Contracts and Non-State Law in Latin America

José Antonio Moreno Rodríguez *

I. – INTRODUCTION

Legal enactments, where they introduce profound changes, lose effectiveness unless they are accompanied by well-conceived and systematic efforts in the legal culture itself. If the new rules are not properly understood, they may not be applied correctly or, worse, not at all. This explains why the far-reaching reforms that have dramatically transformed the legal landscape in Latin America have not been considered from the standpoint of their potential consequences, particularly in relation to contracts and non-state law, as legal scholars and legal practice in general still lag far behind.

This contribution will highlight the relevant changes that have taken place in the region. Important lessons may be drawn from the Latin American experience. Emphasis will be placed here on two aspects: first, the general trend, *i.e.*, the fact that the applicability of non-state law to contracts is widely accepted in the region through a vast array of legal and conventional enactments, and second, the fact that, in general, the legal community in the area may not be fully or adequately aware of the powerful consequences of these regulatory developments.

II. – CONVENTIONAL AND REGIONAL ENACTMENTS IN LATIN AMERICA THAT ACCEPT NON-STATE LAW

Several Latin American Constitutions have been reformed or amended in recent decades, with many of them accepting international principles, for instance in the field of human rights,[1] and even admitting a "supranational

* LL.M. Harvard (USA), 1993; Member of the Working Group on Choice of Law in International Contracts of the Hague Conference on Private International Law.

1 See D.P. FERNÁNDEZ ARROYO, in: D.P. Fernández Arroyo (coord.), *Derecho Internacional Privado de los Estados del MERCOSUR*, Buenos Aires, Zavalía Editor (2003), 74-75, in particular regarding Brazil, Argentina and Paraguay.

order".[2] Moreover, countries in the area have embarked upon regional integration efforts, and accepted the jurisdiction of international tribunals, such as the Inter-American Court of Human Rights [3] or the International Centre for Settlement of Investment Disputes (ICSID),[4] as well as the hundreds of Bilateral Investment Treaties (BITs) ratified in this regard. These tribunals expressly accept the applicability of international or transnational principles, to the point that the ICSID Convention is recognised as the first of its kind to use the expression "rules of law",[5] after being adopted by arbitration rules and by the arbitration model law itself as proposed by the United Nations Commission on International Trade Law (UNCITRAL) in 1985 (as amended in 2006).

At a regional level, the Common Market of the South (MERCOSUR), for instance, attaches importance to non-state law, witness the wording of the Treaty of Asunción of 1991 (which created the regional bloc) in its Annex 2 to the CIF and FOB terms, which clearly makes reference to the International Chamber of Commerce INCOTERMS,[6] or of Article 10 of the MERCOSUR

2 The Paraguayan Constitution is an example in this regard, expressly admitting in its Art. 145 "a supranational legal order".

3 Argentina, Barbados, Bolivia, Brazil, Chile, Colombia, Costa Rica, Dominica, Dominican Republic, Ecuador, El Salvador, Guatemala, Haiti, Honduras, Jamaica, Mexico, Nicaragua, Panama, Paraguay, Peru, Suriname, Uruguay and Venezuela (<http://www.oas.org/juridico/spanish/firmas/b-32.html>.)

4 157 States have signed the ICSID Convention, of which 147 have deposited their instruments (<http://icsid.worldbank.org/ICSID/FrontServlet?requestType=ICSIDDocRH&actionVal=ShowDocument&language=English>).

5 Until its inclusion in the UNCITRAL Model Law on International Arbitration, the expression "rules of law" had only been used in Art. 42 of the 1965 Washington *Convention on the Settlement of Investment Disputes Between States and Nationals of Other States* relative to the investment disputes and arbitration laws of France and Djibouti (UNCITRAL Document No. A/CN.9/WG.II/WP.143/Add.1 – <http://daccess-dds-ny.un.org/doc/UNDOC/LTD/V06/558/70/PDF/V0655870.pdf?OpenElement>).

6 This was pointed out by CRISTIAN GIMÉNEZ CORTE, *Los usos comerciales y el derecho de fuente convencional en el MERCOSUR,* Jurisprudencia Argentina (2002), and by myself in many contributions, such as, for instance, J.A. MORENO RODRÍGUEZ, "Los contratos y La Haya ¿ancla al pasado o puente al futuro?", in: J. Basedow / D.P. Fernández Arroyo / J.A. Moreno Rodríguez (coords.), *¿Cómo se codifica hoy el derecho comercial internacional?,* Asunción, CEDEP / Thomson Reuters / La Ley Paraguaya (2010), 245-339; see also <http://asadip.wordpress.com/2010/09/20/los-contratos-y-la-haya-ancla-al-pasado-o-puente-al-futuro/> (last accessed 31 May 2011), and J.A. MORENO RODRÍGUEZ, "Paraguay", in: C. Espligues / D. Hargain / G. Palao Moreno (coords.), *Derecho de los contratos internacionales en Latinoamérica, Portugal y España,* Edisofer, Madrid (2008), 563-616.

Arbitration Agreement of 1998, which was ratified by all full members of the bloc (Argentina, Brazil, Paraguay and Uruguay [7]), where it recognises the applicability of "Private International Law and its principles", as well as the "Law of International Commerce".

The MERCOSUR countries and many others in Latin America have, in turn, ratified instruments prepared by the Organization of American States (OAS) that are open to the applicability of non-state law, such as the Panama Convention of 1975 regarding Arbitration.[8]

In fact, the OAS, via its Inter-American Specialized Conference on Private International Law (CIDIP, for its Spanish acronym) has accomplished much for the modernisation of Private International Law in the Americas. In seven editions starting in the mid-1970s, the OAS has approved several legal texts later adopted or providing the inspiration for reforms in many countries with general positive impact.[9] Furthermore, as pointed out by Jean Michel Arrighi, many of these enactments have, in turn, helped pave the way for solutions subsequently adopted in other regions or around the world.[10]

In this regard, Article 9 of the 1979 OAS *Inter-American Convention on General Rules of Private International Law* is of particular importance and fecund potential. This Convention provides for equitable solutions to achieve justice in particular cases, notwithstanding the provisions of any national laws that might be applicable to the transaction.[11]

7 Decision No. 3/98 of the MERCOSUR Consejo Mercado Común.

8 In fact, the OAS *Inter-American Convention on International Commercial Arbitration* (Panama, 1975) refers in its Art. 3, in the absence of agreement between the parties, to the rules of the Inter-American Committee of International Commercial Arbitration which, in turn, states in its Art. 30 that, in all cases, "applicable commercial usage" will be taken into account.

9 See D.P. FERNÁNDEZ ARROYO, *Derecho Internacional Privado Interamericano, Evolución y Perspectivas*, Santa Fé, Rubinzal-Culzoni Editores (2000), 55-56.

10 J-M. ARRIGHI, "El proceso actual de elaboración de normas Interamericanas", in: *Jornadas de Derecho Internacional*, Córdoba, organised by the Universidad Nacional de Córdoba and the General Secretariat of the Organization of American States, Department of Legal Affairs, Washington D.C. (2001).

11 Art. 9 of this Convention states: "The different laws that may be applicable to various aspects of one and the same juridical relationship shall be applied harmoniously in order to attain the purposes pursued by each of such laws. Any difficulties that may be caused by their simultaneous application shall be resolved in the light of the requirements of justice in each specific case." Herbert and Fresnedo de Aguirre have pointed out that this article draws upon American doctrines of Currie (governmental interests) and Cavers (equitable solutions), contrary to the abstract and automatic system previously in place in Latin America. The adoption of these doctrines has the merit of having left open an ample interpretative field to relax the rigid criteria

The formula used in this Convention was reproduced in the *Inter-American Convention on the Law Applicable to International Contracts* (Mexico Convention 1994 – (hereinafter: "MC"),[12] which draws on the 1980 *EC Convention on the Law Applicable to Contractual Obligations (Rome*, 1980) and expressly accepts, for the Americas, the applicability of non-state law,[13] in contrast with its predecessor.[14]

In turn, this acceptance is reflected, with certain adjustments, in the Private International Law rules of Mexico and Venezuela, and in a Uruguayan reform bill on the matter, endorsed by the country's leading authorities in the field,[15]

prevalent in the continent until then (see C. FRESNEDO DE AGUIRRE / R. HERBERT, "Flexibilización Teleológica del Derecho Internacional Privado Latinoamericano", in: *Avances del Derecho Internacional Privado en América Latina, Liber Amicorum Jürgen Samtleben*, Montevideo, Editorial Fundación de Cultura Universitaria (2002), 57. See also R. HERBERT, "La Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales", *RUDIP*, Year 1, No. 1, 89-90).

12 Where it states in its Art. 10 that: "In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case."

13 J.L. SIQUEIROS, "Reseña General sobre la Quinta Conferencia Especializada Interamericana sobre el Derecho Internacional Privado, CIDIP-V", *Cursos de Derecho Internacional, Serie Temática, Volumen I (Parte I): El Derecho Internacional Privado en las Américas (1974-2000)*, General Secretariat, Department of Legal Affairs, Washington D.C. (2002), 516. The solution is set forth in Art. 10 (see *supra* note 12). In addition, Art. 9 states: "If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties. The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations. Nevertheless, if a part of the contract were separable from the rest and if it had a closer tie with another State, the law of that State could, exceptionally, apply to that part of the contract."

14 That is why Fernández Arroyo claims that "some roads go beyond Rome", in a publication in French translated into Spanish (D.P. FERNÁNDEZ ARROYO, "La Convención Interamericana sobre Derecho aplicable a los contratos internacionales aprobada por a CIDIP-V", *Revista Jurisprudencia Argentina*, Buenos Aires, No. 5933 (1995), 820-824).

15 Such as D. OPERTTI BADÁN / C. FRESNEDO DE AGUIRRE, "El derecho comercial internacional en el Proyecto de Ley general de derecho internacional privado del Uruguay", in: J. Basedow / D.P. Fernández Arroyo / J. Moreno Rodríguez (coords.), *¿Cómo se codifica hoy el derecho comercial internacional),* Asunción, CEDEP, Thomson Reuters, La Ley Paraguaya (2010), 385-412. See also M.J. BONELL, "El Reglamento CE 593/2008 sobre la ley aplicable a las obligaciones contractuales (Roma I) – Es decir, una ocasión perdida", in: Basedow / Fernández Arroyo / JMoreno Rodríguez (coords.), *op.cit*, 209-218, where he argues that there is no doubt that reference to the soft law instruments, as a source of international commercial contracts, gives the Uruguayan bill a modern and innovative cast.

who favour openness towards transnational law.[16]

However, even though well received by legal scholars,[17] the OAS Convention (MC) itself has so far only been ratified by Mexico and Venezuela, in contrast with other continental instruments which have been widely adopted. One may speculate as to why this Inter-American instrument has not been ratified by more countries, and it is undeniable that there is something wrong with it, yet it would defy common sense to attribute this failure to the openness expressed in the text towards transnational law, considering the many positive developments outlined above as well as other highly relevant accomplishments brought about by arbitration in the region, as will be shown below. It is, of course, possible that the legal establishment is simply not sufficiently aware of the consequences of these many achievements, which should naturally tend to favour ratification of the MC.

In an article written in collaboration with Mercedes Albornoz on the low rate of ratification of the MC,[18] we stated the following:

> "This might be due to the lack of information regarding its content and the methods under which the solutions of this convention could be adopted by the rest of the continent.[19] Additionally, Latin

16 For example, in its Arts. 13 and 51. The contents of the bill and a brief commentary by C. FRESNEDO DE AGUIRRE / G.A. LORENZO IDIARTE may be accessed at <http://asadip.wordpress.com/2009/05/29/el-proyecto-uruguayo-de-ley-general-de-derecho-internacional-privado-2008/>.

17 In fact, the modern solutions offered by the MC have been applauded (see HERBERT, *supra* note 11, 45). See also the analysis included in the article by A. DREYZIN DE KLOR / T. SARACHO, *La Convención Interamericana sobre Derecho Aplicable a los Contratos Internacionales*, La Ley, Buenos Aires (1995), who consider it an important regulatory reform, and J. TÁLICE, "La autonomía de la voluntad como principio de rango superior en el Derecho Internacional Privado Uruguayo", *Liber Amicorum en Homenaje al Profesor Didier Opertti Badán,* Montevideo, Editorial Fundación de Cultura Universitaria (2005), 560-561, who considers they deserve to be ratified or incorporated into the internal laws of the countries through other means. This has been stated, for example, in the Resolution of the XIII[rd] Congress (Quito 2004) of the Instituto Hispano-Luso-Americano de Derecho Internacional, a UN advisory body, established by the Resolution of the Economic and Social Council of 1964 (<http://www.ihladi.org/RESOLUCIONES.html>) (last accessed 25 May 2011).

18 J.A. MORENO RODRIGUEZ / M.M. ALBORNOZ, "Reflections on the Mexico Convention in the Context of the Preparation of the Future Hague Instrument on International Contracts", *Journal of Private International Law*, Vol. 7, No. 3 (Dec. 2011), 492-493.

19 Eugenio Hernández-Bretón is convinced that this is the case: "La Convención de México (CIDIP V, 1994) como modelo para la actualización de los sistemas nacionales de contratación internacional en América Latina", 9 *DeCITA, derecho del comercio internacional, temas y actualidades,* Asunción, CEDEP (2008), 170. Regarding the reception mechanisms – those

> American circles have shown a certain reticence about receiving the modern solutions adopted by the MC." [20]

It is common knowledge that some issues were not fully resolved in the negotiations leading up to the drafting of the MC, with "compromise solutions" the inevitable result. Hence, instead of ratifying the text (or in addition to ratification), States could incorporate its key advances in such prospective laws, regional texts – such as those of MERCOSUR – on private international law as they might be drafting in respect of international contracts, and, where appropriate, even improve on its provisions with regard to those issues in this Inter-American instrument that cause concern or stand in need of clarification (see below).

The current work of the Hague Conference should, in part, contribute to the concrete reception of the MC – through the incorporation mechanism finally opted for – by a greater number of countries. Many countries may have been loath to adopt the MC due to the boldness of its formulae or the doubts surrounding the interpretation of some of its solutions. Additionally, the work of the Hague Conference could contribute to a possible future refinement of the Inter-American instrument to facilitate ratification. There can be no doubt that the answers provided by the Hague Conference, given their indisputable cosmopolitan nature will be of invaluable assistance in interpreting the current issues regarding the Inter-American instrument." [21]

outside treaty ratification – one might resort to "incorporation by reference", as was the case of Uruguay which adopted as a law the rules of interpretation of several articles of the 1940 Montevideo *Treaty on International Civil Law*. Or one might resort directly to "material incorporation", which entails the complete transcription of a treaty into domestic law. For its part, Venezuela took a different path by incorporating the principles of the Mexico Convention into its 1998 Private International Law Act so as to give the MC residual application. That is to say, the conventional instrument was not copied in full but was used as a foundation for the purpose of internal regulation on international contracts. At the same time, any provisions not transcribed or adopted as principles have the full complement of remaining MC rules to interpret its meaning or supplement the rules contained in the autonomous legislation (HERNÁNDEZ-BRETÓN, *cit.*, 185-187).

20 For instance, this reticence prompted the III[rd] Jornadas Argentinas de Derecho Internacional Privado (Rosario, 1994) not to recommend the adoption of the MC by Argentina. See conclusions in: 5 *Boletín de la Sección Derecho Internacional Privado de la Asociación Argentina de Derecho Internacional* (1995), 59.

21 See MORENO RODRÍGUEZ / ALBORNOZ, *supra* note 18, at 493 (published in Spanish as "Reflexiones emergentes de la Convención de México para la elaboración del futuro instrumento de La Haya en materia de contratación internacional", at <http://www.eldial.com.ar/suplementos/privado/tcdNP.asp?id=5514&id_publicar=12340&fecha_publicar=29/03/2011&camara=Doctrina>. Regarding the Mexico Convention, see also J.A. MORENO RODRÍGUEZ, "Los

III. – CISG AND "INTERNATIONAL CONTRACT PRINCIPLES" IN LATIN AMERICA

The implementation of the *United Nations Convention on Contracts for the International Sale of Goods* (CISG), ratified by many Latin American countries,[22] has given rise to developments that offer yet another example of how international principles and standards, *i.e.*, non-state law, are gaining acceptance in the region.

In Mexico, for instance, the Commission for the Protection of International Commerce of Mexico (COMPROMEX for its Spanish acronym), in *Seoul International Co. Ltd. and Seoulia Confectionery Co. v. Dulces Luisi, S.A. de C.V.* (1998), stated that the duty of good faith and fair dealing constitutes a cornerstone in international commerce and, as such, should prevail over provisions of Mexican law. In resolving the case, the Commission decided to apply not only the CISG but also, in general, internationally accepted commercial uses and practices with a view to achieving justice and equity (*justicia y equidad*) in the case at hand.[23]

More recently, two important Colombian decisions have also shown an evident openness to international contract law principles. In a case brought in 2010 regarding a constitutionality challenge in respect of Section 1616 of the Colombian Civil Code, which limits awards to foreseeable damages, the Constitutional Court considered the rule to be reasonable – and, therefore, that it should stand as it was –, in accordance with the international standards laid down in the CISG and the UNIDROIT Principles of International Commercial Contracts (hereinafter: the "UNIDROIT Principles").[24] In another case, also brought in 2010, the Supreme Court relied on Article 77 of the CISG on the duty to mitigate damages, considering it an evident expression of an

contratos y La Haya ¿ancla al pasado o puente al futuro?", in: Basedow / Fernández Arroyo / Moreno Rodríguez (coords.), *supra* note 15, 245-339; *idem*, *Contratación y Arbitraje,* Asunción, CEDEP (2010), 15-138; *idem*, "La Convención de México sobre el derecho aplicable a la contratación internacional", in: J.A. MORENO RODRÍGUEZ, *Temas de contratación internacional, inversiones y arbitraje*, Asunción, Ediciones Jurídicas Catena S.A. / CEDEP (2006), 113-190, reproduced in OAS, *Jornadas de Derecho Internacional*, 22-October 2005, Ottawa, Washington, General Secretariat, 2006), 3-62.

22 Ratified by Argentina, Chile, Colombia, Cuba, Dominican Republic, El Salvador, Honduras, Mexico, Paraguay, Peru, Uruguay and Venezuela (see <http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG_status.html> (last accessed 3 June 2011).

23 See <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg>.

24 Award No. C-1008 (File No. D-8146) (see <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg>).

international principle applicable to contracts, and extending it to a case in which Colombian national law was applicable.[25]

In Brazil, a clear theoretical explanation of how and why non-state law or international principles, such as the UNIDROIT Principles, should permeate Brazilian domestic contract law can be found in an excellent book by renowned scholar, Lauro Gama Jr.[26] According to Gama Jr., Brazilian law, in an arbitral setting, openly admits the broad applicability of *lex mercatoria*, general principles of law or the UNIDROIT Principles.[27] As will be seen in the following paragraphs, this, in fact, is what is happening in Latin American practice.

IV. – NON-STATE LAW AND ARBITRATION IN LATIN AMERICA

The *1958 New York Convention on Recognition and Enforcement of Arbitral Awards* has been widely ratified by Latin American countries, and, as accepted by the International Law Institute in its Cairo Declaration [28] and arbitration practice,[29] this implies the admission of non-state law since recognition of arbitral awards cannot be denied on the sole basis that the tribunals advanced the arguments underlying their decisions relying on non-state law.

Not only have this and other conventional instruments, mentioned above, been adopted in Latin American countries but, starting in 1993 with the Mexican experience, a wave of legal reforms has swept the region, involving many other countries such as Colombia, Chile, Panama, Peru, Venezuela, Paraguay and Brazil.[30] Two notable exceptions are Argentina and Uruguay, although both

25 Case Ref. 11001-3103-008-1989-00042-01 (see <http://turan.uc3m.es/uc3m/dpto/PR/dppr03/cisg>).

26 L. GAMA JR., *Contratos Internacionais a luz dos Principios do UNIDROIT 2004*, Editora Renovar, Río de Janeiro y otras (2006).

27 *Ibid.*, 444.

28 The declaration states: "... the fact that an international arbitrator has sustained an award on transnational rules (general principles of law, principles common to many laws, international law, trade use and similar expressions) instead of the laws of a determined State, should not, by itself, affect the validity or enforceability of the award, when the parties have agreed that the arbitrator could apply transnational rules, or when the parties were silent with regards to the applicable law."

29 See J.A. MORENO RODRÍGUEZ, "Los contratos y la Haya", *supra* note 6.

30 Bolivia, Law No. 1770 of 1997; Brazil, Law No. 9307 of 1996; Colombia, Decree No. 1818 of 1998; Costa Rica, Decree-Law No. 7727 of 1997; Cuba, Decree-Law No. 250 of 2007; Chile, Law No. 19.971 of 2004; Dominican Republic, Law No. 489 of 2008; Ecuador, Law of 1997, under Official Record No. 145; El Salvador, Decree No. 914 in 2002; Guatemala, Decree-Law No. 67 of 1995; Honduras, Decree-Law No. 161 of 2000; Nicaragua, Law No. 540 of 2005;

these countries adhere to the New York Convention [31] and other instruments such as the 1975 Panama Arbitration Convention [32] and the MERCOSUR agreements on arbitration, which are all open to transnational law.

The reforms draw upon the UNCITRAL Model Arbitration Law, and many countries have gone one step further, not only basing their reforms on this instrument for international arbitrations, but extending its provisions to local arbitrations, as well.[33]

This development, described as a "real revolution" or a "notable evolution",[34] can lead to interesting consequences, in the sense that many of the laws concerned not only recognise non-state law as stated in Article 28 of the

Panama, Decree-Law No. 5 of 1999; Peru, Decree No. 1071 of 2008; Paraguay, Law No. 1879 of 2002; and Venezuela, Law on Commercial Arbitration of 1998.

31 Ratified by Argentina (1989); Bolivia (1995); Brazil (2002); Chile (1975); Colombia (1979); Costa Rica (1988); Cuba (1975); Dominican Republic (2002); Ecuador (1962); El Salvador (1998); Guatemala (1984); Honduras (2001); Mexico (1971); Nicaragua (2003); Panama (1985); Paraguay (1998); Peru (1988); Uruguay (1983); Venezuela (1995). Information is available at <www.uncitral.org> (last accessed 25 May 2011).

32 Ratified by Argentina (1994); Bolivia (1998); Brazil (1995); Chile (1976); Colombia (1986); Costa Rica (1978); Dominican Republic (2008); Ecuador (1991); El Salvador (1980); Guatemala (1986); Honduras (1979); Mexico (1978); Nicaragua (2003); Panama (1975); Paraguay (1976); Peru (1989); Uruguay (1977); and Venezuela (1985). Information is available at <http://www.oas.org> (last accessed 25 May 2011).

33 In a comparative analysis, Conejero notes that there is a general tendency to unify the regulation of both national and domestic arbitration and international arbitration. Such is the case of Argentina (Section 1 of the Code of Civil and Commercial Procedure), Bolivia (Titles I and II of Law No. 1770), Brazil (Art. 34 of Law No. 9307/1996), Costa Rica (Law No. 7727, which does not contemplate any international criteria), Dominican Republic (Art. 1 of Law No. 489-08), El Salvador (Art. 3 of Decree No. 914), Guatemala (Art. 1 of Decree No. 67-95), Honduras (Art. 27 of Decree No. 161-2000), Mexico (Title IV of Book V of the Commercial Code), Nicaragua (Art. 22 of Law No. 540), Panama (Law No. 5), Paraguay (Art. 1 of Law No. 1879), Peru (Art. 13.7 of Decree No. 107), Portugal (Art. 37 of Law No. 31/1986), Spain (Art. 3 of Law No. 60/2003), and Venezuela (Art. 11 of the Law on Commercial Arbitration where no distinction is made between domestic and international arbitration). The countries that have chosen the dual system are Chile (Art. 1 of Law No. 19.971), Colombia (Art. 2 of Law No. 350), Cuba (Art. 9 of Decree Law No. 250), Ecuador (Art. 42 of Law No. 145) and the draft law of Uruguay. In the case of Uruguay, even though so far it features no specific Act on arbitration, the rules in force for the internal law are not applicable to the international area. (C. CONEJERO ROOS, "El Arbitraje Comercial Internacional en Iberoamérica: Un Panorama General", in: C. Conejero Roos *et alia* (coords.), *El Arbitraje Comercial Internacional en Iberoamérica – Marco legal y jurisprudencial,* España, La Ley, grupo Wolters Kluwer (2009), 68).

34 See references and an analysis of the problem in J. BOSCO LEE, *Arbitragem Comercial Internacional nos Países do MERCOSUL*, 1ª. Ed (2002), 3ª tir. Curitiba, Juruá (2004), 178-181.

UNCITRAL Law, but also extend this provision to national arbitration. As is well known, Article 28 of the Model Law, by using the expression "rules of law", accepts the applicability of non-state law if chosen by the parties,[35] which is understood to comprise *lex mercatoria* and transnational law.[36]

Moreover, Article 28(4) states that in all cases, the terms and conditions of the contract and the commercial usage and practices applicable to the transaction are to be taken into account. It is widely accepted that the application of this rule does not depend on the will of the parties but prevails over what is determined by conflict rules, which in the final analysis may derive from the *lex mercatoria* or transnational law, at least as regards the application of its fundamental principles to the particular case. This was recognised by an Arbitral Tribunal in Costa Rica [37] and by an Argentine Arbitral Tribunal. Although both parties had designated Argentine law as applicable, the latter resorted to the UNIDROIT Principles as international commercial usage and practices reflecting the solutions of different legal

35 The commentary to Art. 28 of the UNCITRAL Model Law states that when making reference to the choice of "rules of law" and not "law", the Model Law gives the parties a wider range of options regarding the applicable substantive law since they can, for example, choose rules of law developed by an international organisation but not yet incorporated into any domestic law. See also documents regarding Art. 35 of the new UNCITRAL Arbitration Rules, drafted along the same lines (A/CN.9/WG.II/WP.151/Add.1; A/CN.9/WG.II/WP.149; and A/CN.9/641, para. 107).

36 In this regard, both the English official commentary and the Dutch explanatory text to the arbitration laws of these countries advance the thesis that the *lex mercatoria* is included in the expression "rules of law". Explanatory notes to the project in 1985, drafted by a departmental advisory committee of arbitration, stated that this section applies to Art. 28 of the Model Law (Department of Trade and Industry, *Consultative Paper, Sections 1 and 2: Draft Clauses of an Arbitration Bill*, 38). (Notes, Art. 1:101 PECL, commentary 3, a). The English text can be found at <http://frontpage.cbs.dk/law/commission_on_european_ contract_law/PECL%20engelsk/engelsk_partI_og_II.htm>. The explanatory Dutch text (Doc. No. 18464) may be found in F. DE LY, *International Business Law and Lex Mercatoria*, Elsevier Science Publishers B.V. (1992), 250. In turn, as stated in the European Principles of Contract Law: "The expression 'rules of law' of Art. 28(1) of the Model Law indicates that the parties can choose the *lex mercatoria* to govern their contract (Notes, Art. 1:101 PECL, Commentary 3, a)". The new Art. 1511 of the French Code of Civil Procedure also refers to rules of law, and the explanatory report emphasises that Art. 1511 and other related articles recognise an autonomous legal order in international arbitration. All of this cannot but boost the applicability of transnational law.

37 [...] "Not only national statutes and jurisprudence are applicable to this case, but also regulations of international trade that are essentially conformed by the principles and usages generally admitted in commerce [...] This [...] enables the Tribunal to use such rules as has been done by the I.C.C. International Court of Arbitration in similar cases" (*cf.* Awards No. 8908 of 1996 and No. 8873 of 1997; *International Court of Arbitration Bulletin*, vol. 10/2 (Fall 1999), 78 ss.). [...] (*Ad Hoc* Arbitration in Costa Rica, 30.04.2001, cited at <www.unilex.info>).

systems and international contract practice, stating that, as such, according to Article 28(4) of the UNCITRAL Model Law on International Commercial Arbitration, they should prevail over any domestic law.[38]

It is worth noting that, "as a surprising matter for its time and beyond the model law" – as it was described –, the Panama Arbitration Law, which also extends its provisions to domestic arbitration, states in its Article 27 that the tribunal will take into account the contract, commercial uses and practices "and the UNIDROIT Principles of International Commercial Contracts." [39] As a consequence, an arbitral tribunal sitting in Panama invoked Articles 7.4.2 and 7.4.3 of the UNIDROIT Principles regarding damages in an *ex aequo et bono* arbitration, since – according to the arbitrators – the aforementioned Article 27 of the Panama Arbitration Law "orders the tribunal" to take them into account.[40]

Arbitral tribunals in other Latin American countries have also relied on non-state law or the UNIDROIT Principles, for instance in the case of two awards rendered in Costa Rica, one of them referring to Article 7.4.8 of the Principles on "mitigation of damages [41] and the other expressly stating that the UNIDROIT Principles are "the main component of the general rules and principles regulating international contractual obligations and enjoying wide international consensus." [42] In turn, an arbitral tribunal in Colombia decided to apply Colombian law "as well as the provisions of the contract and the relevant commercial usage and practices in accordance with Article 17.2 of the ICC Rules of Arbitration, referring repeatedly to the UNIDROIT Principles, in particular to both the black letter rules and comments of Articles 5.3, 1.7, 7.4.3, 7.4.8 and 7.4.4." [43] In addition, in Brazil, the UNIDROIT Principles were invoked in support of arguments based on Brazilian law in two cases related

38 *Ad Hoc* Arbitral Award of 10.12.1997, cited at <www.unilex.info>).

39 K. GONZÁLEZ ARROCHA / L. SÁNCHEZ ORTEGA, "Arbitraje Comercial Internacional en Panamá: Marco Legal Jurisprudencial", in: C. Conejero Roos y otros (coords.), *El Arbitraje Comercial Internacional en Iberoamérica, Marco legal y jurisprudencial*, La Ley (2009), 554.

40 Arbitral Award of 24.02.2001, Arbitral Tribunal of the City of Panamá, cited at <www.unilex.info>.

41 Arbitral Award of 29.07.2002, Arbitration Centre of the Costa Rican Chamber of Commerce, cited at <www.unilex.info>.

42 *Ad Hoc* Arbitration in Costa Rica, 30.04.2001, cited at <www.unilex.info>.

43 ICC International Court of Arbitration, Barranquilla, Colombia, 00.12.2000, cited at <www.unilex.info>.

to hardship;[44] while in Argentina, in a case already referred to above, an arbitral tribunal made them prevail over the applicable Argentine law, by holding that they constitute international commercial usage and practices that should prevail over any domestic law.[45]

References to the UNIDROIT Principles are not limited to arbitral tribunals. In Venezuela, the Supreme Court, in support of the broad interpretation of the concept of international contracts, referred, *inter alia*, to the Preamble, Commentary 1, of the UNIDROIT Principles.[46] A reference can also be found in the ruling of an Argentine Appellate Court which, among its arguments, referred to Article 2.1.4 of the UNIDROIT Principles in order to determine questions related to the definite nature of the offer.[47]

Although these developments cannot be ignored, it could be argued that, in practice, not too many cases in the region apply non-state law, either directly or for the purpose of interpreting national law provisions. A factor may be that the Latin American countries' reporting systems are, in general, quite primitive and inadequate. Be that as it may, the fact is that the continent has incorporated numerous conventions and laws accepting non-state law, and that the results of these developments remain to be seen, particularly once – and if – the legal culture aligns itself with the evolution taking place at the regulatory level.

It must be recognised, however, that Latin American legal thinking still has some way to go before the potential impact of the admission of non-state law is fully understood.

V. – CONCLUSION

In short, Latin American countries have adopted countless conventions accepting non-state law and even the judgments of supranational tribunals applying it. The region's own instrument on the applicable law in international contracts, *i.e.*, the Mexico Convention, is clearly oriented in this

44 *Ad Hoc* Arbitral Award of 21.12.2005 and Arbitral Award of 09.02.2009, No. 1/2008, of the Cámara FGV de Conciliacão e Arbitragem (São Paulo, Brazil), in *Delta Comercializadora de Energía Ltda. vs. AES Infoenergy Ltda*.

45 *Ad Hoc* Arbitral Award of 10.12.1997.

46 09.10.1997, *Bottling Companies vs. Pepsi Cola Panamericana*, cited in <www.unilex.info>.

47 "*Benítez, Elsa Beatriz" contra "Citibank N.A.*", Court of Appeals in Commercial Matters in and for the City of Buenos Aires, Sala B, Case No. 80.808. 10.06.2004, cited at <www.unilex.info>.

direction, and its low ratification rate does not alter the fact that other conventional enactments open to non-state law are widespread in the region, nor can it overshadow the developments in regional blocks such as MERCOSUR or the mass adoption of arbitration laws in Latin America expressly accepting non-state law – already recognised in arbitration practice –, and even extending it in some cases to domestic settings.

The gradual regional consolidation of this regulatory trend in legal thinking and practice can only strengthen contract parties in their expectations and benefit the international commercial community as a whole, living as it does in a pluralist world where state and non-state law co-exist in ways that can be neither ignored nor undermined.