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Should the Discussion on Whether Non-state Law might be Elected as the Governing Law of Contract be Silenced Forever?

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Abstract

While the extent of the choice of law governing the cross-border contract is subjected to positive law, in the European Union being the Rome I Regulation, some always argued for expanded party autonomy regarding the non-state law. The European Commission proposed the incorporation of such in Rome I Regulation, but it has been ultimately rejected. This article considers the European development, debates whether discussion on non-state law being allowed as the governing law to a cross-border contract is still vital and provides an answer whether discussion on such should be ended or not.

Keywords

Non-state Law; Lex Mercatoria; Rome I Regulation; Hague Principles; Globalization; Dichotomy, Model Law, Doctrine.

1 Introduction

Each of every choice of law provision within written statutes is a mere imprint of freedom of contractual parties to choose a law of sovereign country deemed appropriate to govern their contract. However, do we ought to restrict the possibility to elect governing law to be one from the narrow list of simply less than 200 options? Perhaps, despite the philosophical question of whether the private parties to a cross-border contract essentially should want to deluge from such narrow-listed opportunities, does the European Union ("EU") itself positions the applicability of non-state law to be dead-end discussion or not?

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One might argue that many scholarly opinions on the applicability of non-state law or the *new lex mercatoria*[1] have been drafted yet no result in court litigation could be observed. But as has Lando correctly pointed out "*[…] in the field of European integration some fantasies have become realities. Before the Second World War there were people who talked wild of establishing a European Union. They formed small clubs and met in inexpensive cafés. Their shining eyes rediatted idealism, but their faces also betrayed that they were regarded as dreamers and not taken seriously by sensible people. It took the war to produce sensible people who established a common market which eventually became a European Union.*"[2] It may as well take time instead of war to produce sensible people[3] to overcome the dichotomy between arbitration[4] and litigation.

This article shall not permeate the historical connotations of freedom of choice to elect the law governing the contract or even the freedom of choice itself. Nor this article intents to promote and argue that non-state law should be permitted in litigation. Rather, this article should analyze whether the topic of non-state law being the law governing the contract is viable or not. Admittedly, should the topic still be of interest within the EU, the scope of development in this area shall be presented.

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1 "*The situation is not helped by the often-interchangeable use of lex mercatoria and 'new' lex mercatoria. In the first place, the expression lex mercatoria has long been associated with the medieval rules or 'system of law' based on usage or custom that merchants of the period were accustomed to regard as applying to their transactions. That lex mercatoria or 'law merchant' has traditionally been seen as having dissipated and been absorbed into national systems of law by the 18th and 19th centuries. This partly explains the preference by some for the use of 'new' lex mercatoria to describe the claimed modern body or system of non-State law which (or part of which) is considered applicable to international commercial transactions in certain circumstances. The modern lex mercatoria is seen as embracing more than usage or customary rules but also encompassing deliberately formulated legal instruments – including instruments formulated by international, indeed inter-state, organisations like the United Nations Commission on International Trade Law (UNCITRAL).*" See Stone, P., Farah, Y. *Research Handbook on EU Private International Law*. Cheltenham: Edward Elgar Publishing Ltd, 2017, p. 244.

2 Lando, O. Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law 2000*. 2000, p. 401.

3 Berger, K. P. *The creeping codification of the new lex mercatoria*. Alphen aan den Rijn: Kluwer Law International, 2010, 464 p.; Lando, O. Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law 2000*. 2000, pp. 359–363.

4 For further applicability of lex mercatoria in arbitration proceedings, see, for example, Elcin, M. Lex Mercatoria in International Arbitration Theory and Practice [online]. *European University Institute Research Repository. Vol. I*. Published in August 2016 [cit. 17. 10. 2019]. https://cadmus.eui.eu/bitstream/handle/1814/25204/2012_ELCIN_Vol1.pdf?sequence=1&isAllowed=y

While discussing the liveliness of such discussions, the court jurisprudence shall be omitted in favour of doctrinal approach, basically following point that "*There has been a strong and often hidden antagonism between their doctrines and the practice of the courts. The courts pretend to go by the rules in the books, but they do not. Often covert techniques are used to reach the outcome which the court wants. This impairs the predictability which the choice-of-law rules should provide.*"[5] For the sake of this article, discrepancies between what should be done in the eyes of book authors and what is truly exercised by the judges will not be considered.[6]

2 Law of sovereign state in current era

Before any assumption on the viability of discussion whether the non-state law may or should be applicable as the law governing the contract, existing law must be assessed. Interestingly, private law harmonization within Europe is not a subject of 20th and 21st century. *Code civil des Français*, alternatively *Code Napoléon*, which took effect on 21 March 1804 under the rule of Napoleon I, and consisting of unilateral conflicts rules, may be one of the prime examples of modern legal code with pan-European harmonization character, as it was imposed in occupied countries during and after Napoleonic Wars.[7] Allgemeines bürgerliches Gesetzbuch, the Austrian Empire civil code, passed on 1 July 1811, and enacted on 1 January 1812, might be considered another example of harmonization character legal code with a universal applicability in all crown lands but Lands of the Crown of Saint Stephen.[8]

Notwithstanding the above, in the current legal order, while the harmonization is mostly[9] derived from intra-governmental activities or by coordinated

5 Lando, O. Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law 2000*. 2000, p. 349.

6 "*Na druhé straně je ovšem nutné říci, že literatura věnující se tomuto problému je někdy radikálnější než vlastní praxe.*" [translation by the author: "*On the other hand, it is necessary to say that literature dealing with this issue is occasionally more radical than the actual practice.*"]. See Rozehnalová, N., Střelec, K. Zásady mezinárodních smluv UNIDROIT, lex mercatoria a odvaha k aplikaci. *Časopis pro právní vědu a praxi*. 2004, Vol. 12, No. 1, p. 53.

7 Holtman, R. B. *The Napoleonic revolution*. Philadelphia: J. B. Lippincott Company, 1979, 224 p.

8 Consisting of Kingdom of Hungary, Kingdom of Croatia, Kingdom of Slavonia, Kingdom of Croatia-Slavonia, Free City of Fiume and Condominium of Bosnia and Herzegovina.

9 Harmonization occurs on the EU level as well. Pursuant Art. 114 of Treaty on the Functioning of the European Union ("TFEU") the EU shall "*adopt the measures for the approximation of the provisions laid down by law, regulation or administrative action in Member States which have as their object the establishment and functioning of the internal market.*".

effort of subjects of public international law, unification is derived primarily from the collective effort of the EU as allowed by the primary law.[10]

Convergence of national legal rules is, as is reasoned in the law-and-economics literature,[11,12] spontaneous "*in order to implement an efficient allocation of scare resources*"[13] and is underwent by legislators, judges and scholars as national law allows; arguably such literature is not yet accustomed to adapt specific framework of the EU, in which the unification is built upon the work of the European Commission.

Although unification procedure in the EU is certainly not restricted to the exclusive action of the European Commission, notably the important role of the Court of Justice of the European Union ("CJEU"),[14] it is the European Commission's "right of initiative", the publication of proposals in form of "green" or "white papers"[15] which is certainly the utmost accelerator of EU unification.

In simple words, the unification process is only sparkled when "*growing trade and capital flows crossing national borders*"[16] and thus induces states to "*iron out differences in their national laws.*"[17] It is proclaimed that "*Only when divergencies in a particular field of law shackled cross-border trade and commerce, nation-states showed a readiness to embark upon a unification project. That is, by eliminating legal obstacles to economic growth, a uniform law made extra gains from trade possible that would not have existed otherwise.*"[18] That is exactly what the EU integration ignites within its member states.

10 Chapter 2, Section 1 TFEU.

11 Marciano, A., Josselin, J.-M. *The economics of harmonizing European law*. Cheltenham: Edward Elgar Publishing, 2002, 288 p.

12 Mattei, U. Efficiency in legal transplants: An essay in Comparative Law and Economics. *International Review of Law and Economics*. 1994, Vol. 14, No. 1, pp. 3–19.

13 Crettez, B., Deloche, R. On the unification of legal rules in the European Union. *European Journal of Law and Economics*. 2006, Vol. 21, No. 3, p. 204.

14 In order to assess the binding effect of soft-law see Judgment of the Court of Justice (Second Chamber) of 13 December 1989, Case C-322/88.

15 Crettez, B., Deloche, R. On the unification of legal rules in the European Union. *European Journal of Law and Economics*. 2006, Vol. 21, No. 3, p. 214.

16 Herings, J.-J. P., Kanning, A. J. Unifying Commercial Laws of Nation States Coordination of Legal Systems and Economic Growth [online]. *PennState University Press*. Published in March 2003, p. 22 [cit. 19. 10. 2019]. http://citeseerx.ist.psu.edu/viewdoc/download?doi=10.1.1.195.29&rep=rep1&type=pdf

17 Ibid.

18 Ibid.

2.1 Approach of the Rome Convention

Contractual relationships with international element fall under the unified 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 Regulation")[19] as of 17 December 2009, to which the Convention of 19 June 1980 on the law applicable to contractual obligations ("Rome Convention")[20] is a predecessor.

Historically speaking, the Rome Convention, that entered into effect on 1 April 1991, allowed merely of the traditional choice[21] of national law as the law governing the contract. While some commentators tried to argue that this is not explicitly stated in the Rome Convention,[22] therefore available to a discussion, neither the majority of subjects nor the CJEU even questioned otherwise. The essence of timing in drafting the Rome Convention, taking place between 1967 and 1980,[23] plays an immanent role in the assessment of whether legislator would even consider the possibility of non-state law being the governing law. Traditional line of drafting has been followed in such times when *new lex mercatoria* had not been fully developed yet[24] and no legislator had any intention to allow contractual parties to elevate from the requirement of national law.[25, 26]

19 Regulation (EC) No 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations.

20 Convention of 19 June 1980 on the law applicable to contractual obligations.

21 "*Bezesporu je to dáno starším datem vypracování úmluvy a samozřejmě i prvotním určením úmluvy pro použití před obecnými (státními) soudy.*" [translation by the author: "*This is undoubtedly due to the earlier date of the convention, and of course due to the primary purpose of the convention to be used in court (state) proceedings.*"]. See Rozehnalová, N., Týč, V. *Evropský justiční prostor (v civilních otázkách)*. Brno: Masarykova univerzita, 2006, p. 64.

22 Ibid., p. 65.

23 Grodl, L. International Perspective on Party Autonomy in Contractual Choice of Law [online]. *Masaryk University, Faculty of Law*. Published in 2019, pp. 35–49 [cit. 3. 11. 2019]. https://is.muni.cz/auth/th/dzcwx/Grodl_diploma_thesis.pdf

24 Tang, Z. S. Non-state law in party autonomy – a European perspective. *International Journal of Private Law*. 2012, Vol. 5, No. 1, p. 25.

25 Boele-Woelki, K. The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts. *Uniform Law Review*. 1996, Vol. 1, No. 4, p. 652, 664.

26 Commission of the European Communities. Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation [online]. *EUR-Lex*. Published on 15 January 2003, p. 22 [cit. 27. 10. 2019]. https://eur-lex.europa.eu/legal-content/EN/TXT/PDF/?uri=CELEX:52002DC0654&from=en ("Green Paper on the conversion of the Rome Convention").

Whilst Art. 3 of the Rome Convention itself is silent on a clear definition of the "*law*" chosen by parties, reading of the Rome Convention in a whole in lieu of Art. 1 (1) presumes no ambiguity when promulgating that rules of the Rome Convention involve a choice between the laws of countries.[27]

Lastly, reflecting the above-mentioned, the official report aligning the Rome Convention is silent on an express clarification of law within the Art. 3,[28] merely the importance and existence of the core principle of party autonomy in choice of law is debated. It is only when the question of non-state law is raised, while the European Commission considered modernising the Rome Convention, to which the Green Paper provides explicit rejection of such.[29]

2.2 Novation through the Proposal for Rome I Regulation

While the European community followed the positive law embodied in the Rome Convention, 11 years after the Rome Convention entered into effect, the European Commission took a stand on the modernisation of the Rome Convention. This stand included captivation of the opportunity to go beyond imaginative borders of the nations. Notably, this effort of European Commission in 2002 took place 34 years after the first work on the Rome Convention, therefore rendering the immaturity of the *new lex mercatoria* moderately outdated.

With admission of the resonance of non-state law proponents, the European Commission issued the Proposal for a regulation of the European Parliament and the Council on the law applicable to contractual obligations[30] ("Proposal for Rome I Regulation"), which embodied alteration toward to "*further boost the impact of the parties' will, a key principle of the Convention*"[31] reflected

27 "*The rules of this Convention shall apply to contractual obligations in any situation involving a choice between the laws of different countries.*" See Art. 1 Rome Convention.

28 Council Report on the Convention on the law applicable to contractual obligations by Mario Giuliano and Paul Lagarde. In: Official Journal No C 282/1 of 31 October 1980.

29 Green Paper on the conversion of the Rome Convention, p. 22.

30 Commission of the European Communities. Proposal for a Regulation of the European Parliament and of the Council on the Law Applicable to Contractual Obligations (Rome I) [online]. *EUR-Lex*. Published on 15 December 2005 [cit. 12. 2. 2019]. http://www.europarl.europa.eu/meetdocs/2004_2009/documents/com/com_com(2005)0650_/com_com(2005)0650_en.pdf

31 Ibid., p. 6.

in Art. 3. Henceforth the European Commission took partial stand, on one hand allowing non-state law to be elected as governing law with reference to UNIDROIT Principles, Principles of European Contract Law ("PECL") or a possible future Community instrument,[32] whilst one the other hand in lieu of Rome Convention *excluding lex mercatoria* or private codifications without recognition of the international community.

While this stance might have been greeted by the trade industry itself, many commentators took the liberty to argue impossibility to uphold certainty in results or inadequacy in the identification of threshold for recognition of the international community.[33]

Ultimately, presented modernisation has had become purely great exercise of opinion raising. Some argued that this question is in its nature more academic than practical,[34] the rest simply dismissed the idea.

Although Art. 3 as presented in the Proposal for Rome I Regulation has not been embodied into the Rome I Regulation, the legislator was able to extrude two Recitals into the final wording. Recital 13 of the Rome I Regulation solely facilitates what is by many allowed, incorporation of any non-state instrument within the scope of mandatory rules of governing law. Albeit being a step further to pronouncing core principles, Recital 13 may be deemed redundant as such is common practice and could be easily supplanted by black lettering of all non-state law provisions into a contract and later subsuming them under the mandatory test of governing law.

What must be of paramount interest is the Recital 14[35] opening the window of opportunity to set a threshold for non-state law possessing the ability to be governing law of contract. The only requirement of such is the legislative procedure on EU level and express permission to abide as *lex electa* within

32 Ibid.

33 Garcimartín Alférez F. J. The Rome I Regulation: Much ado about nothing? *The European Legal forum*. 2008, Vol. 1, No. 2, pp. 62–68.

34 Magnus, U., Mankowski, P. Joint Response to the Green Paper on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation COM (2002) 654 final. 2003, p. 14; Tang, Z. S. Non-state law in party autonomy – a European perspective. *International Journal of Private Law*. 2012, Vol. 5, No. 1, p. 26.

35 "*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.*" See Recital 14 Rome I Regulation.

the instrument itself. Should any instrument be enacted on the EU level, the contractual parties would adhere the ability to opt in[36] to it, thus rendering the application primacy of the particular instrument over Rome I Regulation. Consequently, such is in line with the Art. 26 of the Rome I Regulation.

2.3 Result of the Rome I Regulation

Rome I Regulation as a successor of the Rome Convention may be seen as an example, in which the European Commission tried to exercise its right of initiative and failed to carry out the result due to the effect of EU members converging into a rejection of non-state law. While this is true, consequently the European Commission was able to emplace the promulgation of acceptance of non-state law, should it be its own in nature and agreed upon on the regional level. This dichotomy might be contributed to the nature of EU legislature being in fact beyond a state in process of creation, but ultimately being considered of the same legal force as national laws nevertheless with applicable priority.

While such instrument per Recital 14 is nowhere to be discussed, the European Commission was able to withstand the proposition to allow further deliberation on such topic. In this case, the non-cooperative game of member states grasped the *Nash equilibrium*[37] and in accordance with Art. 26 allowed the forthcoming contracting of such instrument to be subsumed under the *Crettez and Deloche complex model of the convergence of legal rules in the European union.*[38] Question, whether this is to be followed, will mainly be answered by the internal market itself[39] with importance stressed on the behaviour of superior EU member states.[40]

36 Tang, Z. S. Non-state law in party autonomy – a European perspective. *International Journal of Private Law*. 2012, Vol. 5, No. 1, p. 27.

37 Nash, J. Non-Cooperative Games [online]. *The Annals of Mathematics*. Vol. 54, No. 2. Published in September 1951 [cit. 15. 9. 2019]. https://www.jstor.org/stable/1969529?seq=1

38 Crettez, B., Deloche, R. On the unification of legal rules in the European Union. *European Journal of Law and Economics*. 2006, Vol. 21, No. 3, pp. 206–214.

39 Smith, J. M. How to predict the differences in uniformity between different areas of a future European private law? An evolutionary approach. In: Marciano, A., Josselin, J.-M. *The economics of harmonizing European law*. Cheltenham: Edward Elgar Publishing, 2002, p. 60.

40 Crettez, B., Deloche, R. On the unification of legal rules in the European Union. *European Journal of Law and Economics*. 2006, Vol. 21, No. 3, p. 204.

The development in the area of party autonomy throughout the pre-Rome Convention era to the Rome I Regulation era in choice of law illustrates that more freedom has been given to the contractual parties,[41] although one restriction is always present, being the inability to choose any law but law of sovereign country.[42] One could even argue that such would mean that we should deem the non-state law in litigation to be dead-end and pursue another topic of private international law. Though this would be very sceptical point of view exercised by the most rigorous positive law supporters, jurisprudence regulated by positive law, which cannot diverge from the letter of law even if the argumentation of such would be impregnable must be separated from the doctrinal approach.

Firstly, the European Commission itself, being the main proponent of non-state law as part of EU law, is not silent on this topic. Secondly, actual usage of non-state law is already indirectly permitted, and lastly, any definitive rejection of non-state law would contradict the *Savigny* approach on harmonisation and unification as presented by *Lando.*[43]

3 Hague Principles as a model law

Principles on Choice of Law in International Commercial Contracts of 19 March 2015 ("Hague Principles") have been adopted by the Hague Conference on Private International Law ("HCCH") on 19 March 2015, after 9 years of preparatory work.[44] Following the wording of its preamble, Hague Principles are soft model law without any real applicability unless transposed into positive law.[45] The Hague Principles are "*deliberately and*

41 Nygh, P. E. *Autonomy in international contracts*. Oxford: Oxford University Press, 1999, pp. 3–14.

42 Grodl, L. International Perspective on Party Autonomy in Contractual Choice of Law [online]. *Masaryk University, Faculty of Law*. Published in 2019, pp. 37–49 [cit. 3. 11. 2019]. https://is.muni.cz/auth/th/dzcwx/Grodl_diploma_thesis.pdf

43 Lando, O. Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law 2000*. 2000, p. 360.

44 Grodl, L. International Perspective on Party Autonomy in Contractual Choice of Law [online]. *Masaryk University, Faculty of Law*. Published in 2019, pp. 51–58 [cit. 3. 11. 2019]. https://is.muni.cz/auth/th/dzcwx/Grodl_diploma_thesis.pdf

45 Until this day, only one country, Paraguay, followed to transpose the Hague Principles in full to the national law. See Law No. 5393 on the Law Applicable to International Contracts (Paraguay).

consciously drafted as soft law"[46] and a non-binding instrument, "*precisely in order to avoid any risk of conflict of standards with regional binding instruments.*"[47]

The mere existence of Hague Principles expressly conveys the continuous presence of deliberation whether subjects to private international law ought to deserve their autonomy extended. Throughout the preparatory work, question whether stance on non-state law in litigation should be presented in the Hague Principles or not, in order to retain status quo,[48] arose and has been collectively settled by accepting the final wording of adoption non-state law regardless of the dispute resolution method. Pursuant the contracting, anticipated phrasing[49] has been accompanied by a further clarification[50] in order to satisfy commentaries on its vague nature.

The European Commission acting as a representative of the EU to the HCCH upheld the pronounced view of EU member states when argued that vague phrasing would potentially lead to a reduction of legal certainty as well as the possibility of application of an unfair set of rules forced on the weaker contracting party.[51] The distress of allowance any rules to be applicable, being the *new lex mercatoria* or religious law, has been thoroughly discussed prior to utilization of two qualifiers and three criterions in the final phrasing of Art. 3 of the Hague Principles.[52]

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46 Purnhagen, K., Rott, P., Micklitz, H.-W. et al. Varieties of European economic law and regulation: liber amicorum for Hans Micklitz. *Studies in European economic law and regulation*. 2014, Vol. 3, p. 66.

47 Magnus, U., Mankowski, P. et al. *Rome I Regulation – Commentary (Magnus/Mankowski, European Commentaries on Private International Law)*. Köln: Sellier European Law Publishers, 2017, p. 209.

48 Girsberger, D., Cohen, N. B. Key Features of the Hague Principles on Choice of Law in International Commercial Contracts. *Uniform Law Review*. 2017, Vol. 22, No. 2, p. 325.

49 "*A contract is governed by the law chosen by the parties. In these Principles a reference to law includes rules of law*" See Permanent Bureau of the Hague Conference on Private International Law. Consolidated version of the preparatory work leading to the draft Hague Principles on the choice of law in international contracts [online]. *Hague Conference on Private International Law*. 2012, p. 13. Published in October 2012 [cit. 7. 10. 2019]. https://assets.hcch.net/docs/9436c200-bc46-40b7-817e-ae8f9232d306.pdf

50 "*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.*" Art. 3 Hague Principles.

51 Girsberger, D., Cohen, N. B. Key Features of the Hague Principles on Choice of Law in International Commercial Contracts. *Uniform Law Review*. 2017, Vol. 22, No. 2, p. 326.

52 Mankowski, P. Article 3 of the Hague Principles: the final breakthrough for the choice of non-State law? *Uniform Law Review*. 2017, Vol. 22, No. 2, p. 4.

The Hague Principles calculate with the eligibility of any rules of law, being generally accepted on an a-national level,[53] balanced, and neutral. The Hague Principles have been adopted in a form of commented edition, commentary forming an inseparable part of the principles itself. The commentary provides that all requirements are specifically satisfied by United Nations Convention of 11 April 1980 on contracts for the international sale of goods ("CISG"), PECL or UNIDROIT Principles, thus such could be used as a sole governing law to the contract.

While the commentary itself is silent on whether the *new lex mercatoria* could be elected as prescribed rules of law, designation of PECL as one of the examples might suggest that as long as comprehensiveness is achieved, *European lex mercatoria*[54] might be eligible.

Conclusion on PECL might be that, whilst it is not pronounced to be the sought instrument in lieu of Recital 14, such may change in the future.[55]

What is on the other hand certain is that the Hague Principles are burdened with the same problem as has been advocated while discussing the Proposal for Rome I Regulation. Hague Principles fail to deliver comprehensive designation of the arbitrary body to decide whether selected rules of law satisfy presented threshold, nor present any lead on how should be such achieved.

Some authors question whether regional acceptance can exist based on the hypothesis that "*genuine non-State law is, per definitionem, outside the realm of State law*"[56] which is predominantly false, as non-state law can exist by virtue of acceptance of legal instruments adopted by public international law bodies, CISG being prime example.

53 Conférence De La Haye De Droit International Privé. *Principles on choice of law in international commercial contracts*. The Hague, The Netherlands: The Hague Conference on Private International Law Permanent Bureau, 2015, p. 40.

54 Lando, O. Some Features of the Law of Contract in the Third Millennium. *Scandinavian Studies in Law 2000*. 2000, pp. 344–401.

55 Calster, G. V. *European private international law*. Oxford: Hart Publishing, 2016, p. 214.

56 Mankowski, P. Article 3 of the Hague Principles: the final breakthrough for the choice of non-State law? *Uniform Law Review*. 2017, Vol. 22, No. 2, p. 7.

4 Dichotomy in non-state law

Referring back to the predominant argument of most to reject non-state law on the grounds of its existence outside the realm of state, a dichotomy of applicability of non-national systems of law certainly exist.

While CISG, being a convention in its nature, thus non-state law, might be indisputably invoked to be incorporated into any contract by reference, original non-state law provisions can be invoked as part of the applicable law of a particular country which adopted CISG.[57] As a matter of fact, should the parties be to reject the application of those provisions that originated as a non-state law, they must so pronounce in accordance with Art. 6 of the CISG.

Interestingly, the parties may derogate or vary the effect of selected provisions of the CISG in lieu of Art. 6 in accord with Art. 12. This brings the possibility to exclude some provisions of the CISG, a possibility only given by the adopted non-state law itself, as long as the state did not replace its domestic regime by CISG in its entirety. In contrast, the same cannot be done with national law. Throughout this possibility, CISG manifests its non-mandatory character.[58]

Therefore, while stating that CISG, if adopted, forms integrated part of national law, it itself still provides options to its subjects to handle such law differently than the true national law. One could still reject default rules but cannot opt-out from whole set of rules, to say preference that an act will not apply. On the other hand, that is what parties may do so with the CISG.

Whether we perceive CIGS to be part of the state law or to be merely adopted non-state law, one thing is undisputed, legal certainty and the principle of party autonomy is constantly under attack.

In *Ostroznik Savo v. La Faraona*[59] the Italian court took the courage to promulgate CISG being "*convention on uniform substantive law, and not of international private law as is sometime erroneously said*" therefore being *lex specialis* to the

57 Stone, P., Farah, Y. *Research Handbook on EU Private International Law*. Cheltenham: Edward Elgar Publishing Ltd, 2017, pp. 232–233.

58 Kröll, S. et al. *UN Convention on Contracts for the International Sale of Goods (CISG): a commentary*. München: C. H. Beck, 2018, p. 135.

59 Judgment of District Court Padova of 11 January 2005, CLOUT Case No. 651.

law of a state which adopted CISG. Should, therefore, be all suppositional national laws be of contracting states to CISG, CISG applies with prevailing force over all national laws.[60] The court ascertained that CISG applies directly to avoid the superfluous step in the application of private international law rules – the investigation of applicable law on conflict-of-rules as a connecting factor and thereafter application of CISG.[61]

Remarkably, while the court declaring CISG being the applicable law (to which gaps are then filled with otherwise applicable national law), should the parties elect CISG to be the applicable law, the court would have to deny such.[62]

"*In light of the foregoing, it is at least a little anachronistic that under the Rome I Regulation contract parties can choose to apply the CISG because it is part of the law of a particular country, whose law is the applicable law, but not independently in its own right as 'a non-State body of law'.* "[63]

This brings the exact opposite effect to what the European harmonisation should convey, one union, identity in contract, identity in contracting parties, but two different approaches to the applicability of widely approbated instrument. Arguably, this scenario presents the problem of dichotomy, which would be solved by the proposed wording of the Rome I Regulation[64] as nobody can claim that CISG is not recognised in the community.

Consequently, by adopting CISG, countries such as the Czech Republic, with a strong doctrinal position on rejection of the *new lex mercatoria*, allow backdoor to be opened for cross-border contracts governed by their domestic law, subjected to interpretation and supplementation of the *new lex marcatoria* where no general principles of CISG itself can be found.[65]

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60 The applicability of the CISG requires several conditions to be met, e.g. sales contract, international character, ratione materiae of CISG. See ibid.

61 Ibid.

62 See ibid. "*[…] the same would have happened if the parties opted for the lex mercatoria, the Unidroit Principles or for the same UN Convention [CISG] in the event it would have not been applicable.*".

63 Stone, P., Farah, Y. *Research Handbook on EU Private International Law*. Cheltenham: Edward Elgar Publishing Ltd, 2017, p. 234.

64 "*Parties shall be allowed to choose as the applicable law the principles and rules recognised internationally or in the community.*" Art. 3 Proposal for Rome I Regulation.

65 Viscasillas, P. P. Interpretation and gap-filling under the CISG: contrast and convergence with the UNIDROIT Principles. *Uniform Law Review*. 2017, Vol. 22, No. 1, pp. 19–21.

5 Conclusion

The question discussed by this article is one of whether the discussion on non-state law being the law applicable to the cross-border contract is still viable, not the one whether it is nowadays permitted. It has been offered that while the stance of European nations has been solely positivistic, the European Commission made a bold move in its Proposal for Rome I Regulation to overcome this narrow exercise of party autonomy in choice of law.

The ability of non-state law is still heavily discussed,[66] and its peak has arisen in the time of Rome I Regulation and Hague Principles contracting.

While Czech doctrine, following the stance taken by *Viktor Knapp* and *Pavel Kalenský*, refuses to recognize any non-state law as a spontaneously created law of transnational character.[67] This stance has been taken in order to object to the promulgation of the *new lex mercatoria* by *C. M. Smitthoff* at first symposium of International Law Association in 1962 in London.[68] To this day, the Czech doctrine refuses to accept stance as has been proposed in Proposal for Rome I Regulation, thus to accept non-state law or the *new lex mercatoria* to be a law in sense of legal system applicable in conflict-of-law. Rather than that, it is ought to be pragmatically perceived as legal norms which are possible to be incorporated to the contractual relationship, either expressly stipulated or by usage. Hence, the doctrine allows choice of non-state law in line of substantive law, not in line of conflict-of-law. This approach is inconsistent with the proposed wording of Art. 3 (2) in Proposal for Rome I Regulation, but agreeable throughout EU countries[69].

Czech doctrinal stance remained consistent with above-written throughout history and *lex mercatoria* is refused to be a real *lex* due to the fact that any law to be a real law applicable to contract must be a state law.[70] Subsequently,

66 Rozehnalová, N. *Instituty českého mezinárodního práva soukromého.* Praha: Wolters Kluwer, 2016, p. 230.
67 Ibid., pp. 234–235.
68 Rozehnalová, N., Střelec, K. Zásady mezinárodních smluv UNIDROIT, lex mercatoria a odvaha k aplikaci. *Časopis pro právní vědu a praxi.* 2004, Vol. 12, No. 1, p. 48.
69 Kučera, Z., Pauknerová, M., Růžička, K. et al. *Mezinárodní právo soukromé.* Plzeň-Brno: Aleš Čeněk – Doplněk, 2015, pp. 90–91, 94.
70 Ibid., p. 214.

Czech doctrine refuses to recognize the will of contracting parties itself to be outside the realm of any law, therefore itself being the sole legal basis for the subsistence of the contract and legal relationship ascending out of it.[71] Self-regulating concept of contracts is thus refused.[72]

Applicability of any non-state law is, therefore, in the judgment of Czech doctrine, allowed as long as it is selected to be incorporated within the contract or if it forms part of usage, nevertheless never as conflict-of-law but rather as a choice of substantial rules within limits of cogent norms of otherwise applicable state law. Substantive freedom of will is hence the only permitted solution furnished to the contracting parties.

Rozehnalová states that even such discussion on Art. 3 of the Proposal for Rome I Regulation or Hague Principles changes nothing in the discourse of Czech doctrine.[73] Although this cannot be disputed, this article, pursuant the question raised in its introduction, intends to answer whether the discussion of mere possibility of allowing non-state law to be the law applicable to contract is dead or viable. The answer to this question should be without any doubt that such discussion is still viable and present.

Even *Rozehnalová*, while affirming that no current discussion on this topic can change the Czech doctrinal approach, promulgates that she belongs to a group of exponents of existence of lex mercatoria as to some extent comprehensive rules of law, originating outside the state realm, being able to serve as *lex contractus*.[74] Consequently, considers herself to be forced to remain positivist and etatist, due to state court being bound by positive law. She gives the answer to the question that prior to Rome I Regulation effectiveness, thus in the time of Proposal for Rome I Regulation, the discussion has been well alive. She states, that direct election of lex mercatoria as the law applicable to contract has been proposed novum in the Proposal for Rome I Regulation, not a restatement of the existing matter of fact.[75]

71 Ibid., p. 215.
72 Rozehnalová, N. *Instituty českého mezinárodního práva soukromého*. Praha: Wolters Kluwer, 2016, p. 235.
73 Ibid., p. 236.
74 Rozehnalová, N., Střelec, K. Zásady mezinárodních smluv UNIDROIT, lex mercatoria a odvaha k aplikaci. *Časopis pro právní vědu a praxi*. 2004, Vol. 12, No. 1, p. 49.
75 Ibid., p. 52.

Such novum would serve as a breakout from state monopoly on positive law, not from positive etatism as a whole.[76]

The Hague Principles and its rich contracting discussion supports that, even 10 years after the Proposal for Rome I Regulation, the idea of non-state law is not exhausted. Many EU member states, as well as the EU through the European Commission, have taken their stand, raised opinions and pronounced their approval of the final wording of the Hague Principles, including the provision on allowing to choose non-state law as the law applicable to contract. Ultimately, Hague Principles being merely soft law with many unresolved issues serves as no more than a discussion point, rather than actual permission of non-state law, nor it could be used as an argument during court proceedings. Yet this article's scope is not of actual permission, rather of the vitality of discussion, which considering above-mentioned must be alive.

Ultima ratio argument for maintaining the discussion alive is the *Savigny* approach to harmonization, being in nature developed through fruitful discussions in universities, articles and books.[77] The *Savigny* approach, as presented by *Klaus Peter Berger*[78] envisions that by discussing, new ideas slowly emerge and grow, ultimately establishing common practices. These new ideas then may be passed to students who take upon to reform them to practice.[79] The restrictions imposed by our legal order set that no court can be freed from letters of the law laid down in the codes, acts or precedents.[80] Admittedly, this restriction does not allow to exercise conflict-of-law choice of non-state law nowadays, yet it may "*creep*" into any future legislation progress.

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