially mentioned in the Green Paper of the European Commission on European Contract Law (European Contract Law COM(2010) 348 (publ. 07.02.2014)) and aimed at the creation of a common instrument to be applicable as governing law; see also WHITTAKER, S., *The Optional Instrument of European Contract Law and Freedom of Contract*, 2011, *European Review of Contract Law*. The project eventually failed, and the idea of a common European Contract Law was abandoned.

⁵⁹ VOGENAUER, S., *Common Frame of Reference and UNIDROIT Principles of International Commercial Contracts: Coexistence, Competition, or Overkill of Soft Law?*, in *European Review of Contract Law*, Vol. 6, No. 2 (2010), p. 149.

⁶⁰ GARRO, A.M., *supra* note 46, p. 42.

⁶¹ GOODE, R., *supra* note 13, p. 2.

⁶² BONELL, M.J., *The CISG, European Contract Law and the Development of a World Contract Law*, in *The American Journal of Comparative Law*, 2008, p. 23.

⁶³ MICHAELS, R., *The UNIDROIT Principles as Global Background Law*, in *Uniform Law Review – Revue de droit uniforme*, 2014, p. 663.

⁶⁴ Some authors believe that the domestic law of Oregon and Louisiana does allow parties to elect non-State law to govern their contracts. See SYMEONIDES, S. C., *Contracts Subject to Non-State Norms*, 54 *American Journal of Comparative Law* 209, 221–22 (2006). Furthermore, also Paraguayan Law allows for the choice of non-state law as a governing law. See BONELL, M.J., *supra* note 26, pp. 27 and following.

⁶⁵ BONELL, M.J., *supra* note 26, pp. 25 and following provides few examples of case law that are the expression of this tendency.

Rome I Regulation⁶⁶ explicitly mentions non-state law in two important recitals: recital 13 and 14.⁶⁷ From these recitals it is clear that, at present, the application of non-state law as the governing law of the contract is not admissible under Rome I Regulation. However, the parties are free to incorporate these instruments in the contract, therefore making them applicable under the contractual terms. Recital 14 has generated cautious optimism regarding the potential future applicability of non-state law, particularly if developed into an optional instrument by the European Community.⁶⁸ However, as previously noted, similar initiatives have already failed,⁶⁹ and the prospect of a new proposal being introduced in the near future appears unlikely.⁷⁰

Even in the United States, there appears to be a consensus that non-state law cannot be applied as the governing law in litigation, despite the absence of case law explicitly addressing the issue. In the restatement 2nd Conflict of laws the wording “*law of the state chosen by the parties... will be applied*” appears and similarly even in the Uniform Commercial Code and the Third Restatement of American commercial law, reference is always made to the “law of the state”,⁷¹ thus ruling out any possibility to apply non-state law. However, the Uniform Commercial Code directly mentions *lex mercatoria* in Section 1–103 on its supplementation.⁷² Therefore, UPICC and other elements of non-state law, could be applied by reference to the *lex mercatoria* and through their elevation to usages of the industry businessmen.⁷³

Similarly, the Inter-American Convention on the Law Applicable to International Contracts (the Mexico City Convention), drafted by the Organization of American

⁶⁶ 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). The 1980 Rome Convention on the law applicable to contractual obligations only referred to the “law of different countries” and never explicitly dealt with the issue of non-state law application.

⁶⁷ Recital 13 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008: (13) This Regulation does not preclude parties from incorporating by reference into their contract a non-State body of law or an international convention.

Recital 14 of Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008: (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.

⁶⁸ TANG, Z. S., *supra* note 16, p. 27.

⁶⁹ It is noteworthy that the 2005 draft of the Rome I Regulation made an attempt to permit the application of non-state law as the governing law, as reflected in the following wording: “2. *The parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community*”. The idea of the Commission was to enhance the parties’ will by allowing them to choose non-state law with a certain level of legal authority, so to permit the use of codified instruments such as the PICC, the PECL or other future principles and rule out the uncoded component of non-state law. Eventually, the proposal was rejected, since it was heavily criticized by many commentators for the risk of uncertainty that the proposed wording would create and for the lack of support from the Council and the European Parliament.

⁷⁰ HOEKSTRA, J., *supra* note 9, p. 114.

⁷¹ *Id.*, p. 104.

⁷² Uniform Commercial Code, Section 1-103: “*Unless displaced by the particular provisions of this Act, 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, or other validating or invalidating cause shall supplement its provisions*”

⁷³ MICHAELS, R., The UNIDROIT Principles as Reference for the Interpretation of U.S. Law, in *The American Journal of Comparative Law*, 2018, p. 34.

States (AOS), refers to “the current law in a State”⁷⁴, even though articles 9 and 10 of the Convention, according to some authors,⁷⁵ have seemed to open the door to the application of non-state law.⁷⁶ However, this convention has only been ratified by Mexico and Venezuela – even though it was also signed by Bolivia, Brazil, and Uruguay – and, for this reason, it has not been widely applied and has not had an influential effect.⁷⁷

The only glimmer of light with regards to the application of non-state law as a governing law, is a soft law instrument: the Hague Principles on Choice of Law in International Commercial Contracts.⁷⁸ Article 3 of the HCCH includes non-state law among the list of possible governing law, regardless of whether the parties litigate or arbitrate, within the choice of law article:⁷⁹ *The law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.*⁸⁰

Notwithstanding the importance of this text, as we have already noted, the Hague Principles are a soft law instrument whose application poses similar issues to the ones we have been analysing so far. Therefore, this tool, and the rules within it, could be used to supplement and develop domestic private international law rules, but the mechanisms for its application are still not completely clear,⁸¹ neither are the effects that would derive from it.⁸² However, UNCITRAL’s endorsement of these principles during its 2015 session⁸³ has

⁷⁴ Article 17 of the OAS Convention.

⁷⁵ HOEKSTRA, J., supra note 9, p. 119.

⁷⁶ Specifically in article 10 of the OAS Convention “*guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted*” are presented as an equitable tool “*to discharge the requirement of justice and equity in a particular case*”.

⁷⁷ MILLS, A., *Party Autonomy in Private International Law*, Cambridge University Press, 2019, p. 503 and following.

⁷⁸ The Hague Principles on Choice of Law in International Commercial Contracts are a set of principles developed in 2015 to promote party autonomy by empowering the parties to choose a non-state or a governmental law as the governing law of the contract. This instrument does not contain conflict of law rules, neither provides for a law applicable in the absence of the parties’ choice, but merely focuses on choice of law. See MARSHALL B., *The Hague Choice of Law Principles, CISG, and PICC: A Hard Look at a Choice of Soft Law*, in *The American Journal of Comparative Law*, 2018, pp. 177 and following.

⁷⁹ <https://www.hcch.net/en/instruments/conventions/full-text/?cid=135#:~:text=Article%203%20broadens%20the%20scope,mode%20of%20dispute%20resolution%20chosen>.

⁸⁰ Article 3 of the Hague Principles on Choice of Law in International Commercial Contracts. An older wording read: “*In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise*”. This draft was abandoned after 2012 and replaced with the current wording.

⁸¹ MARSHALL, B., supra note 78, pp. 187 and following.

⁸² Some authors suggest that the possibility for the parties to opt-in in the Hague Principles regime would create a “double choice” for them, a choice for the Hague Principles and one for the domestic law, which should be integrated by them. See, LANDO, O., *The Draft Hague Principles on the Choice of Law in International Contracts and Rome I*, in *A Commitment to Private International Law-Essays in Honour of Hans Van Loon 299*, Permanent Bureau of the Hague Conference on Private Int’l Law ed., 2013, at 299, p. 304.

⁸³ This approval was issued in article 239 of the report to the 2015 session of the UNCITRAL Commission, see, Rep. of the United Nations Comm’n on Int’l Trade Law on the Work of Its Forty-Eighth Session, 240, U.N. Doc. A/70/17 (2015), <http://undocs.org/A/70/17>. The specific wording reads: “*The United Nations Commission on International Trade Law [...] Taking note that the Hague Principles complement a number of international trade law instruments, including the United Nations Convention on Contracts for the International Sale of Goods, and the UNCITRAL Model Law on International Commercial Arbitration (1985) [...] Commends the use of the Hague Principles, as appropriate, by courts and by arbitral tribunals; as a model for national, regional, supranational or international instruments; and to interpret, supplement and develop rules of private international law.*”

brought renewed attention to their potential as a means of promoting and harmonizing the use of codified non-state law⁸⁴ – particularly the CISG and the UNIDROIT Principles – and of fostering their broader acceptance and application in practice.⁸⁵

Therefore, at the moment, parties in litigation can only make a choice for non-state law, by incorporating it as a contractual term, and only in addition to a choice of a national law. In the absence of an elected *lex causae*, the applicable conflict of law rules will point at a national law,⁸⁶ inevitably applying the relevant geographic criteria under private international law.⁸⁷ However, it is important to remember that the election of non-state law as governing law – which, as we have said above, is generally not permitted – is not the only way how non-state law can be applied before domestic courts. It can easily find application as *lex fori*, or as *lex causae*, if it has become part of the relevant domestic law which is applied. This is the case, for example, for international conventions, among others the CISG, which has been ratified by a number of states, and has become part of their domestic legislation.⁸⁸ In a similar way, some elements of non-state law, could become applicable domestic law, through their elevation to general principles of commercial law or trade usages which could be applicable, without any need for the parties to incorporate them, under domestic legislation. An example of this mechanism can be found under Czech commercial law, and, specifically, Section 558(2) CC,⁸⁹ where it is stated that business usages must be applied to legal transactions among entrepreneurs, unless otherwise agreed in the contract.⁹⁰

The scenario changes when we look at arbitration, where parties' autonomy is further enhanced, and non-state law can be chosen as a governing "rule of law",⁹¹ even though, such

⁸⁴ The Hague Principles, under article 3, set four criteria to filter the kind of non-state law that can be used as a governing law. First, the law chosen must be a "set of rules" of law, therefore ruling out the uncodified non-state law elements. These rules must be "generally accepted" on the international or regional level and they must be, or accepted to be, neutral and balanced. And lastly, non-state law can be chosen only if the *lex fori* does not provide otherwise, therefore severely limiting the possibility to apply non-state law if not coherent, generally accepted and not explicitly excluded under domestic law.

⁸⁵ MARSHALL, B., *supra* note 78, pp. 215 and following.

⁸⁶ MARSHALL, B., *supra* note 78, p. 191.

⁸⁷ HOEKSTRA, J., *supra* note 9, p. 19.

⁸⁸ GOODE, R., *supra* note 13, p. 2.

⁸⁹ Act No. 89/2012 Coll., Civil Code (CC): "*V právním styku podnikatelů se přihlíží k obchodním zvyklostem zachovávaným obecně, anebo v daném odvětví, ledaže to vyloučí ujednání stran nebo zákon. Není-li jiné ujednání, platí, že obchodní zvyklost má přednost před ustanovením zákona, jež nemá donucující účinky, jinak se může podnikatel zvyklosti dovolat, prokáže-li, že druhá strana určitou zvyklost musela znát a s postupem podle ní byla srozuměna.*" [In legal transactions among entrepreneurs, account is taken of business usages maintained in general or in a given industry, unless excluded by an agreement between the parties or by a statute. Unless otherwise agreed, a business usage is conclusively presumed to take precedence over non-compelling provisions of a statute; otherwise, an entrepreneur may invoke a usage if he proves that the other party must have known a given usage and was aware that it would be followed.]

⁹⁰ PAUKNEROVA, M., PFEIFFER, M., *supra* note 32, Id.

⁹¹ BAASCH, ANDERSEN C., HAYWARD, B., ZELLER, B., The Cism And The United Kingdom-Exploring Coherency And Private International Law, in *International & Comparative Law Quarterly*, 2018, p. 8. One of the most important instruments for international arbitration is the UNCITRAL Model Law on International Commercial Arbitration, which was originally adopted in 1985 to encourage states to adapt their laws in order to accommodate international commercial arbitration. After 2006 the text was amended to allow the choice of non-state law by the parties, and, in the current version, article 28 states: "*The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute.*"

application, in practice, is very rare⁹² without a specific reference or explicit choice made by the parties.⁹³ If such choice is not made, non-state rules do not apply automatically and a connecting factor, such as a provision under applicable national law, is needed.⁹⁴ Considering the fact that before a domestic court non-state law cannot be applied as a governing law, it would be fair to wonder whether a national tribunal could challenge an award resulting from the application of such rules as governing law.⁹⁵ So far, no arbitral award has ever been overturned in national courts based on grounds of choice of non-state law⁹⁶ and such awards have been confirmed and enforced in many instances around the world.⁹⁷

Besides its controversial use as a governing law, an essential function of non-state law is that of a background law, to interpret and supplement domestic legislation in order to adapt it to the transnational nature of the commercial transaction. One of the greatest advantages of using non-state law is that it is tailor made for international commercial contracts and it address several specific issues that are usually not provided for under domestic law. Many domestic rules were created keeping in consideration only domestic transactions and they are not fit to deal with the foreign element and the challenges of an international background.⁹⁸ Non-state law can address domestic gaps by offering specific, internationally recognized rules and principles that interpret and supplement national legislation. In this capacity, it functions similarly to the role of international law restatements in the common law tradition.⁹⁹ Especially in arbitration, when the arbitrator is faced with the dilemma of applying a domestic rule which is not deem fit and suitable for the specific international case, or to reach an equitable and fair result, non-state law plays an essential role.¹⁰⁰ Many scholars have noted that national judges and legislators often rely on non-state law to validate their decisions on transnational commercial law,¹⁰¹ using it to support their positions¹⁰² or justify rulings that override national law.¹⁰³ This means that domestic courts in search of recognition

⁹² ALI, S., *The Application of Non-State-Based Standards in International Arbitration*, in *The Oxford Handbook of Global Legal Pluralism*, 2020, p. 789. <https://academic.oup.com/edited-volume/34238/chapter/290321065>.

⁹³ We can find further confirmation of this rule in the second paragraph of article 28 of the UNCITRAL Model Law on International Commercial Arbitration, which states: “(2) *Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*”. While in the first paragraph the wording was explicitly changed to “rules of law”, in the second part the text refers to the law and is made even clearer by the reference to the conflict of law rules, which always point at a geographic territory.

⁹⁴ ALI, S., *supra* note 92, *Id.*.

⁹⁵ The grounds for challenging in the merits an award based on application of non-state law as a governing law could be the capacity of the tribunal to base the award solely on non-state law rules and a violation of public policy – in legal systems where non-state law could overlap with public policy. See ALI S., *supra* note 92, pp. 797–798.

⁹⁶ HEIDEMANN, M., *Implementation of Non-State Law: Issues in Private International Law. A Review of Selected Contributions*, in *Does International Trade Need a Doctrine of Transnational Law?* 27 (2012), https://link.springer.com/10.1007/978-3-642-27500-5_3 (last visited Nov 29, 2023), p. 29.

⁹⁷ ALI S., *supra* note 92, p. 7.

⁹⁸ LANDO, O., *supra* note 36, p. 748.

⁹⁹ MICHAELS, R., *supra* note 73, p. 658.

¹⁰⁰ LANDO, O., *supra* note 36, p. 748.

¹⁰¹ BONELL, M.J., LANDO, O., *Future Prospects of the Unification of Contract Law in Europe and Worldwide*, in *Uniform Law Review*, 2013, p. 23.

¹⁰² MICHAELS, R., *supra* note 73, p. 652.

¹⁰³ ALBERTI, J., CROCI, F., *supra* note 51. This paper points out how when it comes to competition law and financial instruments, non-state law, as soft law, is kept in high regards by judges, juridical practitioners and

and consensus of the international community lean onto non-state law principles and rules to seek legitimacy not only in the national and domestic sphere but also in the transnational one.¹⁰⁴

Lastly, as we mentioned above, non-state law can be incorporated by the parties as a contractual term even by reference, thus giving effect to the desired rules through the contract itself. This can undoubtedly lead to great advantages both for the parties in terms of flexibility, specialization and legal costs, and for international harmonization, since non-state law gains more and more authority with its recurring use and application. When the parties decide to incorporate non-state law, and specifically its codified elements, into the contract they gain force of law and become binding under the applicable national law,¹⁰⁵ within the limits of public policy and mandatory rules and they prevail on non-mandatory domestic rules. This allows the parties to “delocalize” the contract to the transnational sphere, while detaching it from national law,¹⁰⁶ which can be unfit to address certain issues under international commercial law.¹⁰⁷

4. Future prospects under the light of globalization and the advantages of non-state law application

Regardless of the possibility to apply them as a governing law of the contract, as an instrument to interpret and integrate domestic law or as incorporated contractual terms, non-state law rules, and especially the codifications promoted by the international organizations, such as the UPICC, the PECLs and the CISG, are an essential instrument under international commercial law. Their application and use continuously enhances and strengthen their legal authority and their influence in transnational transactions. If we look at their actual application, the numbers, even though notoriously imprecise, are yet not particularly relevant.¹⁰⁸ While the data may be discouraging, given the significant influence and potential role of these rules in harmonizing international commercial law, it is essential to move beyond the numbers and continue efforts to promote their adoption. We believe that enhancing the use and application of non-state rules can be achieved through legal education, research, and codification, which would improve the credibility of these instruments, increase legal certainty, and raise awareness of their numerous advantages.

relevant subjects. This could be connected to the peculiarity of this field, the recognised authority of the organisations or agency which issue such instruments and the pressing need for harmonisation.

¹⁰⁴ HOEKSTRA, J., supra note 9.

¹⁰⁵ GOODE, R., supra note 13, p. 5.

¹⁰⁶ HOEKSTRA, J., supra note 9.

¹⁰⁷ To encourage the practice of incorporation, UNIDROIT has issued the following model clause for the parties to reference the UPICC in their contract: “*The UNIDROIT Principles of International Commercial Contracts (2016) are incorporated in this contract to the extent that they are not inconsistent with the other terms of the contract.*”

¹⁰⁸ <https://www.unilex.info/main/about> The UNILEX Database “is an “intelligent” database of international case law and bibliography on the UNIDROIT Principles of International Commercial Contracts and on the United Nations Convention on Contracts for the International Sale of Goods (CISG) – two of the most important international instruments for the regulation of international commercial transactions.” From the “About Unilex” section on the UNILEX website. On the UNILEX Database the number of reported cases on UPICC are not particularly high: there are 5 cases reported in 2023, 13 cases in 2022, 7 cases in 2021, 13 cases in 2020, 11 cases in 2019 and 10 cases in 2018.

The arguments against non-state rules, notwithstanding the relevant critiques that are moved against them and certainly deserve attention, are not enough to disregard these tools and dismiss their use. The alleged uncertainty and ambiguity and the issues with interpretation and gap filling that are often highlighted by the opponents can be addressed through the different types of application and roles of these instruments. The lack of democratic support, that is frequently cited among the biggest obstacles to the application of non-state law as a governing law, cannot be considered an insurmountable obstacle anymore, especially in today's globalized market, where the state is not the only international actor nor can it be the sole holder of the law-making power, due to the increasingly important role that international organization and other non-state actors play, especially in the areas that are not covered or disciplined by the State.¹⁰⁹

Furthermore, the many benefits of applying non-state law, even from the point of view of the parties themselves, give us even more reason to believe that the use of these tools will be consolidated in the future. They provide a neutral law, a transnational legal regime,¹¹⁰ which could serve as a compromise for the parties in order to avoid biases and achieve fairness.¹¹¹ Non-state law, especially in its codified element, could lower negotiation costs, by providing a semi-complete set of contract rules, that the parties could use as a neutral starting point, and avoiding the issues and costs deriving from the struggle of understanding a different legal system.¹¹² On the other hand, non-state law in its uncodified element, could offer a level of flexibility and dynamism that could well reflect that of the society and the market in which it is applied.¹¹³

5. Conclusions

In conclusion, we believe that, however applicable and applied, non-state law plays an essential role in today's globalized market, and we can only hope that their use will be increased and their functions enhanced in the future, through legal education, research, and self-reflection.¹¹⁴ Many authors believe that soft law is an interim step towards harder and therefore more satisfactory legalization,¹¹⁵ however, in our opinion, this would not be absolutely necessary. What we deem important is to further promote these instruments, by rethinking appropriate application mechanisms,¹¹⁶ updating, studying and modernizing the current codifications and educating legal practitioners, interpreters and business actors to the many advantages which these rules offer. The use of non-state law that currently seems more practical and realistic for the future is as one of the several body of laws applied as general principles in a comparative perspective by the judge or the adjudicator. This could be read as a further step towards harmonization, rather than unification, for an international commercial

¹⁰⁹ MICHAELS, R., JANSEN, N., *supra* note 5, Id.

¹¹⁰ BONELL, M.J., *supra* note 62, Id.

¹¹¹ TANG, Z. S., *supra* note 16, p. 28.

¹¹² AVTONOMOV, A., *supra* note 19, Id..

¹¹³ RAGNO, F., Certainty versus Flexibility in the EU Choice of Law System, in *Private International Law* (FERRARI, F, FERNÁNDEZ, ARROYO D. P. eds., 2019), <https://china.elgaronline.com/view/edcoll/9781789906899/9781789906899.00009.xml>.

¹¹⁴ HESSELINK, M. W., Progress in EU Contract Law, in *European Review of Contract Law*, 2022, p. 281.

¹¹⁵ ABBOTT, K.W., SNIDAL D., *supra* note 11, p. 422.

¹¹⁶ ALLI, S., *supra* note 92, Id..

law discipline that is coherent and actionable in an globalized and dynamic market, but still considers and respects the different legal traditions and cultures that characterize each system, in the path towards a more globalised yet inclusive way of handling translational commercial transactions.