

# SOME REFLECTIONS ON THE SOURCES OF LEX MERCATORIA

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## I. Mainstreams in the Doctrine Regarding the Sources of Lex Mercatoria

As is known, there are two mainstreams in the doctrine regarding the sources lex mercatoria. The *restrictive view*, which originally belongs to *Schmitthoff*<sup>1</sup>, accepts two sources for lex mercatoria; international conventions & model laws, trade usages and practices. On the other hand, the *liberal view*, which originally belongs to *Goldman*<sup>2</sup> accepts seven sources for lex mercatoria (general principles of international contract law, trade usages and practices, international conventions & model laws, uniform rules, standard contract forms & clauses, codes of conduct and

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<sup>1</sup> **Clive M. Schmitthoff**, International Business Law: a New Law Merchant, Current Law and Social Problems, 1961, p. 149 & The Unification of the Law of International Trade, Gothenburg School of Economics and Business Administration Publication 1964, Gothenburg 1964, p. 6-7.

<sup>2</sup> **Berthold Goldman**, La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives, Journal du Droit International, Vol. 106, 1979, p. 477-478, 487, 498-501.

arbitral awards), currently constitutes the dominant opinion in the modern doctrine <sup>3</sup>.

Regarding the sources of *lex mercatoria*, in lieu of the restrictive view, liberal view is to be preferred, since no satisfying grounds are shown by the restrictive view, particularly while refusing the general principles of international contract law as a source for *lex mercatoria*. In direct contradiction with the restrictive view, pursuant to the liberal view, in conjunction with the trade usages and practices, *general principles of international contract law constitute the essence (“noyau dur”) of lex mercatoria*.

## II. General Principles of International Contract Law

Some authors argue that these general principles shall be understood as “*general principles of law recognized by civilized nations*” defined in the Statute of the International Court of Justice art. 38/1-c <sup>4</sup>. Nevertheless, considering the function of *lex mercatoria*, that shall be dealing with international commercial contract law disputes via substantive a-national rules of law; in lieu of the concept “*general principles of law recognized by civilized nations*”, which is certainly a concept of international public law, taking “*general principles of international contract law*” (which is certainly a concept of comparative private law) as a reference shall be preferable.

Here is another question, shall we include principles regarding conflict of laws, arbitration, procedural law and burden of proof into this category? Some sources, such as Trans-Lex Principles implicate such kind of principles into this category. However, including such principles

<sup>3</sup> **Ole Lando**, *The Law Applicable to the Merits of the Dispute*, Sarcevic (ed.), *Essays on International Commercial Arbitration*, Boston- London 1991, p. 145-146; **Filip De Ly**, *International Business Law and Lex Mercatoria*, North Holland 1992, p. 133- no. 197 et seq.; **Filali Osman**, *Les Principes Generaux de la Lex Mercatoria- Contribution a l’etude d’un ordre juridique anational*, Paris 1992, p. 260 et seq.; **Abul F. M. Maniruzzaman**, *Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration*, *American University International Law Review*, Vol. 14, 1998- 1999, p. 669; **Emmanuel Gaillard**, *Transnational Law: A legal System or a Method of Decision Making?*, *Arbitration International*, Vol. 17, No. 1, 2001, p. 63-64 et seq.

<sup>4</sup> **Lando**, *The Law Applicable to the Merits of the Dispute*, p. 144-145.

into this category, merely due to their frequent use in arbitration proceedings, may weaken the theoretical base of *lex mercatoria*. In my opinion, *lex mercatoria*, in its origin, constitutes a problem of contract law, which aims to resolve international contractual disputes via a-national substantive rules of law, and therefore shall remain as a concept of international contract law.

It is obvious that no one or no institution has the authority to give a *definite list* of “*general principles of international contract law*”. Therefore, arbitrators are expected to conduct a comparative law research to find out if there exists a general principle regarding the subject matter of the dispute, where *lex mercatoria* is applied to the merits of the case. Two main criteria are accepted to be the determining factor in such a comparative law research, firstly the attitude of the three major law systems (*common law, civil law & islamic law*) regarding the principle, secondly the level of acceptance regarding the principle in the international commercial law community.

We shall hereby mention two major instruments of crucial importance, that facilitate the task of arbitrators to conduct a comparative law research, where *lex mercatoria* is applied to the merits of the case; these are the Unidroit Principles of International Commercial Contracts & the Trans-Lex Principles.

Particularly, the Unidroit Principles of International Commercial Contracts is of crucial importance, since these Principles constitute; a *systematic code*, that gathers and concretize “*general principles of international commercial contract law*” together, via an objective study of comparative contract law. Unidroit Principles constitute a highly acknowledged *soft law* instrument in academic circles and in the international commercial law community and a valuable example of “*restatement*” technique, that reflect generally accepted legal solutions of the comparative contract law. Therefore, the dominant opinion in the doctrine accepts Unidroit Principles as an important source for *lex mercatoria*, which concretize the content of “*general principles of international commercial contract law*”<sup>5</sup>.

<sup>5</sup> Ole Lando, A Vision of a Future World Contract Law: Impact of European and Unid-

The *Trans-Lex Database* constitutes an alternative instrument to the restatement technique, an on-line database, that contains scientific articles, monographs and references to arbitral awards regarding each principle, open to free world-wide access for everyone (including academic staff, arbitrators and attorneys), which is based on “*listing*” system, therefore constitutes an open ended list with regular/ permanent updating (“*creeping codification technique*”), granting flexibility in comparison with the restatement tools, since the list may be modified/ updated via an informal and easy procedure in a dynamic manner, presented by Center For Transnational Law of Cologne University. I shall tender special thanks to my dear colleague Prof. Klaus Peter Berger, the operator of the database, since I have intensively benefited from the database while I was working on my thesis on *lex mercatoria*.

Unidroit Principles and *Trans-Lex Database* shall be considered as important tools facilitating the task of arbitrators to conduct a comparative law research where *lex mercatoria* is applied to the merits of the case, but in case the solution of these two tools contradict with each other, the final solution shall always be based on the consequences of a comparative law research <sup>6</sup>.

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roit Contract Principles, *Uniform Commercial Code Law Journal*, Vol. 37, Issue 2, Fall 2004, p. 8; **L. Yves Fortier**, *The New, New Lex Mercatoria, or, Back To The Future*, *Arbitration International*, Vol. 17, No. 2, 2001, p. 125; **Fouchard/Gaillard/Goldman**, *Traite de l'arbitrage commercial international*, Paris 1996, no. 1458; **Arthur Rosett**, *The Unidroit Principles of International Commercial Contracts: A New Approach to International Commercial Contracts*, *American Journal of Comparative Law*, Vol. 46, Supplement (1998), p. 354-355; **Barton S. Selden**, *Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look*, *Annual Survey of International and Comparative Law*, Vol. 2, 1995, p. 119-122; **Gesa Baron**, *Do the Unidroit Principles of International Commercial Contracts Form a New Lex Mercatoria?*, *Arbitration International*, Vol. 15 No. 2, 1999, p. 129-130; **Bruno Zeller**, *The Unidroit Principles of Contract Law; Is There Room for Their Inclusion into Domestic Contracts?*, *Journal of Law and Commerce*, Vol. 26, 2006-2007, p. 125; **Elise Charpentier**, *Les Principes d'Unidroit: une codification de la lex mercatoria*, *Les Cahiers de Droit*, Vol. 46, No. 1-2, mars-juin 2005, p. 198-199; **Joseph Lookofsky**, *The Limits of Commercial Contract Freedom: Under the Unidroit “Restatement” and Danish Law*, *American Journal of Comparative Law*, Vol. 46, 1998, p. 490-491.

<sup>6</sup> **Emmanuel Gaillard**, *Transnational Law: A Legal System or a Method of Decision Making?*, *Arbitration International*, Vol. 17, No. 1, 2001, p. 62-65.

### III. Trade Usages & Practices

As mentioned before, pursuant to the liberal view, in conjunction with the general principles of international contract law, trade usages and practices constitute the essence (*“noyau dur”*) of *lex mercatoria*.

Different than some national law systems, instead of using the concept *“custom”*, Unidroit Principles (art. 1.9) and CISG (art. 9) employs the concepts *“usages”* & *“practices”*. Since international commercial contract law is based on *“freedom of contract”* (*“principle of party autonomy”* principle), consistent repetition of a certain way of conduct to the extent that it is believed to be compulsory to comply with this conduct (*“opinio juris sive necessitatis”*), and acquiring the status of *“custom”* seems unlikely. Therefore, from my point of view, choice of terminology of the Unidroit Principles & CISG shall be supported.

A certain way of conduct that become a *“usage”* in a certain line of trade may be codified by international organisations such as ICC or specialized organisations in the relevant business sector (*“codified trade usages”*). There may also be *“uncodified”* (*“unwritten”*) trade usages particular to a specific business sector (*“uncodified trade usages”*).

The principle of *“iura novit curia”*, which foresees that the judge and/or the arbitrator shall apply the law *ex officio*, is not valid for trade usages<sup>7</sup>. The party that claims the existence of a trade usage bears the burden of proving this fact. In arbitral practice, when existence of a trade usage is not established by a written code, *expert witnesses* are consulted on the matter.

Unlike some national laws that treat usages as secondary sources of law (which will be applicable only in case there is a legal lacuna, such as Turkish/ Swiss law systems), international commercial law confers trade usages a more active role. This active and significant role materializes in two different ways:

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<sup>7</sup> Aleksandar Goldstajn, Usages of Trade and Other Autonomous Rules of International Trade According to the UN (1980) Sales Convention, Petar Sarcevic & Paul Volken eds., International Sale of Goods: Dubrovnik Lectures, Oceana 1986, p. 99.

Firstly, trade usages & established practices are recognized as a part of the contract between the parties, under the “*implied terms doctrine*”. Under this theory, trade usages established in a certain branch of business that are known or ought to be known by the parties are deemed to be a part of the contract, regardless of being expressly stated so in the contract<sup>8</sup>. This is called “*incorporation of trade usages into the contract*”, therefore trade usages constitute the natural part/ unwritten stipulations of the contract.

Secondly, international arbitration rules provide that arbitrators shall *take into account* the trade usages relevant with the transaction, along with the national and/or a-national substantive rules applicable to the merits of the dispute<sup>9</sup>.

In addition to these two important roles, trade usages and established practices between the parties may also be used while interpreting the intention and understanding of the parties’ regarding the contract<sup>10</sup>.

A certain view in the doctrine alleges that trade usages enclose the general principles of contract law<sup>11</sup>. This view argues that, general principles of contract law are based on the trade usages in the first place. However, as *Gaillard* asserted general principles of international contract law and trade usages constitute two different categories of sources and their legal regime is certainly different<sup>12</sup>. Since international arbitration rules provide that arbitrators shall, along with the national and/or a-national

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<sup>8</sup> Please see Unidroit Principles art. 1.9.2 & CISG art. 9.2.

<sup>9</sup> Please see the European (Geneva) Convention on International Commercial Arbitration art. VII. alinea (1), Uncitral Model Law on International Commercial Arbitration art. 28, and some institutional arbitration rules such as ICC Arbitration Rules art. 21 (2). The duty of arbitrators is merely *taking into account* the relevant trade usages, but not to apply them in any case (**Jean-Denis Bredin**, A la recherche de l’aequitas mercatoria, in: L’internationalisation du droit- Melanges en l’honneur de Yvon Loussouarn, Dalloz, 1994, p. 110).

<sup>10</sup> please see Unidroit Principles art. 4.3 & CISG art. 8/3.

<sup>11</sup> **Eric Loquin**, La réalite des usages du commerce international, Revue Internationale de Droit Economique, 1989, p. 169 et seq.

<sup>12</sup> **Emmanuel Gaillard**, La distinction des principes généraux du droit et des usages du commerce international, in: Etudes offertés a Pierre Bellet, 1991, p. 210 et seq.

substantive rules applicable to the merits of the dispute, *take into account* the trade usages relevant with the transaction, including general principles of international contract law in the usages category may cause by-pass of a national law chosen by the Parties.

#### **IV. International Conventions & Model Laws**

International conventions constitute an important source for *lex mercatoria*, since they create substantive rules of law with international character, that reflect generally accepted solutions of the comparative law admitted by the international law community.

However, we shall admit that three major problems exist regarding international conventions: reluctance of the States to accede, necessity to follow official & time consuming procedures for modifications and the problem of uniform application. Nevertheless, besides the problems specific to international conventions drafting, successful examples such as CISG and CMR and shall also be mentioned.

On the other hand, model laws may also constitute a source for *lex mercatoria*, as they reflect generally accepted solutions of the comparative law. Uncitral model laws on international credit transfers & electronic signatures and Unidroit model laws on leasing & franchising may be shown as examples for such kind of model laws.

#### **V. Uniform Rules**

Uniform rules constitute soft law instruments that are applicable when the parties choose to incorporate these rules into their contract. Incoterms, UCP 600 for L/Cs, Uniform Rules for Collections, Uniform Rules for Demand Guarantees & York Antwerp Rules may be shown as examples for such kind of uniform rules. Such rules are prepared by highly reputed international institutions that are experts on international trade, and the level of acknowledgement shown by the international commercial law community constitutes the determining factor in order to accept them as a source for *lex mercatoria* or not.

Uniform rules are different than standard forms of contracts, since they do not constitute an entire contract text, but they constitute a certain part of the contract, that bring solutions limited with their subject matter. For example, as is known, Incoterms is specific to transfer of risk & costs of carriage in international sales contracts and does not propose solution to other issues such as passing of title and dispute settlement.

Such uniform rules may also constitute usage in the relevant sector, if their use is sufficiently frequent to be accepted as so.

## **VI. Standard Forms of Contracts & Clauses**

Standard forms of contracts & clauses also constitute soft law instruments which are open to parties' disposal, that are applicable only if the parties choose to use such kind of standard forms of contracts & clauses.

Standard forms of contracts & clauses are also prepared by highly reputed international institutions that are experts on international trade for certain branches of commerce, and they constitute well-balanced, fair, impartial texts based on expertise, that reflect the common understanding and intentions of international trade community. ICC, FIDIC, GAFTA & FOSFA model contracts, ICC model hardship and force majeure clauses may be shown as examples for such kind of standard forms of contracts & clauses.

A view in the doctrine argues that such standard forms of contracts may also be considered as usages<sup>13</sup>. However, a contract, as a whole, may not technically constitute usage, despite the fact that some of its dispositions may reflect trade usages in a particular trade sector<sup>14</sup>. On the other

<sup>13</sup> **Fabrizio Marrella**, Choice of Law in Third-Millennium Arbitrations: The Relevance of the Unidroit Principles of International Commercial Contracts, *Vanderbilt Journal of Transnational Law*, Vol. 36, 2003, p. 1181; **Norbert Horn**, Uniformity and Diversity in the Law of International Commercial Contracts, Horn/ Schmitthoff (eds.), *The Transnational Law of International Commercial Transactions*, Antwerp, Boston, London, Frankfurt a.M. 1982, p. 15; **De Ly**, *International Business Law and Lex Mercatoria*, p. 134 no. 201; **Jan Paulsson**, *La lex mercatoria dans l'arbitrage C.C.I.*, *Revue de l'arbitrage*, 1990, p. 98.

<sup>14</sup> **Yeşim Atamer**, *Uluslararası Satım Sözleşmelerine İlişkin Birleşmiş Milletler Anlaşması*

hand, if we accept these kind of standard contracts as usages, we will be disregarding parties' deliberate choice of not using them<sup>15</sup>. Therefore, standard forms of contracts & clauses shall be accepted as *facultative sources* for *lex mercatoria*.

## VII. Codes of Conduct

Codes of conduct may be defined as sectoral ethical rules, reflecting professional, technical and deontological standards of a certain trade sector. "ICC International Code of Advertising Practice" may be shown as example for such kind of codes of conduct, which are also prepared by the leading international institutions of the relevant sector.

Such codes of conduct may have crucial importance from technical point of view, while determining the standards of diligence to be shown by a sector member, that is to say, while determining whether the obligation of diligence is breached or not in an international contract law dispute<sup>16</sup>. Therefore such rules shall also be accepted as a source for *lex mercatoria*.

## VIII. Arbitral Awards

Regarding the arbitral awards, the problems arising out of confidentiality matters in international arbitration (poor publication ratio of arbitral awards due to this reason) and the lack of "*stare decisis*" effect of pre-existing arbitral awards<sup>17</sup> cannot be denied. However, pre-existing arbitral awards may be used as cogent evidences in order to convince the Arbitral Tribunal to a certain solution, since they have a function to concretize the general principles of international contract law, substantive a-national rules of law and trade usages ("*fonction normative*"). Due

(CISG) Uyarınca Satıcının Yükümlülükleri ve Sözleşmeye Aykırılığın Sonuçları, İstanbul 2005, p. 14 footnote 15.

<sup>15</sup> **Michael Mustill**, *The New Lex Mercatoria: The First Twenty-five Years*, Arbitration International, Vol. 4, 1988, p. 94-96.

<sup>16</sup> **Osman**, *Les Principes Généraux de la Lex Mercatoria- Contribution a l'étude d'un ordre juridique anational*, p. 287-291.

<sup>17</sup> **De Ly**, *International Business Law and Lex Mercatoria*, p. 202-203 no. 309-310; **Paulson**, *La lex mercatoria dans l'arbitrage C.C.I.*, p. 55-56.

to their “*fonction normative*”, arbitral awards shall also be accepted as a source for *lex mercatoria* <sup>18</sup>.

## IX. Conclusion

In order to conclude, we may say that, regarding the sources of *lex mercatoria*, in lieu of the restrictive view, liberal view is to be preferred, since no satisfying grounds are shown by the restrictive view, particularly while refusing the general principles of international contract law as a source for *lex mercatoria*. In direct contradiction with the restrictive view, in conjunction with the *trade usages and practices, general principles of international contract law shall be deemed as the essence (“noyau dur”) of lex mercatoria.*

International conventions predicting substantive a-national rules of law constitute another important source for *lex mercatoria*, while soft law instruments (such as uniform rules & standard forms of contracts), codes of conduct and arbitral awards may be defined as auxiliary sources of *lex mercatoria*.

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<sup>18</sup> Osman, Les Principes Généraux de la Lex Mercatoria- Contribution a l'étude d'un ordre juridique anational, p. 313-316.