

# Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules

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## I. INTRODUCTION

THIRTY YEARS AGO, Berthold Goldman published his celebrated article entitled "Frontières du droit et *lex mercatoria*."<sup>1</sup> In the same year, Clive Schmitthoff devoted an equally important study to the new law merchant in a collection of articles on the sources of international commercial law.<sup>2</sup> Since then, the subject of *lex mercatoria* has given rise to an impressive body of legal writing.<sup>3</sup>

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<sup>1</sup> Goldman, *Frontières du droit et lex mercatoria*, in *Archives de philosophie du droit* 177 (1964). See also same author, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalités et perspectives*, 106 *Journal du droit international* 475 (1979), and *Nouvelles réflexions sur la lex mercatoria*, in *Etudes de droit international en l'honneur de Pierre Lalive* 241 (C. Dominicé, R. Patry & C. Reymond eds., 1993). See also Ph. Kahn, *La vente commerciale internationale* (1964); Ph. Fouchard, *L'arbitrage commercial international* 401 (1965).

<sup>2</sup> C. Schmitthoff, *The Law of International Trade, its Growth, Formulation and Operation*, in *Sources of International Trade* (1964). See also same author, *International Business Law: A New Law Merchant*, in *Current Law and Social Problems* 129 (1961). For earlier theories, including that of E. Lambert in the 1920's, see the excellent study by F. de Ly, *International Business Law and Lex Mercatoria* 207 (1992).

<sup>3</sup> For an extensive analysis, see de Ly, *supra* note 2, at 217; F. Osman, *Les principes généraux de la lex mercatoria. Contribution à l'étude d'un ordre juridique national* (1992).

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It is striking to note that this body of writing now comprises studies published in many different countries worldwide.<sup>4</sup> Interestingly, much of the writing on this subject is today published in common law jurisdictions, traditionally the most reticent towards *lex mercatoria*.<sup>5</sup>

A second and more remarkable feature of the academic debate surrounding *lex mercatoria* is the fact that it remains highly controversial. The subject is by no means a new one, and, as already discussed, a very significant amount of learned attention has been devoted to it. Nonetheless, *lex mercatoria* continues to be a hotly debated subject, with a number of extremists on each side.

*Lex mercatoria* is sometime attacked on ideological, theoretical as well as practical grounds. On the ideological front, *lex mercatoria* has been presented as a "less than candid pseudo-legal caprice,"<sup>6</sup> or, in more moderate terms, "essentially...a doctrine of *laissez-faire*."<sup>7</sup> On the theoretical level, some reproach *lex mercatoria* for not having the characteristics of a complete legal system,<sup>8</sup> leading to the conclusion that *lex mercatoria* does not exist.<sup>9</sup> Finally, the portrayal of the principles of *lex mercatoria* both as few and far between, and as inconsistent with each other are the major criticisms of a practical nature. For many, *lex mercatoria* is only "vague law,"<sup>10</sup> bringing together principles allegedly as contradictory as the binding force of contracts and the theory of unforeseeability.<sup>11</sup> The *coup de grâce* is delivered by those who, very pragmatically, point

<sup>4</sup> See, e.g., studies in German, French, Italian, Spanish, Dutch cited by K.P. Berger, *International Economic Arbitration* 525 (1993). For an overview of judicial decisions on this subject in various jurisdictions (Germany, England, Austria, Belgium, United States, France, Italy, Netherlands), see Osman, *supra* note 3, at 495 and Rivkin, *Enforceability of Arbitral Awards Based on Lex Mercatoria*, 9 *Arb. Int'l* 67 (1993).

<sup>5</sup> See, e.g., Draetta, Lake & Nanda, *Breach and Adaptation of International Contracts: An Introduction to Lex Mercatoria* 9 (1992), and the cited references.

<sup>6</sup> A. Zaki, *L'Etat et l'arbitrage* 225 (1979).

<sup>7</sup> Mustill, *The New Lex Mercatoria: The First Five Years*, in *Liber Amicorum for the Rt. Hon. Lord Wilberforce*, 149-81 (M. Bos & I. Brownlie eds., 1987), reproduced in 4 *Arb. Int'l* 86 (1988); de Ly, *supra* note 2, at 289.

<sup>8</sup> See Lagarde, *Approche critique de la lex mercatoria*, in *Le droit des relations économiques internationales: Etudes offertes à Berthold Goldman* 125 (1982). See also same author, *Compania Valenciana de Cementos c/Primary Coal*, Cour d'appel, Paris, Judgment of July 13, 1989, 1990 *Revue de l'arbitrage* 663.

<sup>9</sup> Stoecker, *The Lex Mercatoria: To What Extent Does It Exist?*, 7 *J. Int'l Arb.*, No. 1, at 101 (1990).

<sup>10</sup> See, e.g., A. Kassis, *Théorie générale des usages du commerce* 561 (1984); Delaume, *The Proper Law of State Contracts and Lex Mercatoria: A Reappraisal*, 3 *ICSID Rev. —FILJ* 79 (1988).

<sup>11</sup> See Kassis, *supra* note 10, at 349.

out that the tremendous amount of academic attention devoted to *lex mercatoria* has only given rise to a very limited number of principles.<sup>12</sup>

In contrast, some authors take an extremely broad view of *lex mercatoria*, finding examples of *lex mercatoria* principles in the most diverse sets of circumstances.<sup>13</sup> Certain arbitral awards influenced by *lex mercatoria* further this tendency by developing highly sophisticated theories to justify the application of universally accepted rules, such as the binding force of contracts or the duty to perform contractual obligations in good faith.<sup>14</sup> This only fuels the idea that the considerable body of academic work on the topic has achieved very little of practical value.

The controversy is made worse by the fact that the terminology *lex mercatoria* is ambiguous. In contrast with the notions of transnational rules or general principles of international commercial law, the notion of *lex mercatoria* emphasizes the content of the rules rather than the way in which such rules come about. By suggesting that it is necessary to have rules specifically tailored to the merchant community, the use of the expression *lex mercatoria* seems to imply that domestic legal systems are inadequate for the purposes of regulating international commercial relationships.

However, even if not always unjustified, the idea that the specificity of international commercial relationships often requires specific rules is liable to cause some difficulty when confused with the issue of whether a rule should necessarily be of national origin. Indeed, it is not necessarily the case that one must resort to rules of international origin in order to meet the requirements of international commerce. Each legal system can address these requirements by having international legal relationships governed by substantive rules (*règles matérielles*) that differ from those governing domestic legal relationships.<sup>15</sup>

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<sup>12</sup> See Mustill, *supra* note 7, at 181; de Ly, *supra* note 2, at 283.

<sup>13</sup> See, e.g., the group drawn up by Goldman, *supra* note 1, and, for a critique of an expansive interpretation, the observations of Paulsson on the interpretation of the decision handed down by the Italian court of cassation on February 8, 1982 (18 *Rivista di diritto internazionale privato e processuale* 829 (1982)) in *La lex mercatoria dans l'arbitrage*, 1990 *Revue de l'arbitrage* 55. On the necessity of drawing from "trade usages" a specific notion, see also Gaillard, *La distinction des principes généraux du droit et des usages du commerce international*, in *Etudes offertes à Pierre Bellet* 203 (1991).

<sup>14</sup> On this point, see Mayer, *Le principe de bonne foi devant les arbitres du commerce international*, in *Etudes de droit international en l'honneur de Pierre Lalive*, *supra* note 1, at 543.

<sup>15</sup> See also Béguin, *Le développement de la lex mercatoria menace-t-il l'ordre juridique international?*, 30 *Mc Gill L.J.* 478 (1985).

Numerous examples of this approach can be found in the case law of various countries.<sup>16</sup>

The terms “transnational rules” and “general principles of international commercial law” are preferable to *lex mercatoria* in so far as they imply that the solution to the problems of the business community may also be found in national legal systems, and because they make clear that the specificity of such rules stems more from their source than from their content. Thus, whereas the concept of *lex mercatoria* seems to suggest the specificity of transnational norms, the terms “transnational rules” or “general principles” imply that such rules are rooted in national legal systems. The concept is no longer one of opposition between national legal systems and a hypothetical transnational legal system, but rather one of complementarity. In other words, the suggestion of the inadequacy of domestic laws gives way to the idea of using a body of different laws, rather than a single law, as the means of resolving a particular dispute.

These observations are not intended to suggest that the impassioned reactions surrounding *lex mercatoria* and transnational rules can be reduced to simple questions of terminology. In fact, manifested in one’s attitude towards transnational rules in international arbitration is an entire philosophy of international arbitration. Although sometimes presented as a “misconception,”<sup>17</sup> it is beyond doubt that it is the truly international character of arbitration, with arbitrators, parties and counsel of different nationalities, and hearings held in many different locations, that prompts arbitrators to resort to rules that are not strictly those of a single legal system. It is precisely because arbitrators, as opposed to judges, have no forum as such that arbitral tribunals will more readily accept to apply rules of international origin.

It is no coincidence that those who consider the seat of the arbitral tribunal to amount to the forum of a national court<sup>18</sup> are also those who have the most difficulty accepting that arbitrators can apply transnational rules. Conversely, those who believe that the source of validity of an international arbitral

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<sup>16</sup> Among many others, the best known example is still that of the admissibility in international law of certain indexation clauses which are prohibited in domestic law. See Judgment of June 21, 1950 Cass. civ., 39 *Revue critique de droit international privé* 609 (1950), note Batiffol. See also the commentary of B. Ancel and Y. Lequette, *Grands arrêts de la jurisprudence française en droit international privé* 23 (1992).

<sup>17</sup> See Mustill, *supra* note 7, at 152.

<sup>18</sup> See, e.g., in English legal thinking, Mann, *Lex Facit Arbitrum*, in *International Arbitration: Liber Amicorum for Martin Domke* 157 (P. Sanders ed., 1967). Compare the less mainstream views of J. Lew, *Applicable Law in International Commercial Arbitration* (1978).

award is found in all the legal systems likely to enforce such award<sup>19</sup> are more willing to accept the idea that arbitrators can apply transnational rules, even if this only means using transnational choice of law rules to select the applicable national law.<sup>20</sup>

The debate surrounding the application of transnational rules by international commercial arbitrators is therefore much more than a mere academic exercise. Rather, it reveals a clear dividing line between two different philosophies of international commercial arbitration. It is therefore not so surprising that, after thirty years, the subject continues to elicit such heated controversy.

We submit, however, that a more balanced view of transnational rules ought to be taken both when assessing the situations in which it is legitimate to apply such rules (II) and when determining their content (III).

## II. CASES WHERE TRANSNATIONAL RULES MAY BE APPLIED IN INTERNATIONAL ARBITRATION

As with any legal mechanism, transnational rules can only be properly evaluated by examining how they are actually applied. An analysis of arbitral practice reveals that in certain situations the application of transnational rules is extremely questionable (A), while in other cases it is perfectly legitimate (B).

### A. *Cases Where the Application of Transnational Rules Is Questionable*

The transnational rules method has, on occasion, been used for two diametrically opposed and equally questionable ends: (1) in order to place the contract at issue above any law and (2) in order to defeat the parties' choice of a specific national law. In both cases, it is only these misguided applications of the transnational rules method that warrant criticism, and not the method itself.

#### 1. *Transnational Rules as a Means of Placing the Contract Above any Law*

In the 1950s, there was much debate as to whether an international contract could be completely self-standing, and whether the parties could there-

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<sup>19</sup> See, e.g., Von Mehren, *To What Extent Is International Commercial Arbitration Autonomous?*, in *Le droit des relations économiques internationales: Etudes offertes à Berthold Goldman* 217 (1982); Gaillard, note on Cass. Civ. 1ère, 23 mars 1994, 121 *Journal du droit international* 701 (1994).

<sup>20</sup> On this aspect, see *infra* note 39 and accompanying text.

fore elect to prevent the application of any national law to that contract.<sup>21</sup> Today, however, the radical idea of a contract with no governing law (*contrat sans loi*) has been rejected in most legal systems.<sup>22</sup>

Clearly, the transnational rules method can be used as a simple substitute for the theory that allows the contract with no governing law, by making the principle *pacta sunt servanda* the cornerstone of *lex mercatoria*, prevailing over all other principles whenever such principles are in conflict. Indeed, certain arbitral awards emphasize the primacy of the binding force of contracts to such an extent that they give some credence to the fears expressed by certain authors that *lex mercatoria* is, at best, a manifestation of the doctrine of *laissez-faire*.<sup>23</sup>

Nevertheless, the transnational rules method does not necessarily imply that the binding force of contracts should be viewed as the ultimate rule. The principle of the binding force of contracts is without question found in most legal systems, and it is clear that such a principle must also be taken into account by arbitrators called upon to decide a case by reference to transnational rules. It does not follow, however, that the principle is the only rule of transnational contract law, and that its application is subject neither to preconditions nor to limitations. For a contract to be binding on the parties, it must have been lawfully entered into, which means, in particular, that the parties must have entered into the contract on the basis of informed consent and not as a result of fraud or mistake.<sup>24</sup> In addition, if the failure to perform a contract is to give rise to an action for specific performance or damages, the failure to perform must not be the result of force majeure or some other event legitimately

<sup>21</sup> Clauses can still be found, albeit rarely, which show a clear nostalgia for the contract with no governing law. See, e.g., the arbitration clause in ICC case No. 4474, which provides: "The Arbitrators shall solve the dispute in accordance with the wording and the spirit of the contract and if necessary they may apply the French law" (emphasis added, unpublished).

<sup>22</sup> See in French law, Cass. June 21, 1950, *supra* note 16 ("tout contrat international est nécessairement rattaché à la loi d'un Etat"). The wording of the Rome Convention of June 19, 1980 according to which "A contract shall be governed by the law chosen by the parties" (Art. 3, para 1, 1st sentence) is usually interpreted in this way. See Lagarde, *Le nouveau droit international privé des contrats après l'entrée en vigueur de la Convention de Rome du 19 juin 1980*, 80 *Revue critique de droit international privé* 287 (1991). On the question generally, see J.M. Jacquet, *Principe d'autonomie et contrats internationaux* 23 (1983); Heuzé, *La réglementation française des contrats internationaux. Etude critique des méthodes* 111 (1990).

<sup>23</sup> See *supra* note 3.

<sup>24</sup> See, e.g., the ICC award rendered in 1981 in case No. 3327, 109 *Journal du droit international* 971 (1982), note Derains. On transnational rules regarding the validity of a contract, see Fouchard, Gaillard, Goldman, *Traité de l'arbitrage commercial international*, 1996, no. 1464 et seq.

excusing performance.<sup>25</sup> Furthermore, the calculation of the extent of recoverable loss is also subject to rules that have a bearing on the outcome of a dispute.<sup>26</sup> In all these areas, arbitral tribunals applying general principles have reached decisions from which it is clear that, no more than in any given national law, the principle of the binding force of contracts is not the only rule governing the resolution of contractual disputes.<sup>27</sup> In other words, the transnational rules method is perfectly able to address the policy concerns of defending the interests of parties needing protection, and of encouraging fair business practice.

The body of rules developed in arbitral practice on the subject of corruption is a good example of how transnational rules do not necessarily operate *in favorem validitatis*. There is now little doubt that, in spite of resistance in some quarters,<sup>28</sup> a transnational rule has been established according to which an agreement reached by means of corruption of one of the signatories, be it a government agency (in a public law context) or an employee of a party (in a private law context), is void, or, at the very least, may not give rise to an award based on the contract in question.<sup>29</sup>

This example also shows that the criticism that transnational rules are too few in number and often contradictory rests on an inaccurate assumption. The principle of the binding force of contracts, and the various principles limiting its scope, are not at all in contradiction. On the contrary, they follow the logic of “principle - conditions - exceptions” that recurs in all legal systems. In the same way, the view that *lex mercatoria* contains contradictory principles such as *pacta sunt servanda* and *rebus sic stantibus*<sup>30</sup> is ill-founded. Should the theory of

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<sup>25</sup> See, e.g., the ICC award rendered in 1974 in case No. 2142, 101 *Journal du droit international* 892 (1974), note R.T. On transnational rules regarding force majeure and similar defenses, see Gaillard, *supra* note 24 and Rivkin, *Lex Mercatoria* and Force Majeure, in *Transnational Rules in International Commercial Arbitration* 161 (E. Gaillard ed., 1993).

<sup>26</sup> See, e.g., the ICC award rendered in 1968 in case No. 1526, 101 *Journal du droit international* 915 (1974), note Derains. On the transnational rules on damages, see Gaillard, *supra* note 24; Hanotiau, *La détermination et l'évaluation du préjudice réparable: principes généraux et principes en émergence*, in *Transnational Rules in International Commercial Arbitration* 209 (1993).

<sup>27</sup> See also, the UNIDROIT Principles of International Commercial Contracts (1994).

<sup>28</sup> See Oppetit, *Le paradoxe de la corruption à l'épreuve du droit du commerce international*, 114 *Journal du droit international* 5 (1987).

<sup>29</sup> On the question of whether corruption renders the subject matter non-arbitrable or whether, as is generally accepted today, arbitrators must retain jurisdiction and declare the agreement void, see Goldman, *Convention d'arbitrage. Arbitrabilité*, 1989 *Juris-classeur de droit international* 586-3; Wetter, *Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Lagergren's Award in ICC Case No. 1110*, 10 *Arb. Int'l* 277 (1994).

<sup>30</sup> See Kassis, *supra* note 10, at 349.

unforeseeability in fact be considered as a general principle of international commercial law,<sup>31</sup> its acceptance as such would be no more contradictory with the theory of the binding force of contracts than it is in each of the various legal systems in which the same two theories are found.<sup>32</sup>

Properly understood, the substantive rules method cannot be reduced to a means of making the will of the parties the ultimate rule, thus resurrecting the theory of the contract with no governing law. On the other hand, the method should not be used to compromise the effectiveness of the parties' choice of a particular national law to govern their agreement.

## 2. *Transnational Rules as a Means of Displacing the Law Chosen by the Parties*

In an international context, the freedom of the parties to choose the law governing their relationship is widely recognized. However, various theories have been put forward which seek to restrict the effects of the parties' choice, even where, as is very often the case in practice, the parties have expressly chosen to have their potential disputes governed by a particular national law. According to one such theory, where the chosen national law is silent on a given issue, arbitrators should fill the gaps by using *lex mercatoria*, general principles of law or, if a state contract is involved, the principles of public international law.<sup>33</sup>

An example of this theory put into practice can be seen in an award rendered in a recent International Centre for Settlement of Investment Disputes (ICSID) arbitration. In its award on the merits, dated May 20, 1992, the tribunal in the *SPP v. Arab Republic of Egypt*<sup>34</sup> arbitration held that even if, as the Arab Republic of Egypt argued, Egyptian law were applicable because it was the law chosen by the parties, this did not exclude the application of principles of international law in order to fill any lacuna in Egyptian law. Applying this line of reasoning, the tribunal concluded that Egyptian law did not contain any rule governing the determination of the starting point for the calculation of in-

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<sup>31</sup> See for a negative answer, Van Houtte, *Changed Circumstances and Pacta Sunt Servanda*, in *Transnational Rules in International Commercial Arbitration* 105 (1993); and, in the affirmative, the UNIDROIT Principles, *supra* note 27, at art. 6.2.1-6.2.3.

<sup>32</sup> For an analysis of comparative law on unforeseeability, see, e.g., D.M. Philippe, *Change-ment de circonstances et bouleversement de l'économie contractuelle* (1986).

<sup>33</sup> This notion was maintained by certain authors during the discussion that led to the passing, in Cairo, in April 1992, of the International Law Association's resolution on the application of transnational rules in international commercial arbitration, 1994 *Revue de l'arbitrage* 211. It explains why a draft resolution condemning the application of transnational rules where the parties have expressly chosen a specific legal system to govern their contract has not been adopted. For a discussion, see *Transnational Rules in International Commercial Arbitration*, *supra* note 25, at 86-87.

<sup>34</sup> Composed of MM. Jiménez de Aréchaga, President, Pietrowski and El Mahdi, arbitrators, the latter dissenting.

terest, and that it was therefore necessary to resolve the issue by reference to international law.<sup>35</sup> If the tribunal's conclusion is accurate, one can only wonder what Egyptian judges do each time they are required to calculate the amount of interest due in a dispute governed solely by domestic law. This solution is so blatantly wrong that it suffices to discredit the method used.

However, it is the idea that national laws contain lacunae that is unsound, rather than the concept of transnational rules. When a court is faced with a difficulty such as that raised in the *SPP* case, it will resolve it, if need be by drawing from general principles of the applicable national law.<sup>36</sup> The concept of lacunae is unnecessarily harmful in that it leads to the conclusion that certain legal systems contain more lacunae than others, and hence that there exist some legal systems insufficiently "developed" to handle all the questions raised by major international ventures. The sort of discrimination that is likely to result from such a notion is well-known; the long-term discredit suffered by international arbitration as a result of the award rendered by Lord Asquith in 1951<sup>37</sup> has received enough commentary to make further discussion of the issue unnecessary here.<sup>38</sup>

These suspect applications of transnational rules should not lead to a wholesale condemnation of the transnational rules method. It is not the transnational rules method itself that merits criticism, but rather the idea that national laws contain lacunae and thus permit the application of transnational rules even when the parties have expressly submitted their disputes to a given national law. This confusion is unfortunate, but it is not such as to call into question the intrinsic value of transnational rules. It is therefore essential to ensure that a distinction is made between situations where it is inappropriate to employ transnational rules and situations where their application is legitimate.

#### *B. Cases Where it Is Legitimate to Apply Transnational Rules*

There are three categories of transnational rules legitimately applied by international commercial arbitrators: transnational choice of law rules (1), substantive transnational rules (2) and transnational public policy rules (3).

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<sup>35</sup> 121 *Journal du droit international* 229 (1994), note Gaillard.

<sup>36</sup> See also, Delaume, *The Pyramids Stand—The Pharaohs Can Rest in Peace*, 8 *ICSID Rev.—FILJ* 231 (1993); the dissenting opinion of El Mahdi, 8 *ICSID Rev.—FILJ* 400 (1993), Gaillard, 118 *Journal du droit international* 183 (1991).

<sup>37</sup> 18 *I.L.R.* 144 (1951).

<sup>38</sup> On the question generally, see Fouchard, Gaillard, Goldman, *supra* note 24, at No. 1512.

### 1. *Transnational Choice of Law Rules*

When arbitrators wish to use choice of law rules in order to determine the law applicable to the dispute before them, those choice of law rules will often be of transnational origin.

While transnational choice of law rules are not the only means of determining the applicable law, the respective merits of the different methods of determining the applicable law are not discussed here.<sup>39</sup> However, it should be noted that the application of the choice of law rules of the seat of the arbitration, as advocated by those who see the seat as amounting to a domestic forum,<sup>40</sup> is a method that is hardly adapted to the international nature of commercial arbitration.<sup>41</sup> To apply the choice of law rules of the seat will often lead to results that are unpredictable and which therefore fail to meet the policy imperatives of reliability often advanced to justify the conflicts method.

This can be seen in the example of a sale of goods contract between a Nigerian and a French company, which provides for arbitration in Cairo. The application of the conflicts rules of the law of the seat would lead, absent agreement between the parties, to the dispute being governed by the law of the place of execution of the contract, under Article 19 of the Egyptian Civil Code of 1948. However, the application of general principles of private international law would more probably lead to the application of the law of habitual residence of the seller, given the influence on transnational rules of the 1955 Hague Convention on the International Sale of Goods.<sup>42</sup> However, the recent adoption in Egypt of a choice of law rule specific to international arbitration now enables the problem to be avoided.

The application of choice of law rules specific to international arbitration can only escape the same criticism if, as with the Swiss law of 1987 or the Egyptian law of 1994, the rule applied is sufficiently flexible as to allow the ar-

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<sup>39</sup> On the question generally, see, e.g., Goldman, *Les conflits de lois dans l'arbitrage international de droit privé*, 109 *Recueil des cours* 347 (1963); P. Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, 1976 *Revue de l'arbitrage* 155; Derains, *Attente légitime des parties et droit applicable au fond en matière d'arbitrage commercial international*, 1985 *Travaux du comité français de droit international privé* 81; Gailard, *supra* note 24.

<sup>40</sup> See, e.g., the resolution of 1957 of the Institut de droit international and Sauser-Hall's Report, *Annuaire de l'institut de droit international* 469 (1957).

<sup>41</sup> *Id.*

<sup>42</sup> See, e.g., the ICC award rendered in 1985 in case No. 4996, 113 *Journal du droit international* 1131 (1986), note Derains.

bitrators to satisfy the policy imperative of predictability considered to underpin the choice of law process.<sup>43</sup>

As to the “direct” method which, in the absence of an agreement by the parties, allows arbitrators the freedom to choose the legal rules applicable to the substance of the dispute, in the same way as the parties could have done, it is clear that the exercise of this freedom almost always only serves to justify the application of transnational choice of law rules. Arbitrators do not, in fact, arbitrarily use the freedom made available to them by an increasing number of national laws of international arbitration.<sup>44</sup> In seeking to determine the most appropriate applicable law (or, if the seat is in jurisdictions such as Switzerland or Egypt, in seeking to determine the law that has the “closest connection” with the case), the arbitrators assess the respective value of each of the different factors (e.g., the place of signature of the contract, the place of performance, or the habitual residence of the parties) that are likely to lead to the application of one of the connected laws. In so doing, arbitrators will of course consider the precedent constituted by other arbitral awards rendered in analogous situations, as well as the solutions adopted in the various relevant systems of private international law. The comfort that the arbitrators find in such precedents, as opposed to the daunting freedom to reinvent private international law for each new dispute (or even to determine the closest connection on a case by case basis), usually leads to arbitrators applying, implicitly or expressly, generally accepted principles of private international law.<sup>45</sup>

Arbitral practice offers many examples of the *lex mercatoria* of private international law, although of course one hesitates to call it that, wrongly accustomed as we are to viewing *lex mercatoria* and private international law as concepts that are diametrically opposed.<sup>46</sup>

## 2. Substantive Transnational Rules

International commercial arbitrators legitimately apply substantive rules of transnational origin in two situations: (a) where the arbitrators are to rule upon the existence and the validity of the arbitration agreement; and (b) where the parties intended to submit the merits of their dispute to such rules or did not specify the applicable law.

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<sup>43</sup> See Swiss Law (LDIP), Art. 187 and Egyptian law No. 27, Art. 39, providing that, absent any choice made by the parties, the arbitral tribunal applies the rules of law with which the case has the closest connection.

<sup>44</sup> See, e.g., French nouveau code de procédure civile, Art. 1496; Dutch Civil Procedure Code, Art. 1054 and Tunisian law of April 26, 1993 reforming arbitration law, Art. 73(2).

<sup>45</sup> See also Lalive, *supra* note 39; A. Bucher, *Le nouvel arbitrage international en Suisse* 249 (1988); Gaillard, *supra* note 24.

<sup>46</sup> For an analysis of the principal transnational conflicts rules, see Goldman, *supra* note 1.

*a. Substantive Transnational Rules Relating to the Existence and the Validity of the Arbitration Agreement*

In the context of international arbitration, one of the situations where the use of the choice of law method, irrespective of the source of the choice of law rules, is least justified, is where the arbitrators are asked to rule on the existence and the validity of the arbitration agreement from which their own authority is derived.

The principal choice of law rules in national legal systems are not well suited to apply to arbitration agreements. This is true both for widely accepted rules—such as those that designate the law of the place of performance of the contract or the law of habitual residence of the party performing the obligation that is characteristic of the contract—and for more archaic rules such as those that designate the law of the place of signature of the contract.

Applying the law of the place of signature of the arbitration agreement would leave the question of the validity of the arbitration agreement to chance or to the cunning of the parties, which is hardly consistent with the purpose of the choice of law approach. Basing the choice of applicable law on the habitual residence of the party performing the obligation that is characteristic of the contract is meaningless in the context of an agreement to arbitrate, and the law of the place of performance is scarcely of more relevance. Of course, the question could be resolved by reference to the law of the seat of the arbitration, but the seat is often chosen for reasons of geographical or other convenience that have no bearing on the issue of whether the arbitration agreement is valid or not. Further, the application of the law of the seat is inappropriate as it would again leave the validity of the arbitration agreement to chance or to the cunning of the parties.

It would also be inappropriate to apply to the arbitration agreement either the law chosen by the parties to govern the merits of the case or the law likely to result from the application of choice of law rules designed to determine the law applicable to the underlying agreement. To apply either of such laws would not only fail to respect the principle of the severability of the arbitration agreement, now accepted in most jurisdictions, but it would also lead to results that might be completely at odds with the parties' legitimate expectations. Frequently, the parties will have negotiated a compromise whereby their substantive agreement is governed by the national law of one of the parties (for example the law of the country in which the agreement is performed), but where the dispute resolution mechanism is neutral (e.g., institutional international arbitration or arbitration in a third state). To have the validity of the arbitration agreement depend upon the particularities of the law chosen by the parties to govern the substance of the dispute would undoubtedly upset the balance sought by the parties in such a situation.

This point is well illustrated by the facts in the *Dalico* case, where International Chamber of Commerce (ICC) arbitrators, as well as the French courts upon reviewing the award, applied substantive transnational rules to decide whether an arbitration agreement was valid. The dispute was between a Danish party and a Libyan party and concerned a works contract performed in Libya. The parties had provided that Libyan law would govern the contract, but they had also referred to a document stipulating that any disputes would be resolved by ICC arbitration in Paris. The existence and validity of the arbitration agreement was then contested before the arbitrators, as well as before the French courts in an action to set aside. Rather than have the validity of the agreement dependent upon the particularities of Danish or Libyan law, the arbitrators and the French courts preferred instead to base their decisions solely on generally accepted principles of international commerce.<sup>47</sup>

This in no way signifies that the arbitration agreement will be systematically held to be valid. The agreement will be held to be void if it is found that one of the parties did not consent to arbitration, or if, for example, consent was obtained by duress or through the corruption of the signatory.<sup>48</sup> On the other hand, atypical national laws (e.g., those requiring the reiteration of the arbitration agreement once litigation has begun<sup>49</sup>) will, even if they have links with the case, not lead arbitrators applying substantive transnational rules to hold the arbitration agreement to be void. Here again, the solution reached is consistent with the international character of arbitration and should be unreservedly approved.<sup>50</sup> Such a solution will not prevent courts from refusing to enforce an award based on generally accepted principles, if they consider that the approach taken in their own jurisdiction reflects fundamental domestic public policy. However, this solution does prevent the uncertainties of the conflicts method from giving rise to the application of substantive rules that are not adapted to an international context.

*b. Substantive Transnational Rules Relating to the Merits of the Dispute*

When the parties have chosen to have their dispute governed by transnational rules (by referring, in particular, to general principles of international

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<sup>47</sup> See *Municipalité de Khoms El Mergeb c/ Société Dalico*, Cour de cassation Civ. 1ère, Judgment of December 20, 1993, 1994 *Revue de l'arbitrage* 116, note Gaudemet-Tallon; 121 *Journal du droit international* 432 (1994), note Gaillard.

<sup>48</sup> On the generally accepted transnational rules regarding the existence and the validity of the arbitration agreement, see, e.g., Fouchard, Gaillard, Goldman, *supra* note 24, at No. 435 et seq.

<sup>49</sup> On the continued existence of this requirement in the laws of certain Latin American countries, see, e.g., Rangel, Brazil, in *International Handbook on Commercial Arbitration* (A. van den Berg & P. Sanders eds., 1988).

<sup>50</sup> On the question generally, see Gaillard, *supra* note 47, at 433.

commercial law, international arbitral practice, principles common to certain legal systems, or *lex mercatoria*), the arbitrators are bound to give effect to that choice, whether or not they consider such choice appropriate. Most recent statutes regarding international arbitration recognize the parties' right to choose transnational rules, by providing that arbitrators are required to apply "the rules of law" rather than "the law" chosen by the parties.<sup>51</sup>

A more controversial question is whether the arbitrators, in the absence of an agreement between the parties on the law applicable to the merits of the dispute, can choose to apply transnational rules rather than a national law selected by means of traditional choice of law rules. Certain legal systems do not encourage this solution, and neither does the United Nations Commission on International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (the Model Law), known for its relative conservatism. Article 28(2) of the Model Law provides that, absent a choice by the parties, "the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable." However, Article 28(2) does not refer to "the rules of law" in the same way as Article 28(1) as regards the choice of law made by the parties.<sup>52</sup> It is true that arbitrators are in practice given a certain amount of latitude by the absence of a provision in the Model Law permitting the review of the arbitrators' decision as to applicable law during an action to set aside in the country of the seat.<sup>53</sup> In contrast, other recent laws permit arbitrators to apply transnational rules if they deem it appropriate and absent agreement by the parties.<sup>54</sup>

This notion was embodied in a resolution adopted by the International Law Association in Cairo on April 28, 1992, to the effect that

the fact that an international arbitrator has based an award on transnational rules (general principles of law, principles common to several jurisdictions, international law, usages of trade, etc.) rather than on one law of a particular State should not in itself affect the validity or enforceability of the award: (1) where the parties have agreed that

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<sup>51</sup> See, e.g., French nouveau code de procédure civile, Art. 1496, Dutch Civil Procedure Code, Art. 1054(1), the Swiss LDIP, Art. 187, or UNCITRAL Model Law, Art. 28(1).

<sup>52</sup> See Fouchard, *La loi type de la CNUDCI sur l'arbitrage commercial international*, 114 *Journal du droit international* 861 (1987); H.M. Holtzmann & J.E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration* 764 (1989).

<sup>53</sup> UNCITRAL Model Law, *supra* note 51, at art. 36.

<sup>54</sup> See, e.g., French nouveau code de procédure civile, Art. 1496; Dutch Civil Procedure Code, Art. 1054(2) and Swiss LDIP, Art. 187.

the arbitrator may apply transnational rules; or (2) where the parties have remained silent concerning the applicable law.<sup>55</sup>

Here again, the application of substantive transnational rules is entirely legitimate, although it is obviously not the only possible course of action. The main criticism made regarding the application of these rules in the absence of agreement between the parties is the uncertainty of their content, which contrasts with the perceived certainty of the solutions provided by national law. Nevertheless, in practice, when the parties have not chosen the applicable law, it will often be less in accordance with the policy imperatives of predictability and consistency to require the arbitrators to choose between available national laws, than to apply general principles drawn from international arbitral practice and comparative law.<sup>56</sup> This is illustrated in particular when two or more legal systems are equally closely linked to the dispute, as in the *Norsolor* case, decided in 1979 by an arbitral tribunal<sup>57</sup> sitting in Vienna.<sup>58</sup>

### 3. *Transnational Public Policy*

State courts, in actions to set aside or enforce an award, will ensure that the award does not violate the conception of international public policy of the forum. Undoubtedly, the conception of international public policy of the forum will not be the same as that of the domestic public policy, but it is nonetheless a body of rules of national origin. The 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention) recognizes this explicitly when it addresses the review of the conformity with public policy of the country in which recognition and enforcement are sought.<sup>59</sup>

However, the issue is different for arbitrators. As they are not restricted by any one legal system, arbitrators are free to retain a truly transnational conception of international public policy. During the VIIIth Congress of the International Council for Commercial Arbitration (ICCA), held in New York in 1986, Pierre Lalive elaborated on this theme in an extremely convincing man-

<sup>55</sup> 1994 *Revue de l'arbitrage* 211. For an in-depth discussion of this resolution, see *Transnational Rules in International Commercial Arbitration*, *supra* note 25, at 37.

<sup>56</sup> See *infra* note 64 and accompanying text.

<sup>57</sup> Composed of MM. Bernardo Cremades, President; Ghestin and Steiner, arbitrators.

<sup>58</sup> ICC case No. 3131, 1983 *Revue de l'arbitrage* 525. On the subsequent proceedings, see, e.g., Goldman, *Une bataille judiciaire autour de la lex mercatoria: L'affaire Norsolor*, 1983 *Revue de l'arbitrage* 525.

<sup>59</sup> New York Convention, Art. V para. 2(b).

ner.<sup>60</sup> It is not therefore necessary to dwell on the issue here. In any case, arbitrators only have to take into consideration the requirements of conformity with the international public policy of the seat of the arbitration to the extent necessary to avoid having their award set aside; the same is true with respect to the various states in which the award is likely to be enforced. The international effectiveness of an arbitral award, alluded to in Article 26 of the ICC Rules of Arbitration, is something that arbitrators should legitimately take into account. It is possible, however, that this purely utilitarian concern will conflict with the arbitrators' own conception of the essential requirements of international morality. This may be the case, in particular, where the country of the seat of the arbitration has a conception of international public policy that is isolated on a global level, but well established locally: the boycott of a state on racial or religious grounds is an example.

In the rare cases where it appears that the conflict between the conception of international public policy of the seat and that of truly international public policy cannot be resolved, the latter concept should nonetheless prevail before the arbitrators, as it alone is in keeping with the international nature of arbitration.<sup>61</sup> One arbitral award has already made tentative steps in this direction.<sup>62</sup> This solution is also supported in the case law of countries like France, which allow for the enforcement of an award that has been set aside in the country of the seat of the arbitration, provided that the award satisfies the relevant conditions imposed in the country of enforcement.<sup>63</sup>

In the cases described above, we are in no doubt that the application of transnational rules is legitimate. We will now discuss how the parties and the arbitrators establish the content of such rules.

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<sup>60</sup> P. Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, 3 ICCA Congress Series 257 (1987); *Ordre public transnational (ou réellement international) et arbitrage international*, 1986 *Revue de l'arbitrage* 329. See also Matray, *Arbitrage et ordre public transnational*, in *Etudes Sanders* 244 (1982).

<sup>61</sup> See *supra* note 17 and accompanying text. Compare with Mayer, *La règle morale dans l'arbitrage international*, in *Etudes offertes à Pierre Bellet*, *supra* note 13, at 379, 390, who, on the basis that the arbitrators do not have a forum, considers the will of the arbitrator to be the justification for displacing a rule that would otherwise apply, when such a rule is contrary to the arbitrator's conception of morality.

<sup>62</sup> See the award rendered in 1984 by MM. E. Jiménez de Aréchaga, K.H. Böckstiegel and J.H. Pickering in ICC Case no. 4695, 11 *Y. B. Com. Arb.* 149 (1986).

<sup>63</sup> See *Société Hilmarton Ltd c/ Société Omnium de traitement et de valorisation*, Cour de cassation Civ. Ière, Judgment of March 23, 1994, 121 *Journal du droit international* 701 (1994), note Gaillard.

### III. THE CONTENT OF TRANSNATIONAL RULES

The transnational rules method is often criticized because of the perceived difficulty of determining the content of the rules with any precision. The credibility of the method is therefore as dependent upon the determination of the content of the rules as it is upon their legitimacy.

The content of transnational rules is of course a subject that can only be fully analyzed through extensive comparative law studies.<sup>64</sup> The following discussion will therefore be confined to two essential aspects of the process by which transnational rules are formed: (A) the idea that transnational rules are a method, not a list; and (B) the fact that the foundation for transnational rules in comparative law need not be unanimous.

#### *A. Transnational Rules: A Method, Not a List*

Lord Mustill's influential article on *lex mercatoria*, written for the twenty-fifth anniversary of the subject,<sup>65</sup> gave rise to a certain amount of misunderstanding. By setting forth a list of twenty transnational rules encountered in arbitral practice, Lord Mustill hardly intended to defend *lex mercatoria*. Rather, his point was to emphasize the relative poverty of the method, with a mere twenty principles, particularly when compared with the wealth of domestic laws. However, supporters of *lex mercatoria*, whether genuinely or not, expressed satisfaction with the large number of principles listed. In addition, the fact that some of the principles so listed are of an extremely specific nature (e.g., those on interest and damages) provided further support for the view that the rules are not so general as to have no practical utility.<sup>66</sup>

However, the presentation of transnational rules as a list of principles is misguided: transnational rules should not be thought of as a list, but rather as a method.

Whenever arbitrators or counsel are required to apply transnational rules, such as in cases where the parties so agree,<sup>67</sup> the first step is to ascertain whether the parties themselves have given any indication as to how the applicable rules should be determined. This will be the case, for example, when the parties have selected as the applicable law principles common to two or more legal systems. Thus, the arbitrators sitting in the Eurotunnel case were required to

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<sup>64</sup> See the examples *infra*.

<sup>65</sup> See Mustill *supra* note 7.

<sup>66</sup> See, e.g., Kahn, *Les principes généraux du droit devant les arbitres du commerce international*, 116 *Journal du droit international* 305, 325 (1989). For a response to the argument that the list is short, see also Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, 6 *Arb. Int'l* 133 (1990) and Goldman, *Nouvelles réflexions sur la lex mercatoria*, *supra* note 1, at 243.

<sup>67</sup> See *supra* note 51 and accompanying text.

apply “the principles common to English and French law” and, failing that, “the principles of international commercial law as they have been applied by national and international tribunals.” Similarly, arbitrators sitting in ICC case No. 5163 had to apply “the principles common to the laws of the Arab Republic of Egypt and the United States of America.”<sup>68</sup> In the same way, the parties may use geographical criteria to restrict the applicable general principles. Thus, for example, the arbitrators sitting in ICC case No. 6378 were required to apply “general principles of law applicable in Western Europe.”<sup>69</sup> In other cases, the arbitrators were asked to apply “general principles of law applicable in Northern Europe.”<sup>70</sup> Other examples involve arbitrators being required to refer first to a particular national law and, failing that, to general principles of international commercial law.<sup>71</sup>

When seeking to establish the parties’ intentions, arbitrators should take a flexible approach, striving to give the terms of the contract the meaning that the parties understood them to have. Thus, for instance, while the phrase “trade usages,” as used in Article 13.5 of the ICC Rules and Article 1496 of the new French Code of Civil Procedure, does not refer to transnational rules but rather to trade practices generally observed in particular areas of international commerce,<sup>72</sup> it is always possible that parties providing for the application of “trade usages” intended general principles of international commercial law to apply. Such an interpretation should be adopted, for example, where the only alternative conclusion is that the parties intended to enter into a contract with no governing law, which would oblige the arbitrators themselves to determine the law applicable to the contract.<sup>73</sup> In other cases, the term “usages” has the same meaning as in Article 13.5 of the ICC Rules.<sup>74</sup>

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<sup>68</sup> Unpublished clause. On the “tronc commun” method, which is one of the specific ways in which the transnational rules method is applied, see Rubino-Sammartano, *Le tronc commun des lois nationales en présence: réflexions sur le droit applicable par l’arbitre international*, 1987 *Revue de l’arbitrage* 133.

<sup>69</sup> Unpublished clause.

<sup>70</sup> Unpublished clause.

<sup>71</sup> See, e.g., the unpublished arbitration clause seen in ICC case No. 5331: “This agreement shall be given effect and shall be applied in accordance with the terms of this Agreement, then with the Federal law of the United Arab Emirates and then with generally recognized principles of international commercial law.” On the meaning of this wording which, in ICSID arbitration, corresponds, absent party agreement, to the application of Art. 42 (1) of the Washington Convention, see Gaillard, 118 *Journal du droit international* 181 (1994).

<sup>72</sup> On this question, see Gaillard, *supra* note 13, at 203.

<sup>73</sup> See *supra* note 21 and accompanying text.

<sup>74</sup> See, e.g., in ICC case No. 4722: “the arbitration committee shall take into consideration the terms of the contract and the trade usages” (unpublished clause).

Failing a clear indication by the parties as to how the applicable transnational rules are to be determined, the second step of the process involves counsel and arbitrators carrying out an analysis of comparative law in order to establish the relevant rule or rules. Although precedents from arbitral case law are unquestionably of importance, they are not the only source. While at the same time respecting due process,<sup>75</sup> it is incumbent upon counsel and arbitrators to show that national laws converge on particular points at issue, thereby establishing a transnational rule that is capable of being applied. If the analysis of comparative law has not already been carried out, it must be undertaken by counsel, a task that is no more arduous than, say, researching the content of various national laws connected to a dispute, in order to establish what is at stake when the traditional choice of law method is used in the absence of any agreement on the applicable law.

Accordingly, the transnational rules method cannot be criticized for being vague or incomplete. However detailed the question at issue, the transnational rules method will produce a solution, in the same way as national laws. The example of limitation periods, often cited as highlighting the inadequacies of the transnational rules method, is very telling in this respect. Suppose that an item, sold under an international sale of goods contract with no applicable law provision, has a latent defect, and that one of the parties alleges that a claim based on the defect is time barred by limitation rules. The arbitrators may, justifiably, not want to have the resolution of this dispute dependent upon the national law of one of the parties, particularly if the case has equally strong connections with more than one national law. In such an instance, the application of the general principles method is an adequate alternative, and can be arrived at by reference to international rules,<sup>76</sup> such as the Vienna Convention of 1980 on International Sales of Goods or the International Institute for the Unification of Private Law (UNIDROIT) Principles,<sup>77</sup> as well as by reference to a comparison of the various legal systems connected to the case.

In determining the content of transnational rules, parties and arbitrators are not, however, wholly reliant on access to a huge volume of comparative law studies. There are various other sources enabling arbitrators to establish the existence of these rules, and then to evaluate their support in comparative law.

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<sup>75</sup> It is important to emphasize here that arbitrators cannot, without violating the requirement of due process, decide the dispute by applying a particular transnational rule without having heard the parties' views as to the rule's existence and content. This is particularly so in the situation where, failing the parties' agreement on applicable law, the arbitrators decide on their own to resolve the dispute by reference to transnational rules.

<sup>76</sup> See the Vienna Convention, Art. 38 *et seq.*

<sup>77</sup> See UNIDROIT Principles, Art. 7.2.2.

The most authoritative source is undoubtedly the body of international conventions on a particular subject matter. The fact that a certain number of states have adopted a rule by signing, or indeed ratifying, a convention in which that rule is contained, is an obvious indicator of the international recognition of such rule. The greater the number of states that are party to the convention, and the more diverse their origin, the more authoritative the rule. It is not therefore surprising that many awards dealing with the international sale of goods now make reference to the 1980 Vienna Convention.<sup>78</sup> Similarly, when faced with questions of applicable law, arbitrators often refer to the 1955 Hague Convention, whose rules were followed and expanded in the 1980 European Convention on the Law Applicable to Contractual Obligations (Rome Convention).<sup>79</sup> Even when a convention is not yet in force, it possesses a certain degree of authority in that it represents the opinion of the delegates from the various states that negotiated the convention. Accordingly, international commercial arbitrators frequently refer to international conventions yet to enter into effect as evidence of the existence of a transnational rule.<sup>80</sup>

Monographs on comparative law are also a useful source, especially if they specifically address the determination of transnational rules.<sup>81</sup> The Arbitration Committee of the International Law Association has devoted a series of studies to the following transnational rules: change of economic circumstances and *pacta sunt servanda*, estoppel, the duty to cooperate in long term-contracts, the *exceptio non adimpleti contractus*, force majeure, the determination of recoverable damages, and interest.<sup>82</sup>

Particular mention must be made of the remarkable achievement of the UNIDROIT working group, which in May 1994, published a collection of *Principles of International Commercial Contracts*.<sup>83</sup> These principles are specifically intended to be applied "when parties have agreed that their contract be governed by 'general principles of law,' the '*lex mercatoria*' or the like."<sup>84</sup> The col-

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<sup>78</sup> See, e.g., the ICC award rendered in 1992 in case No. 7153, 119 *Journal du droit international* 1005 (1992), note Hascher.

<sup>79</sup> See, e.g., the ICC award rendered in 1989 in case No. 5713, 15 *Y. B. Com. Arb.* 70 (1990).

<sup>80</sup> See, e.g., the ICC award rendered in 1989 in case No. 5885, 16 *Y. B. Com. Arb.* 91 (1991).

<sup>81</sup> See, e.g., Osman, *supra* note 3.

<sup>82</sup> See the respective contributions of Houtte, Bowden, Bernardini, O'Neill and Salam, Rivkin, Hanotiau and Karrer in *Transnational Rules in International Commercial Arbitration*, *supra* note 25. See also the excellent article by Loquin, *La réalité des usages du commerce international*, 1989 *Revue générale du droit économique* 163.

<sup>83</sup> Publication of UNIDROIT (1994).

<sup>84</sup> Preamble at 1.

lection comprises 108 principles presented in the style of a codification or “restatement,” and accompanied by commentary explaining the meaning of each principle. Some of these principles will no doubt be challenged. Nevertheless, the publication of the results of this extensive study of applied comparative law is a most valuable contribution to the determination of transnational rules.<sup>85</sup> The UNIDROIT principles also evidence the fact that the support for transnational rules provided by comparative law need not be unanimous.

*B. The Support for Transnational Rules in Comparative Law Need Not Be Unanimous*

As regards the extent to which it is necessary to have a basis in comparative law for the formation of a transnational rule, we will show in turn (1) that the unanimity of legal systems is not required and (2) that general regional principles do exist.

*1. The Unanimity of Legal Systems Is Not Required for the Formation of a Transnational Rule*

It has at times been suggested that in order to establish the existence of a transnational rule, it is necessary to prove that the rule can be found in every legal system, or at least in every leading legal system. Thus, for example, in his lecture to The Hague Academy of International Law on *L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence*, Pierre Mayer questions whether the severability of the arbitration agreement is a general principle of the law of international arbitration. Mr. Mayer argues, prior to the recognition of the severability principle by English law in *Harbour v. Kansa*, that “even if the position of English law is relatively isolated, the fact that it is one of the most developed legal systems, together with the fact that England is a prominent place for international arbitration (at least in certain fields), prevents the existence of the consensus necessary for the establishment of a general principle of law.”<sup>86</sup>

If this point of view were to prevail, the fears held by many as regards transnational rules would be justified. Without exploring in detail the dangers inherent in this theory—which are similar to those inherent in the “lacunae” theory—<sup>87</sup> a requirement for unanimity, or at least the existence of a veto exercisable by legal systems considered to be among the “most developed,” significantly reduces the usefulness of the transnational rules method, as well as

<sup>85</sup> See the working papers of the ICC-UNIDROIT Symposium on the UNIDROIT Principles of International Commercial Contracts: A New *Lex Mercatoria*, held in Paris on October 20–21, 1994. See also M.J. Bonell, *An International Restatement of Contract Law. The UNIDROIT Principles of International Commercial Contracts* (1994).

<sup>86</sup> See Mayer, *L'autonomie de l'arbitre international dans l'appréciation de sa propre compétence*, 217 *Recueil des cours* 319 (1989). On the current status of English law, see *infra* note 91.

<sup>87</sup> See *supra* note 33 and accompanying text.

calling into question its neutrality. What use is the general principles method if it is applied only to determine rules already present in every legal system? Moreover, if transnational rules were to be reduced to their smallest common denominator (which would of course include the principles of the binding force of contracts and the duty to perform contractual obligations in good faith), they would effectively afford the parties complete freedom of action, because the restrictions customarily applicable to such rules are unlikely to be present in every legal system, and would therefore themselves not be considered to be transnational rules. In such a situation, the criticisms that the method amounts to a doctrine of “*laissez-faire*”<sup>88</sup> would be fully vindicated.

However, this view is caricatural of the general principles method which must be rejected. The whole aim of transnational rules is not to diminish the role of national laws, but rather to avoid having solutions that have not received sufficient support in comparative law prevail over solutions more generally accepted in the international community. This is perfectly in keeping with the intentions of parties who provide for the resolution of their disputes through the application of general principles, rather than national laws upon which they are unable to agree. In cases where the dispute has connections with a wide variety of jurisdictions, the method responds fairly well to the concerns of parties who have not been able to agree on an applicable law clause, or who did not give any thought to the question. In all of these situations, the application of one particular law may lead to unexpected results, whereas applying the solution that reflects the most generally accepted point of view will, contrary to received thinking, meet the concerns of consistency and predictability.

The principle of the autonomy and, in particular, the severability of the arbitration clause, provides a good example of this point. It is clear that this principle has long been widely recognized, as is evidenced, for example, in the rules of the principal arbitral institutions, in comparative law, and in leading international legislation.<sup>89</sup> After the adoption of the UNCITRAL Model Law in many common law jurisdictions, English law had become isolated because

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<sup>88</sup> See *supra* note 6 and accompanying text.

<sup>89</sup> On the question generally, see Fouchard, Gaillard, Goldman, *supra* note 24, at No. 389 et seq.

of its reluctance to accept the autonomy of the arbitration clause,<sup>90</sup> although, in 1993, English law did come into line with the generally accepted position.<sup>91</sup>

Against that background, arbitrators required to apply general principles of law rather than a particular national law could hardly refuse to apply the rule of autonomy of the arbitration clause, even before English law came into line. That refusal based on the lack of unanimity of legal systems to support the rule would result in the least widely accepted rule<sup>92</sup> prevailing over the most widely accepted solution, which cannot be consistent either with the intent of the parties or the aims of the transnational rules method.

Clearly, to require unanimity in comparative law renders the transnational rules method meaningless. The UNIDROIT Governing Council correctly observed, in the introduction to the Principles of International Commercial Contracts, that

the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems. Since however the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted.<sup>93</sup>

This same problem recurs, on a different scale, in the context of regional transnational rules.

## 2. *Regional Transnational Rules*

Sometimes parties who do not wish to submit their potential disputes to the rules of a particular national law choose to have regional general principles apply instead. Thus, for example, contracts may require arbitrators to apply “general principles of law applicable in Western Europe” or “general principles applicable in Northern Europe.”<sup>94</sup> The parties’ contractual freedom to choose the applicable “rules of law” in this way<sup>95</sup> is perfectly legitimate and must be respected by the arbitrators. The actual rules at issue will then be determined by the arbitrators in the same way as for the determination of the content of gen-

<sup>90</sup> On the question, see, e.g., Samuel, Separability in English law, 3 J. Int’l Arb., No. 3, at 95 (1986); Steyn & Veeder, England, in ICCA International Handbook on Commercial Arbitration 14 (1988): “The concept of the separability of the arbitration clause has not yet been fully worked out by the English courts.” Compare a presentation that is much more favorable to the autonomy of the agreement to arbitrate, presented as though “relatively new but widely recognized,” A. Redfern & M. Hunter, International Commercial Arbitration 174 (1991).

<sup>91</sup> Harbour Assurance v. Kansa, [1993] QB 70. See also the draft bill on arbitration article 3(e), 10 Arb. Int’l 189 (1994).

<sup>92</sup> On the example of legal systems that require the restatement of the agreement to arbitrate once the dispute is begun, see *supra* note 22.

<sup>93</sup> See *supra* note 27, at 8.

<sup>94</sup> See *supra* note 67 and accompanying text.

<sup>95</sup> See *supra* note 51 and accompanying text.

eral principles of international commerce. The relevant sources will include international conventions applicable to or ratified by countries in the region, the comparative law of the relevant countries, and the case law of the international tribunals that operate in the region.

Absent agreement by the parties as to the applicable law, the arbitrators, when exercising their powers to determine the "rules of law" applicable to the dispute, can also choose to rely on regional principles. The only issue raised in such circumstances is whether, on the facts, the application of such rules is appropriate: if the dispute is connected exclusively to countries with the same legal tradition, and the conflicts method is not to be used, is it appropriate to submit the dispute to general regional principles, or is it preferable to apply general principles of international commerce?

At first glance, the application of regional principles, or principles drawn from one legal tradition, seems appropriate. For example, in a dispute connected only with two Arab countries, it might seem legitimate to apply only general principles of the laws of Arab jurisdictions. Similarly, in a case having connections only with, say, France and Argentina, it would be possible to apply only principles drawn from civil law sources.

However, closer analysis suggests that this approach is not satisfactory. In practice, arbitrators will be confronted with two types of situation: firstly, where the available laws lead to the same conclusion. In such a case, it would be possible to apply regional principles, but the solution has little practical value because the conflicts method would produce the same result. This first solution is therefore unlikely to be of great practical use, except perhaps for reasons of national sensitivity. The second type of situation is more likely to raise actual controversy in practice, but is more problematic: it is that where the laws connected to the case, albeit from the same legal tradition, do not produce the same result. In such a case, the question of which method to use becomes of great significance. Once it has been decided that the transnational rules method is to be used, it must then be asked whether it is appropriate to look for a solution that is generally accepted in the national laws making up the relevant legal tradition, or rules that are more widely accepted.

Without entering into an exhaustive discussion on the subject, it seems preferable in such a situation to apply rules that have broad support in comparative law, international arbitral practice and leading international conventions, rather than applying rules which, although they may come from the same legal tradition, nonetheless lead to different results. Such a divergence between laws from the same legal tradition in fact indicates that principles from a region or from a same legal tradition are not sufficiently well established, thus making it necessary to apply principles that are accepted as generally applicable. The universalist approach reflected in the transnational rules method should probably prevail over the divergent positions of national laws.



**ICSID Review**

Foreign Investment Law journal

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10 *ICSID Review* 208 (1995)