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THE HAGUE PRINCIPLES AND THE CHOICE OF NON-STATE “RULES OF LAW” TO GOVERN AN INTERNATIONAL COMMERCIAL CONTRACT

*Geneviève Saumier**

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INTRODUCTION

Most States recognize that parties to international commercial contracts have an interest in choosing the law that will govern their transaction and any disputes that may arise from it.¹ As a result, the choice-of-law rules for international contracts typically grant parties freedom to choose the law governing their relationship—an option often referred to as

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¹ Following common usage, I capitalize “State” when referring to countries, whether unitary or federal, and “state” using lower-case to refer to sub-divisions of federal states.

“party autonomy.”² Should parties fail to exercise this option, the contract’s governing law will be identified on the basis of concrete factors connecting the contract to a particular State and its law.³ This can lead to uncertainty because different States use different connecting factors, and because the application of these factors by courts can be unpredictable.⁴ In this context, it is usually in the parties’ interests to take advantage of the opportunity granted to them to designate the law best suited to their particular transaction and relationship. Legal certainty is increased under this option, thereby ostensibly reducing the overall existing risk inherent in international transactions.

While party autonomy in international commercial contracts is largely recognized on a global scale, it does have some variants and is even formally rejected in some States.⁵ For example, in the United States, where party autonomy is largely accepted, the choice is limited to a law with which the parties or their transaction have a reasonable connection.⁶ Throughout all of the European Union and Canada, and recently China,⁷ party autonomy is recognized without any similar requirement.⁸ In some South

² Catherine Walsh, *The Uses And Abuses of Party Autonomy in International Contracts*, 30 U. NEW BRUNSWICK L. J. 12 (2009).

³ See Hague Conference on Private Int’l Law, PERMANENT BUREAU, *Feasibility Study on the Choice of Law in International Contracts—Overview and Analysis of Existing Instruments*, Prel. Doc. No. 22B, para. 80–81 (Mar. 2007). All references in this Article to materials of the Hague Conference on Private Int’l Law are available online at www.hcch.net.

⁴ *Id.*

⁵ See Symeon Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. OF COMPARATIVE L. 873, 875–76 (2013).

⁶ *Id.* at 880. U.C.C. § 1-301, in force throughout the United States, provides the following limit to party autonomy in international contracts: “[W]hen a transaction bears a reasonable relationship to [the forum] state and also to another state or nation the parties may agree that the law of either this state or of such other state or nation shall govern their rights and duties.” An attempt to remove this requirement by a 2001 modification to the U.C.C. was eventually reversed in 2008. U.C.C. § 1-301 (amended 2008).

⁷ See Yongping Xiao & Weidi Long, *Contractual Party Autonomy In Chinese Private International Law*, 11 Y.B. OF PRIVATE INT’L L., 193, 197 (2009) (“[A]lthough the chosen law most often has some connection with the transaction, there is general consensus that Chinese law allows the choice of a law which has no connection with the contract.”).

⁸ For the EU, see Commission Regulation, 593/2008, 2008 O.J. (L177) 6; for Quebec, see Civil Code of Quebec, S.Q. 1991, c. 64, art. 3111 (Can.); Canadian

American countries, such as Brazil,⁹ positive law still rejects party autonomy. There is thus a lack of uniformity concerning party autonomy, although the great majority of States accept and support it in principle and in practice.¹⁰

A further relevant distinction to this Article relates to the scope of party autonomy within the two main fora for dispute resolution in international commercial matters—court litigation and arbitration. Where disputes are brought before national courts, choice-of-law rules recognizing party autonomy are typically understood to allow only the designation of State law.¹¹ Where disputes are brought to arbitration, however, the scope of party autonomy is often broader, recognizing the parties' ability to designate non-State law to govern their contract dispute.¹² In other words, arbitration tribunals may resolve international commercial disputes by referring to a body of rules that is not a State law, by referring to "non-State law." This possibility is expressly recognized in numerous State arbitration laws and most arbitration rules adopted by international bodies such as the United Nations Commission on International Trade Law ("UNCITRAL") or the International Chamber of Commerce

common law provinces follow the Privy Council precedent in *Vita Foods. Vita Foods v. Unus Shipping* [1939] A.C. 277 (P.C.) (appeal taken from Nova Scotia).⁹ Brazil has expressly adopted the *lex loci contractus* principle. *Lei de Introdução às Normas do Direito Brasileiro*, C.C. art. 9 (Braz.); Nadia de Araujo & Fabiola Saldanha, *Recent Developments and Current Trends in Brazilian Private International Law Concerning International Contracts*, 1 PANORAMA OF BRAZILIAN L. 73, 76–77 (2013).

¹⁰ Hague Conference on Private International Law, *Feasibility Study On The Choice Of Law In International Contracts*, Prel. Doc. No. 5, para. 5–6 (Feb 2008). All of the documents of the Hague Conference mentioned in this Article are available online at www.hcch.net in the section "Choice of law in international contracts."

¹¹ See Horatia Muir-Watt, *Private International Law*, in *ELGAR ENCYCLOPEDIA OF COMPARATIVE LAW* 701, 710 (2d ed. 2012). In this sentence, I use "State" in opposition to "non-State." For some federal States, the law of contract is within the legislative competence of the federal level whereas in others it is within the jurisdiction of the sub-divisions, i.e., the states. When I refer to "State law" or "non-State law" the reference is to the law of the entity within the State that has legislative competence over contracts. For example, "State law" in France is French law, whereas "State law" in the United States is the domestic contract law of a particular state, for example the law of Michigan. The same is true in Canada, where there is no 'Canadian contract law,' but rather only the contract law of each province or territory.

¹² See the previous footnote for the meaning of "non-State law."

(“ICC”) and even by national arbitration institutions such as the AAA.¹³

Since 2006, the Hague Conference on Private International Law—an international intergovernmental body involved in the development of uniform conflict of laws instruments¹⁴—has taken on the task of drafting an instrument on choice of law in international commercial contracts. In November 2012, forty-two Member States attended a special meeting of the Hague Conference.¹⁵ These attending States gave unanimous support to the Hague Principles on Choice of Law in International Contracts (“Hague Principles”), a non-binding instrument that endorses a broad definition of party autonomy in choice of law but also moves into uncharted territory by recognizing the possibility that State courts can give effect to the designation of non-State law by parties to an international commercial contract.¹⁶ The instrument adopted at that meeting is comprised of a series of twelve black-letter rules. An extensive commentary was subsequently drafted to accompany the black-letter rules (“Commentary”),¹⁷ which has since been subject to the approval of the

¹³ See, e.g., *infra* note 75. In fact, these sources refer to the parties’ ability to designate “rules of law” to govern their contract rather than using the expression “non-State law” although the expressions are equivalent.

¹⁴ For details on this organization, see its website at www.hcch.net. There are seventy-six member states from around the world. The European Union is also a member, while the United States has been a member since 1964.

¹⁵ Hague Conference on Private International Law, PERMANENT BUREAU, *Report of the November 2012 Special Commission Meeting on the Choice of Law in International Contracts*, Nov. 12-16, para. 3 (2013) [hereinafter *Report of the November 2012 Special Commission*] available at http://www.hcch.net/upload/wop/contracts_rpt2012e.pdf.

¹⁶ *Id.* at para. 12–16.

¹⁷ The initial text of the Commentary was completed in November 2013 (Hague Conference on Private International Law, *Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts*, (2013)), and the most recent revised version is from July 2014 (Hague Conference on Private International Law, *The Draft Hague Principles on Choice of Law in International Commercial Contracts*, Prel. Doc. No. 6 – revised (2014)). As of February 7, 2015, the Hague Principles still await official sanction. Member States were given until August 31 to comment on the July, 2014, version of the instrument. Based on those comments, further modifications were made to the instrument by the Working Group. None of the modifications affect Article 3 itself, or its Commentary. The revised text of the Principles and Commentary were submitted to Member States for final comments to be submitted by the end of March 2015. This information is known to the Author personally, due to her membership in the Working Group.

Member States, a process that was finally completed in March, 2015.

This Article will examine Article 3 of the Hague Principles, which deals with the controversial issue of non-State law. After describing how this issue arose in the drafting process, this Article will discuss Article 3 in theoretical terms and its practical implications.

I. TRACING THE HISTORY OF NON-STATE LAW IN ARTICLE 3 OF THE HAGUE PRINCIPLES

Efforts to produce uniform choice-of-law rules for international commercial contracts have been successful only on a regional level. The best known of these regional agreements are the Rome Convention, now the Rome I Regulation, and the Inter-American Convention.¹⁸ The former is an example of successful regional unification and has been in force throughout the European Union for over twenty-five years. The latter can be considered a failure, as it is in force in only two States thirty years after its adoption by the Organization of American States.¹⁹ The absence of a multilateral instrument on the law governing international commercial contracts can be seen as the result of two countervailing forces. On one hand, the widespread consensus on the applicable general principles for choice-of-law in contracts reduces the need to draft a formal instrument. On the other hand, persistent disagreement about certain significant details, such as whether or not party autonomy needs to be limited by requiring a connection between the law chosen and the parties or their transaction, creates potentially insurmountable obstacles to the adoption of a common set of choice-of-law rules.

In 2006, the Hague Conference on Private International Law decided to investigate the opportunity to draft choice-of-law rules for international contracts. This discussion, however, was

¹⁸ Organization of American States, Inter-American Convention on the Law Applicable to International Contracts, Mar. 17, 1994, O.A.S.T.S. No.78. For a comparison with the Rome Convention, see Friedrich K. Juenger, *The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons*, 42 AM. J. COMP. L. 381 (1994).

¹⁹ It has been ratified by Mexico and Venezuela. See the signatories and ratification record at <http://www.oas.org/juridico/english/sigs/b-56.html>.

not the first of its kind.²⁰ Indeed, a similar initiative was undertaken in 1983 and culminated in the publication of a feasibility study.²¹ The project was not pursued, as the prospect for agreement on a binding instrument was considered improbable at the time.²² By 2006, however, the Hague Conference was prepared to envisage the option of proposing the alternative of a non-binding instrument to its Member States. A survey of Member States showed significant support for the project generally, and even included surprising support for a binding instrument.²³ Still, the preliminary survey indicated a lack of consensus sufficient to convince the Hague Conference that a non-binding instrument would be more successful.²⁴ This decision was critical to the eventual inclusion of Article 3 in the Hague Principles.

²⁰ The ICC had also established a working group in 1980 to study the possibility of formulating choice-of-law rules for international contracts destined for arbitrators. The project was not pursued at that time. See O. Lando, *Conflict-of-Law Rules for Arbitrators*, in *Festschrift für Konrad Zweigert zum 70. Geburtstag* 157 (J.C.B. Mohr (Paul Siebeck) Tübingen, 1981). In 2010, the ICC Commission on commercial law and practice established a working group to prepare a document on the “choice of general principles (*lex mercatoria*) as the applicable law,” headed by F. Bortolotti.

²¹ See H. van Loon, *Feasibility Study on the Law Applicable to Contractual Obligations, Proceedings of the Fifteenth Session*, Prel. Doc. E, Tome I (Dec. 1983).

²² See Hague Conference on Private Int'l Law, PERMANENT BUREAU, *Choice of Law in International Commercial Contracts: Hague Principles?* 15 UNIF. L. REV. 883, 887 (2010) [hereinafter PB 2010].

²³ See Hague Conference on Private Int'l Law, PERMANENT BUREAU, *Feasibility Study on the Choice of Law in International Contracts – Report on Work Carried Out and Preliminary Conclusions*, Prel. Doc. No. 22A, at 5–6 (Mar. 2007), available at http://www.hcch.net/upload/wop/genaff_pd22a2007e.pdf. Stakeholders in the international business and commercial arbitration communities expressed similar support. See *id.* at 8–9.

²⁴ For a full discussion of this decision, see PB 2010, *supra* note 22, at 888–89. Instruments are normally adopted by majority vote at the Hague Conference, but a project is unlikely to make it to a vote at a Diplomatic Conference if there is significant disagreement among Member States during its elaboration. The Hague Conference's process is as follows: “The principal method used to achieve the purpose of the Conference consists in the negotiation and drafting of multilateral treaties or Conventions in the different fields of private international law. . . . After preparatory research has been done by the secretariat, preliminary drafts of the Conventions are drawn up by the Special Commissions made up of governmental experts. The drafts are then discussed and adopted at a Plenary Session of the Hague Conference, which is a diplomatic conference.” (“About HCHH” at www.hcch.net).

The decision to work toward a non-binding instrument freed the drafting process from the sometimes stifling methods of treaty-drafting. As the Permanent Bureau of the Hague Conference (“Permanent Bureau”) put it, the drafting process could move forward “without the constraints and trade-offs inherent to the negotiation of treaties.”²⁵ The instrument’s drafting was handled by a Working Group of Experts (“Working Group”) from various Member States who participated in their individual capacity and not as government representatives. While it was understood that any proposed instrument would eventually be subject to the scrutiny of Member State government officials, the Working Group was not hindered in its deliberations by any particular State imperatives. Instead, its work was guided by the general mandate provided by the Hague Conference which was to draft a non-binding instrument to “promot[e] party autonomy in the field of international commercial contracts.”²⁶

This mandate set the stage for the Working Group’s product. Indeed, early on it was clear that the Working Group would limit its review to rules concerning the designation of the governing law by the parties, not with rules to identify the governing law in the absence of party choice, since the latter do not involve party autonomy.²⁷ Second, in designing the rules, a substantive objective was to be pursued—the promotion of party autonomy. Third, consideration had to be given to both judicial and arbitral proceedings. The content of the instrument reflects these parameters and is particularly apparent in Article 3.

Once the proposed instrument’s intent to further party autonomy was established, it was obvious that the question of non-State law would have to be addressed. The very expression “non-State law” is contentious, as it implies that “law” can have origins outside of the State.²⁸ This was the subject of discussion in

²⁵ *Id.* at 888. The Permanent Bureau is the name given to the secretariat of the Hague Conference.

²⁶ Hague Conference on Private International Law, COUNCIL ON GENERAL AFFAIRS AND POLICY, *Conclusions and Recommendations Adopted by the Council, Mar. 31 – Apr. 2, 2009*, at 2 (2009), available at http://www.hcch.net/upload/wop/genaff_concl09e.pdf.

²⁷ Hague Conference on Private International Law, COUNCIL ON GENERAL AFFAIRS AND POLICY, *Conclusions and Recommendations Adopted by the Council, 7–9 April 2010*, at 2 (2010), available at http://www.hcch.net/upload/wop/genaff2010concl_e.pdf.

²⁸ There are a myriad of contrasting views on this fundamental issue. Particularly relevant here, the literature on transnational law and governance has

the Working Group as it considered how to address non-State law as part of its mandate to draft rules governing party autonomy. That discussion took place against the backdrop of the preparatory work undertaken by the Hague Conference's Permanent Bureau to identify the status of party autonomy within State systems of private international law.²⁹

The Permanent Bureau's preparatory work confirmed two essential guiding facts. First, most State arbitration law expressly granted parties to a transaction freedom to designate non-State law to govern their international commercial contract.³⁰ Second, such a designation was not given effect if the dispute was brought before State courts.³¹ This was also true of the main uniform private international law instrument in force throughout the European Union.³² As a result, the Working Group faced a decision—to draft choice-of-law rules that reflected generally the *status quo* as expressed in the preparatory work, or to consider

challenged the traditional view that all “law” governing international commercial actors comes from the State. See e.g., Peer Zumbansen, *Neither ‘Public’ nor ‘Private,’ ‘National’ nor ‘International’: Transnational Corporate Governance from a Legal Pluralist Perspective*, 38 J. L. & SOC’Y 50, 52 (2011). Still, others remain skeptical. See Ralf Michaels, *The Re-State-Ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 WAYNE L. REV. 1209 (2005).

²⁹ Hague Conference on Private Int’l Law, PERMANENT BUREAU, *Feasibility Study on the Choice of Law in International Contracts – Report on Work Carried Out and Preliminary Conclusions*, Prel. Doc. No. 22A (Mar. 2007); *Feasibility Study on the Choice of Law in International Contracts—Overview and Analysis of Existing Instruments*, Prel. doc. No. 22B (March 2007); *Feasibility Study on the Choice of Law in International Contracts—Overview and Analysis of Existing Instruments—Special Focus on International Arbitration*, Prel. Doc. No. 2C (March 2007); *Feasibility Study On The Choice Of Law In International Contracts Report On Work Carried Out And Suggested Work Programme for The Development Of A Future Instrument*, Prel. Doc. No. 7 (Mar. 2009).

³⁰ See Hague Conference on Private International Law, PERMANENT BUREAU *Feasibility Study on the Choice of Law in Int’l Contracts – Special Focus on Int’l Arbitration*, Prel. Doc. No. 22C, at 4 (Mar. 2007) [hereinafter PB 2007], available at http://www.hcch.net/upload/wop/genaff_pd22c2007e.pdf.

³¹ See PB 2010, *supra* note 22, at 892. Some argue that the legislation of Oregon and Louisiana does allow parties to elect non-State law to govern their contracts. See Symeon C. Symeonides, *Contracts Subject to Non-State Norms*, 54 AM. J. COMP. L. 209, 221–22 (2006).

³² PB 2010, *supra* note 22, at 982–93.

an alternative approach. A sub-group was formed within the Working Group to explore these options further.³³

The sub-group identified three possible ways to address non-State law in the proposed instrument. This included reserving the reference to non-State law to the arbitral setting, extending the reference to the judicial setting, or making no statement about non-State law. The first option was tantamount to a restatement of the majority position as expressed in the preparatory work of the Permanent Bureau. Its report on party autonomy in arbitration had indicated widespread acceptance, in State arbitration legislation and in the rules of arbitral institutions, that parties could designate “rules of law” to govern their contract.³⁴ If the Hague Principles adopted this position, it would reflect a growing consensus on this issue. While not all arbitration instruments currently recognize the ability of parties to select non-State law as the law applicable to their contract, the Hague Principles would not break new ground by supporting that position. It should therefore come as no surprise that this option raised no objections within the Working Group.

The second possibility, extending the reference to non-State law into the judicial sphere, presented a significant challenge. Indeed, this option is not available in any known State system of private international law. Moreover, it had been proposed and rejected at the European Union level less than five years earlier.³⁵ The Hague Principles’ adoption of this option would mean

³³ The sub-group included this Author, Lauro Gama and Emmanuel Daramkoum for its first report (May 2010 - unpublished) and José Moreno Rodriguez for its second report (June 2011 - unpublished). For a detailed discussion of the work of the sub-group, see Lauro Gama Jr. & Geneviève Saumier, *Non-State Law in the (Proposed) Hague Principles on Choice of Law in International Contracts*, in *EL DERECHO INTERNACIONAL PRIVADO EN LOS PROCESOS DE INTEGRACION REGIONAL* 41 (D.P. Fernández Arroyo, J.J. Obando Peralta, eds., 2011); for an updated and Portuguese translated version, see Lauro Gama & Geneviève Saumier, *Contratos Internacionais e os (Futuros) Princípios da Haia: Desafios da Aplicação e Interpretação do Direito Não Estatal (Non-State Law)*, 34 *REVISTA DE ARBITRAGEM* 72 (2012).

³⁴ See PB 2007, *supra* note 31, at 4.

³⁵ For the proposal, see *Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual Obligations (Rome I)*, at 2, 11, COM (2005) 650 final (Dec. 15, 2005). The final text did not adopt this proposal: Regulation (EC) No 593/2008 [“Rome I Regulation”]. See the discussion in Katharina Boele-Woelki & Vesna Lazić, *Where Do We Stand on the Rome I Regulation?*, in *THE FUTURE OF EUROPEAN CONTRACT LAW* 19, 27–30 (Katharina Boele-Woelki & F.W. Grosheide eds., 2007).

departing from the status quo and endorsing an option that had not yet received any support in positive law outside the arbitral setting. Again, it was no surprise that this option raised significant objections within the Working Group's initial discussions.³⁶

The third and final possibility was for the proposed Hague Principles to remain silent regarding the designation of non-State law. Following this approach would be the closest to a restatement of current law and practice. By limiting its reference to the parties' choice of "law," the instrument would merely defer to the meaning of the term in the particular dispute resolution setting.³⁷ Before an arbitral tribunal subject to State arbitration law or institutional rules where "law" includes "rules of law," that broad interpretation would prevail. Before State courts, "law" would only mean "State law." Any extension beyond the status quo would depend exclusively on change within specific arbitration law—or rules—and State private international law. Arguably this option would not contradict the Working Group's mandate to "promote party autonomy," but it would do so in the most minimal way.

The sub-group supported the second option in a discussion paper submitted to the Working Group at its second meeting in November 2010. By the end of the meeting, a majority of the Working Group members supported that option, though further discussion on potential limitations to the reference to non-State law was thought necessary.³⁸ Furthermore, the Working Group decided to use the expression "rules of law," as opposed to "non-State law," given that the former was already well established in arbitration instruments.³⁹ The fact that the chosen expression would not necessarily be recognized by non-experts was a concern, though the Working Group believed the concern could be addressed in the planned commentary to the Principles.

For the third meeting in June, 2011, the Working Group accepted the sub-group's further proposal that the instrument provide no definition of the term "rules of law." It was readily admitted that the expression would have to be further explained

³⁶ Hague Conference on Private International Law, *Report of the Second Meeting of the Working Group on Choice of Law in International Contracts*, Nov. 15-17, at 3 (2010), available at http://www.hcch.net/upload/wop/contracts_rpt_june2011e.pdf.

³⁷ *Id.*

³⁸ *Id.*

³⁹ See *infra* note 75.

by reference to examples and illustrations in the commentary. For the “black-letter rule” itself, the Working Group thought it impossible to agree on a precise definition and that to limit the parties’ choice was not consistent with the promotion of party autonomy. The Working Group agreed that the commentary would specify that “rules of law” refers to a body of rules which were to be distinguished from individual contract rules devised by the parties.⁴⁰ The draft instrument already contained general limitations on party autonomy with respect to mandatory rules and public policy, and no further restrictions were believed necessary regarding the designation of “rules of law.” Moreover, because the instrument was to exclude consumer and employment contracts, concerns about the potential exploitation of vulnerable parties were not manifest in terms of the possible reference to non-State law.

By the end of its third meeting, the Working Group unanimously adopted the following provision on non-State law:

Freedom of choice

1. A contract is governed by the law chosen by the parties. In these Principles a reference to law includes rules of law.

In a policy document accompanying the proposed instrument, the Working Group elaborated upon this provision and discussed the rationale for the express reference to “rules of law” and the reasons for rejecting any definitional criteria in the text of the draft Principles.⁴¹

The Governing Council of the Hague Conference received the Working Group’s draft instrument at its meeting in April, 2012, and determined that this proposal would be presented to a Spe-

⁴⁰ See Hague Conference on Private International Law, *Report of the Third Meeting of the Working Group on Choice of Law in International Contracts*, June 28-30, at 3 (2011), available at http://www.hcch.net/upload/wop/contracts_rpt_june2011e.pdf. In addition, the issue of gap-filling was identified as needing further consideration.

⁴¹ See Hague Conference on Private International Law, PERMANENT BUREAU, *Choice of Law in International Contracts: Development Process of the Draft Instrument and Future Planning. Annex III: Policy Document Regarding Hague Principles on Choice of Law in International Commercial Contracts*, Prel. Doc. No. 4, para. 16–19, (Jan. 2012), available at http://www.hcch.net/upload/wop/genaff_pd22c2007e.pdf [hereinafter PB 2012].

cial Commission composed of government delegates and observers.⁴² The Special Commission was convened from November 12–16, 2012, and was comprised of delegates from over forty Member States and fifteen observers.⁴³ As expected by those involved in the project, one of the most contentious issues concerned the designation of non-State law, particularly the effect of such a designation before national courts.⁴⁴

At the Special Commission's meetings, two initial conflicting positions arose regarding the treatment of non-State law in the Hague Principles. The European Union favored the view that the Hague Principles should include no reference to non-State law.⁴⁵ The EU objection had normative and practical aspects. One concern was that an open reference to "rules of law" could give rise to "the proliferation of unfair unilateral rules."⁴⁶ More pragmatically, the European Union feared increased complexity and uncertainty in litigation resulting from the designation of non-State law before national courts.⁴⁷ Many other delegations supported the position adopted in the draft Article, largely for the reasons put forward by the Working Group in the Policy Document submitted to the General Council.⁴⁸ Bridging these two positions proved challenging, but a compromise was reached and the general principle underlying the Working Group's proposal was preserved—but with significant modifications. The text adopted at the Special Commission reads as follows:

Article 3 - Rules of law

In these Principles, a reference to law includes rules of law that are generally accepted on an international, supranational or

⁴² This was not to be a Diplomatic Conference, as the instrument was of a non-binding nature.

⁴³ More precisely, there were 119 experts from forty-two Member States as well as representatives of the European Union, seven observers from non-Member States and eleven observers from international organizations. See *Report of the November 2012 Special Commission*, *supra* note 16, para. 3.

⁴⁴ See *id.* para. 12. See also Symeon C. Symeonides, *The Hague Principles on Choice of Law for International Contracts: Some Preliminary Comments*, 61 AM. J. COMP. L. 873, 892 (2013).

⁴⁵ *Report of the November 2012 Special Commission*, *supra* note 15, para. 12.

⁴⁶ *Id.* para 13.

⁴⁷ *Id.*

⁴⁸ See PB 2012, *supra* note 41.

regional level as a neutral and balanced set of rules, unless the law of the forum provides otherwise.⁴⁹

From this revised text, three modifications merit discussion. First, the Special Commission signalled the importance of the reference to “rules of law” by giving it its own article—the reference to “rules of law” originally included in the general provision on party autonomy was recast as a stand-alone provision. Second, the Special Commission added a series of criteria to define “rules of law” under the draft Principles. Finally, the modified provision specifies that it remains for each State’s own private international law to determine whether its courts will give effect to the designation of non-State law to resolve a contract dispute. In addition to the textual modifications, the Special Commission also instructed the Working Group to provide additional details in the Commentary to the Principles regarding the meaning of the required criteria and the rationale for those criteria and for the rule itself.⁵⁰

Following the meeting of the Special Commission, the Working Group met twice to draft the Commentary to the Principles in June, 2013, and January, 2014. During these meetings, minor modifications to the Principles’ text were proposed to improve clarity. One such modification was made to Article 3 on non-State law as follows, striking out the opening words of the original version and replacing them with an alternative formulation:

~~“In these Principles, a reference to law includes~~ 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.”⁵¹

⁴⁹ Hague Conference on Private International Law, SPECIAL COMM’N ON CHOICE OF LAW IN INT’L CONTRACTS, *Draft Hague Principles as Approved by the November 2012 Special Comm’n Meeting on Choice of Law in Int’l Contracts and Recommendations for the Commentary*, Nov. 12-16, art. 3 (2012), available at http://www.hcch.net/upload/wop/contracts2012principles_e.pdf.

⁵⁰ See *Report of the November 2012 Special Commission*, *supra* note 15, para. 15–16.

⁵¹ See Hague Conference on Private International Law, *The Revised Draft Hague Principles on Choice of Law in International Commercial Contracts*, Revised Prel. Doc. No. 6, at x (July 2014), following on the Report of the Fourth Meeting of the Working Group on Choice of Law in Int’l Contracts, June 24-26, at 1 (2013) and the Report of the Fifth Meeting of the Working Group on Choice of Law in Int’l Contracts, Jan. 27-28, at 1 (2014).

This suggested modification is intended to avoid any confusion regarding the nature of the designation of “rules of law.” The proposed text removes any possible ambiguity regarding the meaning of the provision, confirming that it allows parties to choose “rules of law” instead of State law to govern their contract. This reformulation was distributed for comment to Member States and to the Council. While the text still awaits final approval, no objections to the rewording of Article 3 were raised.⁵²

The last noteworthy aspect of Article 3’s history is the Commentary. Early in the drafting process, the Working Group decided to adopt a model similar to that of the UNIDROIT Principles of International Commercial Contracts (“UPICC”).⁵³ This would mean drafting black-letter rules accompanied by a commentary that would provide both explanation and illustrations.⁵⁴ The Council supported this approach,⁵⁵ and, as noted previously, the Special Commission requested that the Commentary address specific issues in relation to non-State law.⁵⁶

The initial drafting task was divided among members of the Working Group, as was done for the black-letter rules. Predictably, the primary responsibility for the Commentary to Article 3

⁵² The General Council invited Member States to “submit comments on the changes introduced in the draft Commentary after January, 2014,” and to do so by August 31, 2014. See Hague Conference on International Private Law, COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, *Conclusions and Recommendations Adopted by the Council*, Apr. 8-10, para. 2 (2014) [hereinafter *Conclusions and Recommendations Adopted by the Council*], available at http://www.hcch.net/upload/wop/genaff2014concl_en.pdf. As a member of the Working Group, I have seen the comments, which are not available on the Hague Conference website.

⁵³ UNIDROIT stands for the International Institute for the Unification of Private Law. Like the Hague Conference, it is an international intergovernmental institution involved in the elaboration of uniform law instruments in many areas of international law, including international commercial law. See www.unidroit.org.

⁵⁴ See Hague Conference on Private International Law, PERMANENT BUREAU, *Report on Work Carried Out and Perspectives for the Development of the Future Instrument*, Prel. Doc. No. 6, para. 19 (Mar. 2010), available at <http://www.hcch.net/upload/wop/genaff2010pd06e.pdf>.

⁵⁵ See Hague Conference on Private International Law, COUNCIL ON GENERAL AFFAIRS AND POLICY OF THE CONFERENCE, *Conclusions and Recommendations Adopted by the Council*, Apr. 5-7, para. 19 (2011), available at http://www.hcch.net/upload/wop/genaff_concl2011e.pdf.

⁵⁶ See *supra* note 49.

was composed of a sub-group of members of the Working Group who had worked on the provision itself.⁵⁷ A first version of the draft comments was considered at the Working Group's fourth meeting in June, 2013,⁵⁸ and, following extensive revisions, a new draft was circulated to Member States in November, 2013.⁵⁹ Few comments were received, but these were considered at the Working Group's fifth meeting in January, 2014.⁶⁰ The Working group further established two small editorial committees to finalize the English version of the Commentary⁶¹ for formal submission to the Council in time for consideration at its April, 2014 annual meeting.⁶²

The Commentary to Article 3 is succinct and runs to less than three pages out of almost fifty pages for the entire instrument, including black-letter rules and Commentary. The Commentary on Article 3 is divided into an introduction and five subsections, of which three subsections address the criteria added by the Special Commission, one discusses trade usages, and the last deals with gap-filling. The Commentary on the criteria largely tracks the language provided by the Special Commission.

⁵⁷ More specifically, this Author and Lauro Gama were responsible for the Commentary on Articles 2 and 3. For a complete list of the sub-groups, see Hague Conference on Private International Law, WORKING GROUP, *Draft Commentary on the Draft Hague Principles on Choice of Law in International Contracts*, at 3 (Nov. 2013), available at http://www.hcch.net/upload/wop/princ_com.pdf [hereinafter *Draft Commentary*].

⁵⁸ Hague Conference on Private International Law, *Report of the Fourth Meeting of the Working Group on Choice of Law in Int'l Contracts*, June 24-26, at 1 (2013).

⁵⁹ See *Draft Commentary*, *supra* note 57. Although the Working Group did not meet again before the Draft was submitted to Member States, it held several teleconference calls and functioned via email exchanges.

⁶⁰ Comments were received from Argentina, Canada, the European Union, and the United States, as well as from Peter Winship, professor at SMU School of Law in Dallas, Texas. See Hague Conference on Private International Law, *Fifth Meeting of the Working Group on Choice of Law in Int'l Contracts*, Jan. 27-28, (2014), available at http://www.hcch.net/upload/wop/contracts2014report_en.pdf.

⁶¹ This was composed of this Author, the Chair of the Working Group, Daniel Girsberger, Neil Cohen and Symeon Symeonides, with the assistance of the Permanent Bureau. See *id.*

⁶² All instruments of the Hague Conference are adopted in English and French. The Permanent Bureau was responsible for drafting the French version, with editorial assistance provided by three French-speaking members of the Working Group, the Author, Bénédicte Fauvarque-Cosson, and Thomas Kadner.

The introduction to the Commentary sets out the dichotomy between arbitration and litigation as it relates to the designation of non-State law. It highlights that Article 3 “broadens the scope of party autonomy in Article 2(1) by providing that the parties may designate not only State law but also ‘rules of law’ to govern their contract, regardless of the mode of dispute resolution chosen.”⁶³

The subsequent sub-sections explain the criteria used to set the limits of using “rules of law.” Here, the overall goal is to confirm that “Article 3 admits only those ‘rules of law’ that are generally accepted as a neutral and balanced set of rules.”⁶⁴ Article 3’s first element, that the “rules of law” be “generally accepted on an international, supranational or regional level,” is meant to ensure that the rules in question do not merely emanate from the parties’ contract or from a local industry. The Commentary suggests as examples of “rules of law” that would satisfy this element, either the 1980 Vienna Convention on Contracts for the International Sale of Goods (“CISG”) or the UPICC, the former being an international set of rules and the other a supranational set.⁶⁵ The Principles of European Contract Law are suggested as a potential example of rules of law that may be recognized at a regional level. With respect to the requirement that the “rules of law” chosen by the parties be “a neutral and balanced set of rules,” the Commentary indicates that this involves three distinct though related attributes. The requirement of “neutrality” is intended to refer to the source of the “rules of law” and this criteria directs the court or arbitral tribunal to consider where the rules come from. In terms of “balance,” the Commentary points to the need to avoid rules that may be seen to “benefit one

⁶³ *The Draft Hague Principles on Choice of Law in International Commercial Contracts*, Prel. Doc. No. 6 – revised, para. 3.1 (July 2014), available at www.hcch.net/upload/wop/gap2014pd06rev_en.pdf [hereinafter *Draft Hague Principles (July 2014)*].

⁶⁴ *See id.* para. 3.3.

⁶⁵ *See id.* para. 3.5. The 1980 Vienna Convention on Contracts for the International Sale of Goods (“CISG”) is an example of an “international” source because it is a treaty that is part of public international law; it is a relevant example only if it is designated by the parties as a self-standing set of rules, not as integrated within the national law of a State that has ratified that convention. The UPICC is “supranational” because it is not a treaty, and therefore not part of public international law, but it is an international instrument adopted by an international institution and directed at international transactions.

side of transactions in a particular regional or global industry.”⁶⁶ Finally, by referring to a “set of rules,” Article 3 emphasizes that any “governing law” must be sufficiently extensive so as to cover most issues that might arise in an international commercial dispute.⁶⁷ In other words, general principles of law, *lex mercatoria*, or a single Incoterm, will not meet this requirement.

The Commentary on Article 3 also includes a short paragraph on trade usages.⁶⁸ It states that the Principles “are silent regarding [their] application,” which is said to be “typically determined either under the chosen law itself or by other rules governing the dispute.”⁶⁹ Although trade usages are of obvious importance in international commerce,⁷⁰ the Principles do not dictate how trade usages are to be dealt with in resolving international commercial disputes—instead, the substantive governing law will determine whether parties are subject to trade usages, and, if so, by what means. Regarding the issue of gap-filling, which the Principles do not address, the Commentary suggests that parties designating “rules of law” should be alert to the potential need for a gap-filling provision in their contract and provides two illustrations of how such a clause might be drafted.⁷¹

Finally, the Commentary explains the closing words of Article 3. According to the Commentary, these words are meant to recognize that references to “rules of law” have historically been restricted to the arbitral setting and that a State’s private international law may well “confine the parties’ freedom to a choice of State law.”⁷² Given the non-binding nature of the instrument, this particular element of Article 3 is technically unnecessary, but its presence was the result of the compromise reached at the Special Commission.⁷³

This concludes the genesis of Article 3, as it stands so far. Indeed, the wording that will ultimately be adopted, as well as the final version of the commentary, remains to be confirmed. At its April, 2014, meeting, the General Council extended the period

⁶⁶ *Draft Hague Principles (July 2014)*, *supra* note 63, para. 3.11.

⁶⁷ *Id.* para. 3.9–3.12.

⁶⁸ This was done to address the question whether trades usages can be considered to be “rules of law” in the sense used in Article 3.

⁶⁹ *Draft Hague Principles (July 2014)*, *supra* note 63, para. 3.13.

⁷⁰ See PB 2007, *supra* note 31, para. 41–45.

⁷¹ *Draft Hague Principles (July 2014)*, *supra* note 63, para. 3.15.

⁷² *Id.* para. 3.14.

⁷³ *Report of the November 2012 Special Commission*, *supra* note 15, para. 15.

for comments by Member States until August, 2014. The Working Group considered those comments, proposed certain changes, and submitted a new version of the instrument and its Commentary for the formal approval of the Hague Conference. When it set up the process for comments by the Member States, the Council had indicated that approval would be forthcoming “if no objection is raised within 60 days.”⁷⁴ However, there are no guidelines regarding how potential objections to this new version of the instrument would be addressed.

II. ARTICULATING A JUSTIFICATION FOR ARTICLE 3: THEORY AND PRACTICE

Having set out the origins of Article 3, this Article now considers in greater detail why the Working Group decided to include Article 3 in the Principles and what convinced the Special Commission to support the designation of non-State law as the governing law in international commercial contracts, even with the numerous conditions added to the language proposed initially. Arguments for Article 3's inclusion can be divided into the following two strands: those drawn from theory, and those more closely connected to practical considerations. It is useful to begin with a quick review of existing law to highlight the extent to which these two justificatory strands are intertwined.

Article 3 of the proposed Hague Principles departs from the status quo in a limited but significant way. The innovation proposed by the Hague Principles is *not* to grant parties to international commercial contracts the opportunity to designate something other than State law to govern their contract. Indeed, this option has been made available to them for several decades, provided for in—and thus sanctioned by—both international instruments and State legislation.⁷⁵ Insofar as parties to international

⁷⁴ *Conclusions and Recommendations Adopted by the Council*, *supra* note 52, para. 2.

⁷⁵ For reference to arbitration rules, see, for example, AM. ARBITRATION ASS'N, *International Dispute Resolution Procedures Including Mediation and Arbitration Rules*, art. 28 (2010), https://www.adr.org/aaa/ShowProperty?nodeId=/UCM/ADRSTG_002037&revision=latestreleased; UNITED NATIONS COMM'N ON INT'L TRADE LAW, *UNCITRAL Arbitration Rules*, art. 35 (2010), <http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules-revised/arb-rules-revised-2010-e.pdf>; and INT'L COURT OF ARBITRATION, *Arbitration Rules*, art. 21 (2012), <http://www.iccwbo.org/Products-and-Services/Arbitration-and-ADR/Arbitration/Rules-of-arbitration/Download-ICC-Rules-of-Arbitration/ICC-Rules-of-Arbitration-in-several-languages/>. For reference to

commercial contracts already have the freedom to select “rules of law” to govern their contract, the Hague Principles merely support a continuation of this widespread choice-of-law policy, in accordance with the Principles’ stated objective of supporting party autonomy.⁷⁶

While international and state sources recognize parties’ freedom to select something other than State law to govern their contract, these same sources have limited the effect of that choice by confining it to the arbitral context. In other words, even if parties have included a choice of law clause in their contract designating, for example, the UPICC to govern their contract, this choice would not be effective if a dispute is brought before a State court.⁷⁷ This follows from the fact that national courts will assess the validity and efficacy of the parties’ choice of law in accordance with their choice of law rules, none of which currently recognize the ability of parties to select non-State law.

This state of affairs can lead to incongruous results. Continuing with the example used above, suppose the contract containing the UPICC choice of law clause also includes an arbitration clause. In such a situation, the parties could legitimately expect that they are entitled to rely on and govern themselves in accordance with the substantive law rules of the UPICC. Should a dispute arise, the expectation would be that the arbitral tribunal

national laws, see, for example, Brazil Law No 9.307, art. 2 § 1 (1996), available at <http://www.jus.uio.no/lm/brazil.arbitration.law.no.9.307.1996/portrait.pdf> (“The parties may freely choose the rules of law applicable in the arbitration”); Chūsai-hō [Arbitration Act], Law No. 138 of 2003, art. 36–1 (Japan), translated in *Arbitration Law* (2004) (“The arbitral tribunal shall decide the dispute in accordance with such rules of law as are agreed by the parties as applicable to the substance of the dispute.”); Ley Modelo de la CNUDMI sobre Arbitraje Comercial Internacional, as amended, art. 28–1, Febrero de 2008, V.07-87001– February 2008– 740 (Costa Rica) (“El tribunal arbitral decidirá el litigio de conformidad con las normas de derecho elegidas por las partes como aplicables al fondo del litigio.”); Código de Comercio [CCo.][Commercial Code], as amended, Diario Oficial de la Federación [DO], art. 1445, 2014 (Mex.) (“The arbitral tribunal shall resolve the controversy in accordance with the principles of law chosen by the parties.”); and CODE DE PROCEDURE CIVILE [C.P.C.] art. 1511 (Fr.) (amended 2014) (“Le tribunal arbitral tranche le litige conformément aux règles de droit que les parties ont choisies . . .”).

⁷⁶ See the Preamble of the Principles, *Draft Hague Principles (July 2014)*, supra note 63.

⁷⁷ For further discussion of the designation of UPICC, see Geneviève Saumier, *Designating the UNIDROIT Principles in International Dispute Resolution*, 17 UNIF. L. REV. 533 (2012).

would assess the respective rights and obligations of the parties in accordance with the UPICC. What if, however, one of the parties brings the dispute before a State court, arguing that the arbitral clause is either invalid or unenforceable? If the court seized of the dispute does not enforce the arbitration agreement, the law governing the dispute will be ascertained without regard to the choice-of-law clause designating the UPICC, because such a choice is not sanctioned under State choice-of-law rules. What might justify this inconsistency in the State's own approach to choice-of-law in international commercial contracts?

Alternatively, one may ask why States have granted to arbitration a monopoly over the application of non-State law to international commercial contracts. Such a state of affairs plays into the hands of those who contend that international arbitration is a completely autonomous system for dispute resolution that is entirely self-regulating.⁷⁸ Yet, the continued relevance of State processes for the enforcement of arbitral awards confirms that a link remains between the two systems of dispute resolution. By agreeing to enforce an arbitration award decided by the "rules of law" designated by the parties, States necessarily admit the legitimacy of such a designation, even if only indirectly.⁷⁹ Why are States not willing to accept a similar approach when disputes are brought before national courts?

The answer to that question is no doubt related to the fact that international commercial arbitration differs from judicial dispute resolution in important ways. The consensual contractual nature of private arbitration allows parties not only to choose the decision maker(s) but also the situs of the proceedings along with the procedural and substantive law governing the process and the merits of the dispute. The arbitral process and eventual award are typically confidential and without appeal, thereby

⁷⁸ See generally EMMANUEL GAILLARD, *LEGAL THEORY OF INTERNATIONAL ARBITRATION* (2010). For a critique of such a view, see Ralf Michaels, *Dreaming Law without a State: Scholarship on Autonomous International Arbitration as Utopian Literature*, 1 LONDON REV. INT'L L. 35 (2013).

⁷⁹ Grounds for refusing to enforce an arbitral award do not typically extend to a review of the law applied by the tribunal—see, for example, the limited grounds under Article V of the 1958 New York Convention on Recognition of Foreign Arbitral Awards—unless public policy is involved. See generally GARY B. BORN, *INTERNATIONAL COMMERCIAL ARBITRATION* 2150–51 (2009).

limiting any possibility of *stare decisis* evolving naturally or being imposed.⁸⁰ Finally, most national legal systems have very little oversight, having relinquished oversight of the arbitral process through international obligations derived from the 1958 New York Convention.⁸¹ The extent of autonomy granted parties in international commercial arbitration is much greater than before national courts—this might well support a distinction between the two dispute resolution fora in relation to the designation of non-State law.

This greater autonomy explains largely the draw of arbitration to resolve international commercial disputes. The downside of this market domination for dispute resolution services is a reduced role for national courts in developing international commercial law and trade usages and customary norms, in the oversight of international commercial transactions, and in the interpretation of uniform law such as the CISG. As many commentators condemn the loss of State regulatory power over transnational commercial actors,⁸² the competitive advantages granted to arbitration by State laws themselves may be subject to reconsideration. Considering the distinguishing features of international arbitration noted above, allowing national courts to give effect to choice of law clauses designating non-State law would be a very small change in the current landscape. Moreover, it is likely one of the only current features exclusive to arbitration that could be extended to courts.

The argument that rules emanating from sources beyond or outside the State are not “law” and therefore cannot be designated as the “governing law” for international commercial contracts is difficult to reconcile with positive law. Whether or not parties designate non-State law in practice, or whether arbitration tribunals apply or don’t apply the same,⁸³ the fact remains that numerous State laws expressly recognize the power of par-

⁸⁰ *Id.* at 88–90 and 3822–27.

⁸¹ *Id.* at 104–12.

⁸² See, e.g., Horatia Muir-Watt, *Private International Law Beyond the Schism*, 2 *TRANSNAT’L LEGAL THEORY* 347 (2011).

⁸³ For Ralf Michaels, however, this is a significant issue that renders Article 3 of the Hague Principles of little interest. See Ralf Michaels, *Non-State Law in the Hague Principles on Choice of Law in International Contracts*, in *VARIETIES OF EUROPEAN ECONOMIC LAW AND REGULATION: LIBER AMICORUM FOR HANS MICKLITZ* 43 (Kai Purnhagen & Peter Rott, eds., 2014).

ties to designate and of arbitrators to apply “rules of law.” Whatever one’s theory of law, it defies logic to maintain that a body of rules designated to govern a contractual relationship changes its nature, from “law” to “non-law,” by the sole fact that the dispute resolution forum is altered from arbitration to national court. The refusal by States to recognize the efficacy of parties’ designation of “rules of law” before national courts cannot, therefore, convincingly rest on an argument that “rules of law” are not “law.”

The distinctive treatment of the parties’ reference may, on the other hand, flow from a belief that judges, unlike arbitrators, are not empowered to give effect to “rules of law” because they do not emanate from State sources.⁸⁴ In so far as this conclusion flows from the view that “rules of law” are not “law,” it would be refuted by the argument previously made. If not, then the attribution of such power to arbitrators could simply be extended to judges by legislation, for example, by the adoption of a choice of law rule such as that proposed by Article 3 of the Hague Principles. Viewed this way, the parties’ ability to designate non-State law before State courts becomes one of policy that does not require a reconceptualization of the nature of law. The question then becomes whether judges face insurmountable obstacles in the application of non-State law that might justify the maintenance of the status quo, which is the topic of the next section.

III. IDENTIFYING AND EVALUATING PRACTICAL CHALLENGES TO ARTICLE 3

What challenges exist to the adoption of Article 3 of the Hague Principles? Are these challenges different for State courts than they are for arbitral tribunals? Are the potential solutions distinct? While this section focuses on the challenges facing courts, it is worth considering briefly the implications for arbitration.

As noted throughout this Article, parties to an international contract have long been entitled to designate “rules of law” to govern their contract when this choice is associated with dispute resolution by arbitration. Numerous arbitration laws and rules have explicitly recognized this at an increasing rate over the past quarter century.⁸⁵ The proposed Hague Principles support this approach while narrowing the scope of party autonomy

⁸⁴ PB 2010, *supra* note 22, at 892.

⁸⁵ See *supra* note 75.

through the criteria imposed on the selection of “rules of law” in its Article 3. Indeed, unlike existing arbitration instruments that simply allow the parties, or the arbitrators, to designate “rules of law,” the Hague Principles circumscribe that choice by a series of conditions regarding the nature of the “rules of law” whose designation will be recognized.⁸⁶ As described earlier, these conditions are multiple and refer to the source of the rules as well as their attributes. From the arbitration perspective, therefore, there is no denying the Hague Principles restrict party autonomy in relation to the choice of governing law.

This outcome is not insignificant. Surprisingly, the restriction on party autonomy in the arbitral context does not appear to have been considered during the debates at the Special Commission that led to the addition of criteria for “rules of law.”⁸⁷ Admittedly, the Special Commission was preoccupied with the application of Article 3 before national courts, not before arbitral tribunals. In relation to arbitration, therefore, Article 3 is halfway between the unfettered reference to “rules of law” in those arbitration instruments that allow such reference and States or arbitral institutions that do not yet explicitly recognize this aspect of party autonomy. The preference for one approach over the other may well depend on the criteria’s ability to overcome the obstacles that they were developed to address.

The challenges associated with the possibility of designating “rules of law” to govern an international commercial contract are said to be numerous, and include problems of identification, proof, and interpretation.⁸⁸ As discussed below, Article 3 only addresses the challenge related to identification, leaving the other two challenges to general methods and solutions of private international law.

Opposition to the original proposal at the Special Commission rested largely on concerns with the issue of identifying “rules of law” for the purposes of party autonomy in international commercial contracts. Those delegations that rejected the original proposal to include no definition or limitation to “rules of law” in the instrument insisted on the addition of criteria that would

⁸⁶ See *supra* text accompanying notes 64–67.

⁸⁷ The restriction on party autonomy is not mentioned in the Report of the Special Commission.

⁸⁸ For an extensive critique, see generally Michaels, *supra* note 83.

limit what parties could designate as “rules of law.”⁸⁹ The criteria, described previously, should be understood in that perspective—that is, as an aid to counsel, courts and arbitrators in identifying what *can* be chosen. As the Hague Principles are the first choice of law instrument to adopt a provision on “rules of law,” the criteria selected are original and are therefore untested. This has given rise to rather virulent criticism calling the criteria vague and unclear, and therefore unhelpful or even useless.⁹⁰ Drafting by committee to reach compromise often yields results that are less than optimal. Still, if the criteria in Article 3 can serve to identify “rules of law” that successfully meet the requirements, the provision remains operational.

It is helpful to recall that according to Article 3, only “rules of law” that are “generally accepted on an international, supranational or regional level as a neutral and balanced set of rules” can be designated by the parties to govern their contract.⁹¹ The Commentary to Article 3 puts forth two examples of “rules of law” that arguably satisfy these conditions and are already considered likely candidates for designation by parties to international commercial contracts.⁹² The first is the CISG which is undoubtedly a “set of rules” that is internationally recognized, the convention having been ratified by over 80 States. Given that the CISG is a product of UNCITRAL, the attributes of “neutral and balanced” seem difficult to deny.⁹³ In other words, it seems evident that parties to international sales contracts who want to

⁸⁹ See *supra* text accompanying notes 49–51.

⁹⁰ See Andrew Dickinson, *A Principled Approach to Choice of Law in Contract?*, 18 BUTTERWORTHS J. INT'L BANKING AND FIN. L. 151, 152 (2013); see also Michaels, *supra* note 83.

⁹¹ *Draft Hague Principles (July 2014)*, *supra* note 64.

⁹² The Chinese European Arbitration Centre in Hamburg proposes choice of law clauses designating the CISG or the UPICC as governing law. See *CEAC Choice of Law Clause*, CHINESE EUROPEAN ARBITRATION CTR., <http://www.ceac-arbitration.com/fileadmin/assets/docs/english/choice-of-law-clause.pdf> (last visited Sep. 6, 2014).

⁹³ Admittedly, the drafting history of the CISG is not bereft of accusations to the contrary, though these were largely politically motivated. For an example of the political dimension of the debate over trade usages, see A. Farnsworth, *Developing International Trade Law*, 9 CAL. W. INT'L L.J. 461, 468 (1979); Gyula Eörsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sale of Goods*, 31 AM. J. COMP. L. 333, 341 (1983).

subject their contract to the CISG, whether it applies or not according to its own terms, should be entitled to do so pursuant to Article 3 of the Hague Principles.

The second example is the UNIDROIT Principles of International Commercial Contracts (“UPICC”) whose ambit is broader than the CISG as they are not limited to sales contracts. The fact that the UPICC are “generally accepted on an international level” is evidenced by numerous references made to them by courts and arbitral tribunals. The references to the UPICC are usually made to support arguments involving contract interpretation under State law, but sometimes, though more rarely, as directly resolving an issue in dispute.⁹⁴ Described as “an international restatement of contract law,”⁹⁵ the UPICC are also likely to merit being qualified as “a neutral and balanced” set of rules, thereby also meeting the conditions for designation as governing law under Article 3 of the Hague Principles.⁹⁶

Is it necessary to find additional candidates to justify the existence of Article 3? Or is it sufficient to point to two well-known examples that seem beyond reproach? The challenge of demonstrating that other potential candidates for designation meet the requirements of Article 3—such as the Principles of European Contract Law or the Common European Sales Law—may determine whether parties should consider selecting those or not. In so far as Article 3 is intended to support party autonomy, it is certainly not inconsistent for the parties to be responsible for the exercise of their freedom of choice. Therefore, this Article argues that the existence of two significant examples that do meet Article 3’s criteria suffice to overcome the challenge of “identification” that is said to plague the reference to “rules of law.”

Even if contracting parties, and subsequently courts or arbitral tribunals, succeed in identifying “rules of law” that satisfy

⁹⁴ See Luca G. Radicati di Brozolo, *Non-National Rules and Conflicts of Laws: Reflections in Light of the UNIDROIT and Hague Principles*, 4 RIVISTA DI DIRITTO INTERNAZIONALE PRIVATE E PROCESSUALE 841, 842–46 (2012). Also note the UNILEX database that records all references to the UPICC in court and arbitral decisions. *UNILEX UNIDROIT Principles*, <http://www.unilex.info/dynasite.cfm?dssid=2377&dsmid=14311> (last visited Sept. 4, 2014).

⁹⁵ See MICHAEL J. BONELL, *AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW – THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS* (3d ed. 2005).

⁹⁶ See Radicati di Brozolo, *supra* note 94, at 860.

the conditions for their designation under Article 3, an additional challenge may arise in relation to the application of these rules to resolve a particular dispute.⁹⁷ Indeed, it is difficult to speak of authoritative sources for interpreting “rules of law” equivalent to those that exist for national laws.⁹⁸ To address this issue, it is useful to consider whether judges are well placed to enforce a choice of law clause designating “rules of law” by analogy to how they deal with references to foreign State law. While the judicial treatment of foreign law varies across legal systems, those diverse means of ascertaining foreign law can be transposed to non-State law within each system.⁹⁹ Indeed, whether foreign law is treated as “law” or “fact,”¹⁰⁰ judges are primarily responsible for answering questions involving foreign law. The difference among legal systems rests largely on whether judges can look to foreign law on their own initiative and the sources that judges can refer to. But by and large, judges in State courts are capable of identifying, ascertaining, and applying foreign law to resolve disputes. Indeed, most modern private international law regimes are built on the assumption that courts occasionally will be called upon to apply foreign law.

The argument here is that judges and parties would resort to the same methodologies used in relation to a choice of foreign State law where the choice is instead for “rules of law” under

⁹⁷ This challenge has been considered by the International Law Association. See International Law Association Rio De Janeiro Conference, Rio de Janeiro, Braz, Aug. 17–21, 2008, *Ascertaining the Contents of the Applicable Law in International Commercial Arbitration* (2008), available at <http://www.ila-hq.org/download.cfm/docid/985890F9-BF95-45C9-A47EB7B52082CDC4>. Subsequent to this report, the International Commercial Arbitration Committee adopted a resolution containing useful guidelines on the responsibilities of the parties on this issue. See INTERNATIONAL LAW ASSOCIATION, *International Law Association Recommendations on Ascertaining the Contents of the Applicable Law in International Commercial Arbitration*, Resol. No. 6/2008 (Aug. 21, 2008), available at <http://www.ila-hq.org/download.cfm/docid/7FC8F94B-BE34-4634-AA5DE5128B097B4A>.

⁹⁸ This is especially true for legal systems that do not admit the authority of doctrinal writing as often the only explanations or discussions of potential “rules of law” are found in law journal articles or treatises.

⁹⁹ The neutral term “ascertain” is used here instead of “proof.” SOFIE GEEROMS, *FOREIGN LAW IN CIVIL LITIGATION: A COMPARATIVE AND FUNCTIONAL ANALYSIS* 9, 27 (2004).

¹⁰⁰ For a typical approach in English common law jurisdictions, see generally R. FENTIMAN, *FOREIGN LAW IN ENGLISH COURTS: PLEADING, PROOF AND CHOICE OF LAW* (1998).

Article 3 of the Hague Principles. Thus, in those systems where experts are called to provide evidence on the content and meaning of foreign law, similar experts could be called to do the same for the particular “rules of law” involved. The requirement that “rules of law” be “generally accepted on an international . . . level” should assist in ensuring that such experts exist and are readily identifiable. In systems where judges are charged with ascertaining the content and meaning of foreign law, or where parties are invited to share in that burden, the same process can be transposed where “rules of law” govern the contract.¹⁰¹

When courts are called upon to apply foreign law, lack of evidence or contradictory evidence does not preclude resolution of the dispute. Instead, judges rely on existing gap-filling methods, on evidentiary principles, or resort to applying *lex fori* as the subsidiary applicable law by default.¹⁰² Again, these techniques are equally available in the application of “rules of law.”

Judges and arbitrators are also experienced in applying trade usages that originate from non-State sources. Adjudicators may refer to trade usages to interpret the contract—an interpretive function—and even to imply terms into the contract—a normative function.¹⁰³ Where parties have referred expressly to a trade usage in their contract, such as an INCOTERM or the UCP, the interpretation of such a usage will be determined primarily by

¹⁰¹ See Peter E. Nygh, *The Reasonable Expectations of the Parties as a Guide to the Choice of Law in Contract and in Tort*, 251 COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 269, 309 (1995).

¹⁰² See GEEROMS, *supra* note 99, para. 2.463; see, e.g., Civil Code of Quebec, S.Q. 1991, c. 64, s. 2809 (Can.).

¹⁰³ See generally Leonardo Graffi, *Remarks on Trade Usages and Business Practices in International Sales Law*, 29 J.L. & COM. 273 (2011). Under the CISG, trade usages that the parties “knew or ought to have known” are binding upon them unless expressly excluded. See United Nations Convention for the International Sale of Goods, art. 9, para 2, Apr. 11, 1980, 1489 U.N.T.S. 3. The U.C.C. also allows for such normative effect. See U.C.C. § 1-205 (2002); see also Clayton P. Gillette, *Harmony and Stasis in Trade Usages for International Sales*, 39 VA. J. INT’L L. 707 (1999). Of course under Article 3 of the Hague Principles, the parties will have agreed to the application of “rules of law” and therefore there is no issue of *imposing* their application on the parties as may be the case with trade usages and which is the source of some controversy in the literature.

reference to its formal external source.¹⁰⁴ In other words, courts have experience in referring to rules emanating from non-State sources and interpreting and applying them to address an issue in an international commercial dispute. The application of a body of non-State rules as a governing law should be seen as building on this experience.

CONCLUSION

This Article traces the history of the reference to non-State law, or “rules of law,” in Article 3 of the Hague Principles on Choice of Law in International Contracts, and provides some justification for its inclusion and addresses practical issues regarding its application before State courts. The Article’s purpose is both to inform readers about this innovative provision and to defend its inclusion in the Hague Principles in theoretical and practical terms. Article 3, as currently worded, presents numerous challenges and has been subject to stinging criticism by some commentators. Others, however, are more supportive. Sharply divided views of Article 3 were entirely predictable from the moment the Working Group charged with drafting the instrument departed from the *status quo* and proposed that parties to international commercial contracts could choose non-State law to govern their contracts, and have this party choice upheld before State courts and arbitral tribunals.

One of the great advantages of a non-binding, international instrument is the greater freedom it affords States to support an instrument they may not be prepared to adopt into their own law, but for which they see benefits. The consensus reached on Article 3 at the Special Commission of the Hague Conference provides a plain example of this. Indeed, while some delegations made clear they would not anticipate moving their private international law in Article 3’s direction, they were not prepared to stand in the way of its inclusion in the Hague Principles. This approach is consistent not only with the nature of the instrument as non-binding but also with the purpose of its elaboration, that is, to support party autonomy in international commercial contracts. At the end of the day, no State law or tribunal will

¹⁰⁴ Both are put forward by the ICC. See generally Jan Ramberg, *Incoterms 2010*, 13 EUR. J. L. REFORM 380 (2011). The ICC has also published a commentary on the UCP 600, INT’L CHAMBER OF COMMERCE, COMMENTARY ON UCP 600 (2007).

impose “rules of law” on parties that have not chosen to be subject to them. Article 3 simply presents parties with an option regarding the law governing their contract that does not force them into arbitration. Parties remain free to exercise this choice or reject it depending on their interests—the very meaning of party autonomy—subject always to overriding State public policy concerns preserved elsewhere in the Hague Principles.

The Hague Conference only recently approved the Hague Principles.¹⁰⁵ Should Article 3 remain as currently drafted, it is difficult to predict the impact it may have in practice.¹⁰⁶ The non-binding nature of the instrument as a whole and the reference to State law’s prerogative to deny the efficacy of a reference to “rules of law” before national courts may be a recipe for inertia and maintaining the *status quo*. At the very least, however, a significant number of States recognizing that “rules of law” can be a legitimate choice for parties to international contracts outside the arbitral context and that national courts are capable of identifying and applying these “rules of law” is a step beyond the *status quo*. Only time will tell whether Article 3 is a bold step forward or a step in the wrong direction. With such minimal downside risk it is a step worth taking, if only to see where it leads.

¹⁰⁵ Following the second period for comments from Member States that ended August 31, 2014, further modifications were made to the instrument by the Working Group, mostly in the commentary. None of the modifications affected Article 3 itself or its commentary. Comments by Member States on this new version of the Principles and commentaries were open until March 19, 2015. None were received and as a result, the Principles were approved on 20 March 2015. The official announcement of the approval of this new Hague Conference instrument will be made during the meeting of the Council on General Affairs and Policy of the Hague Conference, which will take place in The Hague from 24 to 26 March, 2015. This information is known to the Author, personally, given her membership in the Working Group.

¹⁰⁶ On January 15, 2015, Paraguay adopted a statute incorporating the Hague Principles (Ley No. 5.393 "Sobre Derecho Aplicable a los Contratos Internacionales"), thus demonstrating that the reference to non-State law in art. 3, including its enforceability before national courts, is no longer merely theoretical. For the official Spanish version see http://www.gacetaoficial.gov.py/uploads/pdf/2009/2009-08-28/gaceta_2670_EDCKIFIDBEKCFIBGKDIJGIKADDACHEFBIIBGCJJD.pdf.