The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration

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Content:
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Background, Procedure and Selected Results

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Introduction

All discussions about the existence and viability of a new law merchant are suffering from a basic deficiency. They were and are still based to a large extent on assumptions about the conduct of businessmen and the behavior of business lawyers in contract drafting and dispute settlement which have no empirical basis. Therefore, many arguments exchanged in the debate are highly speculative or of a prognostic character. Apart from its emotional and passionate nature, this is one of the major reasons why the debate about transnational commercial law is characterized by so many misunderstandings and irreconcilable antinomies of viewpoints. Since the lex mercatoria doctrine must be considered as an answer to the changes of economic reality, the analysis of the lex mercatoria requires an empirical evaluation of the reality of international business law. However, these issues have remained largely unexplored until today. Part of the reason is simply the scale of the enquiry required.

Also, many of those who participate in the discussion on the viability of a doctrine of transnational commercial law take a very biased approach which, in their eyes, renders any attempt to conduct a worldwide enquiry on the use of transnational law in legal practice a superfluous undertaking. They maintain that the notion of transnational law is limited to such general and vague principles as 'good faith' and 'pacta sunt servanda' which lack any concrete and workable content. Critics of the lex mercatoria maintain that the evolution of detailed legal rules which might resolve complex legal disputes requires comprehensive and time-consuming comparative law efforts which international arbitrators, attorneys, in-house counsel, or judges cannot perform within the tight schedules of international contract drafting or arbitration proceedings:

"The arbitrator would...face a formidable task of comparative research. Instead of having to consult, after application of the appropriate rule of conflict of laws, the rules of one single - no more - national system of law, he would have to assume the role of a full-fledged comparatist in charge of a research into perhaps a multitude of different national jurisdictions whose rules might be phrased in a language of which he is not in command. There might be fields of law, it is true, where such comparative research would have already been done, where a specific rule would therefore be easily detectable or where arbitral awards would have already flattened some paths in the jungle of the different national laws to be consulted. But an unforeseeable number of legal questions for which such research has never been carried out, would still have to be answered by arbitrators who, despite their often unusually extensive experience with foreign and international laws, would mostly be ill equipped to perform this kind of a more academic function."

It is for these reasons that the discussions on transnational commercial law have been trapped in a vicious circle in the past forty years. The alleged practical uselessness is used as an argument against the theoretical viability of the lex mercatoria doctrine and vice versa.

Until now, these contentions of legal theory about the attitudes of legal practice vis a vis transnational commercial law have never been tested in real life and have never been supported by empirical data. This has made a serious discussion about the concept of transnational law almost impossible. The CENTRAL Enquiry's main goal is to provide interested academics and practitioners for the first time with reliable empirical data as to the use of transnational commercial law in international legal practice.

I. Previous Enquiries on the Use of Transnational Law in Legal Practice

So far, only three enquiries have been made known which have been conducted to verify the use of the lex mercatoria in international legal practice.

1. The Selden-Enquiry

In 1995, Barton S. Selden, a private practitioner from San Francisco and Adjunct Professor at Golden Gate University School of Law, made an enquiry among 23 practitioners from ten countries on the use of the lex mercatoria. The study was made in an informal manner without any scientific basis. Most recipients replied that they would strongly advise against a choice of the lex mercatoria in an international contract and would prefer a 'definitive' and 'provable' law
2. The UNIDROIT-Enquiry

In 1996, UNIDROIT conducted an enquiry based on a questionnaire among some 1000 users of the Principles of International Commercial Contracts with a view to gathering more detailed information as to the different ways in which the Principles had been used in practice\(^\text{12}\). The result of the enquiry was that the practical usefulness and intrinsic quality of the Principles were confirmed by the addressees.

3. The Gordon-Enquiry

In 1997, Michael Wallace Gordon, Professor of Law at the University of Florida and Co-Reporter for the United States on the UNIDROIT Principles at the International Congress for Comparative Law in Bristol, England in 1998 conducted an enquiry among law faculties, practitioners and judges in Florida on their familiarity with the UN Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles\(^\text{13}\). The enquiry was based on a questionnaire and introduced the UNIDROIT Principles as 'a kind of lex mercatoria or law merchant'\(^\text{14}\). The basic outcome of this enquiry was that there was little awareness and understanding among the recipients of the CISG and the UNIDROIT Principles\(^\text{15}\). This result is important insofar as it hints at the possibility that it is not so much dogmatic concerns but mere lack of information which might contribute to the reluctance of practitioners to accept and apply transnational law instruments\(^\text{16}\).

4. The Value of these Studies

The Selden and Gordon enquiries cannot provide reliable data as to the use of transnational commercial law on a global scale since they were conducted on a small scale basis. This does not apply to the UNIDROIT Enquiry which provides an extremely useful picture of the use of the UNIDROIT Principles. Since the UNIDROIT Principles refer to the lex mercatoria, they were also included in the CENTRAL Enquiry. However, since the Principles are mere 'Pre-Statements' of transnational commercial law and do not codify this legal system\(^\text{17}\), data about their use alone may not serve as an indicator for the acceptance of transnational commercial law by international practitioners. Also, none of the enquiries covered the whole range of international business practice from contract drafting to arbitration. None of them was conducted with an intent to generate reliable empirical data based on the scientific elaboration of a comprehensive questionnaire. The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration is intended to provide more reliable empirical data on the use of transnational law in international contract drafting and arbitration.

II. The CENTRAL Research Project on Transnational Commercial Law

The Enquiry is the core part of a three-year research project\(^\text{18}\) which is conducted at CENTRAL and sponsored by the Volkswagen Foundation under the auspices of their program 'Law and Behaviour'\(^\text{19}\).

The project is entitled

‘The Role of Merchants, their Lawyers and their Arbitral Tribunals in the Evolution and Development of Transnational Commercial Law’.

It is based on two hypotheses.

First, the repeated use of certain contract clauses \textit{(e.g.} 'force majeure', 'hardship'-clauses) by contracting parties in international commerce and trade and the reliance of such parties on the mutual adherence to such clauses has led to the formation of a transnational legal system, that has to be distinguished from domestic law and public international law, a new 'lex mercatoria'\(^\text{20}\). Secondly, the specificity of this 'third' legal system satisfies all elements of the classic theory of the sources of law. It is created by the behavior of the players in international commercial transactions. By repeatedly using the same clauses and relying on their validity and the adherence of the other party to the clauses ('my word is my bond') these players are creating a new legal framework for cross-border commercial transactions. This transnational legal framework serves as a predominant point of reference both in negotiating contracts (evaluation of risk factors, defining bargaining positions) as well as in the context of international arbitration proceedings (helping counsel to form legal arguments, serving arbitrators and courts as a supranational basis for decision making). The research project
pursues two goals.

The first goal is of an empirical nature and has led to the worldwide CENTRAL Enquiry. The project is intended to clarify whether the conduct of international businessmen is in fact determined by transnational law. This involves the general question as to whether transnational law is being used and accepted by international legal practice in the field of contract negotiations, contract drafting and in the area of dispute settlement through international commercial arbitration. It also involves the more specific question whether concrete rules or principles of transnational commercial law such as 'pacta sunt servanda', 'good faith' or specific rules relating to the conclusion, performance and non-performance of international commercial contracts are being used in international commercial practice.

To find reliable answers to these questions, the CENTRAL Research Team, in co-operation with the Center for Enquiries, Methods and Analysis (Zentrum für Umfragen, Methoden, Analysen, ZUMA) in Mannheim, Germany, an academic institution specializing in empirical research, developed a comprehensive questionnaire. This questionnaire formed the basis for a world-wide empirical study on the Use of Transnational Law in International Contract Law and Arbitration. The details of this study will be outlined below.

The second goal of the research project is a methodical one. Based on the results of the world-wide empirical study conducted in the first phase of the project, a comprehensive concept on the viability of transnational commercial law as a third legal system will be designed. This involves the reconciliation of the idea of creating transnational law 'from below' with the classical theory of legal sources. In their combined effect, the two steps of the research project are intended to break the vicious circle which has hitherto prevented an objective, fact-based discussion on the viability of a doctrine of transnational commercial law.

III. The Preparation of the CENTRAL-Enquiry

1. Selection of Addressees

It has to be emphasized at the outset that the Enquiry is not and does not purport to be a representative one. To achieve such a goal with a worldwide enquiry is almost impossible given the cost and time restraints under which such a project is usually conducted. Nevertheless, CENTRAL has tried to send the questionnaire to addressees who can typically be expected to have had intensive experience with legal problems arising out of international commercial transactions: In-house counsel of major companies, attorneys from major law firms, international arbitrators and law professors working in the field of international commercial law. 2733 questionnaires have been sent out altogether. The addresses were gathered from various sources.

a. In-House Counsel

The CENTRAL questionnaire was sent to in-house counsel from companies listed in the following publications:

1. The 500 biggest companies world-wide as they were listed on the 1998 'Global 500' list published by 'Fortune'.
2. The 500 biggest companies in the United States as they were listed on the 1998 'Fortune 500' list published by 'Fortune'.
3. American companies in Germany as listed by the American Chamber of Commerce in Germany (ACC) in its publication 'Top 50 US Companies in Germany' (50 addresses altogether).

b. Attorneys

The questionnaire was sent to attorneys from law firms listed in the following publications:

1. Attorneys listed by name and address in the book 'Law Firms in Europe - The European Legal 500' provided that the area of practice indicated by them was arbitration, litigation, contract or insurance (740 names altogether).

c. Arbitrators

The addresses of arbitrators to whom the questionnaire was sent were gathered from the following sources:
(1). Arbitrators listed by name and address in 'Profiles of ASA-Members 1998-2000' published by the Association Suisse de l'Arbitrage (ASA)\(^{27}\) (345 names altogether).

(2). Arbitrators listed by name and address on the participants list of the International Council for Commercial Arbitration (ICCA) 12th Annual Meeting in Vienna in November 1994\(^{28}\) (444 names altogether).

d. Other Addressees

The category of 'other addressees' comprises persons known to CENTRAL who work in the field of international business law (321 names altogether). These names include members of the Legal Committee of the Federation of the German Industry (Bundesverband der Deutschen Industrie, BDI).

e. Doublet Addressees

There are a certain number of doublets among the different sources of addressees. For example many attorneys are also listed as arbitrators and many arbitrators are listed in more than one directory. Therefore the net total number of addressees is lower than the sum of all of the above-mentioned addressees.

f. Personalized Addresses vs. Anonymous Addresses

For most companies, the names of their in-house counsel were not known to the Research Team. In these cases (872 addresses = 31.9 %) the questionnaire was sent to the 'Head of Legal Department' / 'Leiter Rechtsabteilung'. The rest (1,861 questionnaires = 68.1 %) was sent to specific persons.

g. Age of the Addressees

Nearly all of the addresses stem from publications that were published between 1996 and 1998. The addresses of persons know to CENTRAL are updated on a regular basis and are therefore usually not older than those gathered from the publications.

h. Regional Distribution

The questionnaire was sent to addressees from 78 different countries. As a consequence of the selection of sources used for gathering addresses, the regional distribution of the addresses is not representative neither for the world's population nor for the world's legal professionals. It can be said, however, that states which play an important role in international commerce usually are represented with more addresses than those which do not. Even with this in mind, the reader may consider Switzerland (298 addresses) to be over-represented. The high number of addresses from this country stems mainly from the inclusion of the book 'Profiles of ASA Members 1998-2000'\(^{29}\) as a source of addresses. Also, due to its neutrality, Switzerland is a very popular country for international arbitration with a very high number of specialized practitioners.\(^{30}\)

2. Anonymity

One important decision taken when designing the enquiry was to make anonymous the data collected. This goal was in conflict with the necessity and standard practice of writing a second and maybe third time to those addressees who had not reacted to the first letter in order to get a sufficient response rate. The conflict was resolved in such a way that every questionnaire contained an individual number that allowed to find out the addressee it had been sent to. After sending out the last reminder to those addressees that still had not answered, the database that allowed combining ID numbers and addresses was destroyed. However, an excerpt containing those addressees who answered - but without the ID number - was kept in order to be able to invite these persons to the conference. As a consequence, it is no longer possible to assign a questionnaire to an addressee.

3. Design of the Questionnaire

From the outset, the design of the questionnaire has played a major role in the work of the CENTRAL Research Team. This is due to the fact that the design of a questionnaire, e.g. the order and general setting in which the questions are presented has important repercussions on the understanding, behavior and responses of the addressees. After extensive debate on this issue, the Research Team finally decided to divide the questionnaire into five parts. Each part was indicated by different colors of the paper used. In the first three parts \(A (= \text{green sheet})\), \(B (= \text{yellow sheet})\) and \(C (= \text{red sheet})\) the addressees were asked about their practical experiences with the use of transnational law in contract negotiations \(A\), contract drafting \(B\) and dispute settlement \(C\). The questions in these three parts were organized
according to a recurring pattern. In part D (= blue sheet) the addressees were asked to give a general evaluation of transnational law and in part E (= white sheet) CENTRAL asked for some complementary information about the addressee.

4. Language of the Questionnaire

The questionnaire was sent out in two versions, a German one and an English one. The German version was the original version. It was translated into English with the help of a specialist from ZUMA. With a few exceptions, the German version (552 = 20.2 %) was sent to all addresses in Germany, Austria, Liechtenstein and in those parts of Switzerland where German is the official language. The remaining 2,181 questionnaires (79.8 %) were in the English language.

IV. The Procedure for the Enquiry

1. The Letters

The Enquiry began in January 1999. An information letter was sent to nearly all addressees. For technical reasons, 45 addresses could only be added after a delay of about three months to the address database. The letter informed the addressees about the goals of the CENTRAL Enquiry and announced that they would receive the questionnaire within a few days. One week after the initial letter and accompanied by another explanatory letter the questionnaires were sent out. This accompanying letter also introduced to the addressees the notion of transnational law on which the study was based. This was a particular intricate problem in view of the many meanings which are attached to the notion of transnational law even in the academic discussion.

In order to ensure broad coverage of all aspects of transnational legal structures in international trade and commerce, both the announcement and the cover-letter used a very broad definition which referred to 'principles of law that are detached from domestic law'. In addition, in the first question of Sections A, B and C of the questionnaire, reference was made to 'transnational principles of law', 'general principles of law', 'lex mercatoria', the UNIDROIT or Lando Principles or other instruments, thus providing the addressees with an additional indication of what was meant with the term 'transnational law'. Those addressees who did not send back their questionnaire within four weeks received a one-page reminder. Those who did not react to this reminder within two weeks received a second and last reminder accompanied by a new questionnaire.

2. The Answers Received

A certain number of addresses (86 = 3.1 %) turned out to be invalid. There may have been other invalid addresses of which the Research Team was not notified. CENTRAL received a total of 808 answers (29.6 % of the addressees). This seems to be an excellent return rate. It is of course difficult to find comparable data for similar enquiries conducted on a world-wide scale. However, the enquiry conducted by UNIDROIT in 1997 had a return rate of over 20 %. This was regarded as a great success by UNIDROIT.

V. The Data Entry Phase

90 (3.3 % of all addressees) of those addressees who answered expressly refused to fill in the questionnaire.

1. Categorizing the Questionnaires

a. Useful and not Useful Questionnaires

A first examination of the other 718 (26.3 % of all addressees) answers showed that a certain number of addressees did not fill in the questionnaire as intended by the Research Team. Some of them answered only a small number of questions, some answered a few questions and sent a side letter containing explanations, some only returned a letter with details etc. And, unfortunately, a small number of questionnaires differed very much from what the Research Team expected. For example, a few addressees apparently misunderstood the concept of transnational law while some others gave contradictory answers. Therefore, a concept had to be devised to determine which questionnaires were useful and which were not. The following guidelines were applied:

A questionnaire was considered useful, if
it did not contain apparently contradictory answers,
- it did not contain answers which clearly showed that the addressee had misunderstood the concept of transnational law (typical example for such a misunderstanding: the addressee mentions ‘EU Directives’ as an example of transnational law he/she has made reference to) and
- the addressee had answered a minimum of questions. This minimum was determined in such a way, that he/she must have answered at least most of one of the parts A, B, C and the parts D and E as intended. Questions 3, 5, 10, 17, 21, 23, 26 were not taken into consideration when determining this minimum reply ratio.

Explanations contained in side letters etc. were not taken into account.

b. Selection of the Questionnaires for the Data Entry Procedure

Only questionnaires belonging to the category useful were selected for further processing. According to these criteria, 639 (23.4 % of all addressees\(^{35}\) ) questionnaires were included in the data entry phase and had to be transformed into an electronic form suitable for further evaluation with a statistical software package\(^{36}\).

There is an important consequence for the understanding of this Study which follows from this procedure. Unless stated otherwise, the percentage figures indicated throughout the CENTRAL Study always have to be seen in relation to this figure and not in relation to the total amount of 808 answers received.

2. Data Entry Procedure

All data were made anonymous during the data entry phase. To minimize typing errors the data were entered by two-person teams. After completion of the data entry phase, plausibility tests were applied to eliminate mistakes during the data entry phase. Therefore, it can be expected that only very few typing errors are left in the database. However, typing errors cannot be excluded altogether. Given the high number of questionnaires entered they did not influence the results of the Enquiry.

The questionnaire contains some questions that cannot be answered by 'yes' or 'no' or by selecting a value out of a range. Instead, the addressees were required to give textual answers or figures. As far as the latter are concerned, addressees often only provided approximate ones. In order to be able to process them, they had to be transformed into exact numbers. This was done using the following rules:

What the addressee indicate
What was entered into the database
the addressee wrote
'd < X'  X - 1
(X is 0 ...
 N)
' > X'  X + 1
(X is 0 ...
 N)
'X-Y'  X
(X, Y are 0 ...
 N; Y = X
+ 1)
'X-Y'  mean (rounded)
(Y, Y are 0 ...
 N; Y > X
+ 1)
‘about X
t X' (X is 0 ... N)
'several', 'many', 'don't remember'

To be able to process the textual answers they had to be put into categories by the Research Team. When analyzing these answers and their categories, it has to be borne in mind that every categorization is necessarily affected by language ambiguities and personal value judgements. Therefore it cannot always be guaranteed that the person who filled in the questionnaire would have put his textual answer into the same category. Nevertheless the Research Team decided to categorize the answers since this approach provides at least a rough overview of the answers given.

VI. Selected Results of the CENTRAL Enquiry

When analyzing the results of the enquiry it has to be borne in mind that the CENTRAL Enquiry is not and could not be representative. All data derived from the Study have to be viewed against this caveat.

1. Regional Distribution and Types of Contracts

The CENTRAL Enquiry covers many regions of the world and countries from all continents. Lawyers from 51 countries have responded to the questionnaire. However, there is of course no even regional distribution among those who have responded to the enquiry. Lawyers from some jurisdictions were more responsive than others. There was also an initial preponderance of lawyers from Switzerland as the country with a major arbitration community and from Germany as the country where CENTRAL has its seat among those lawyers to whom the questionnaire was initially sent out. Also, the CENTRAL Research Project was already known in these countries, while in others such as the United States or the United Kingdom, many lawyers heard of CENTRAL and its research activities for the first time in the letter announcing the questionnaire. Also, the heads of the legal departments of most US companies to which the questionnaire was initially sent were not known to the CENTRAL Research Team. Thus, the letter announcing the questionnaire and the cover letter had to be addressed to the 'head of the legal department' instead of the person who is holding this position. This has certainly lead to a substantial loss of potential replies among those companies. Consequently, responses from the USA were relatively poor given that almost 22 % of the questionnaires were sent to the US. However, replies were also received from such distant jurisdictions as China, the Cook Islands, Island, Qatar and the Syrian Arab Republic.

The same applies to the nationalities of the parties involved in the respective transaction or arbitration about which the addressees have responded in their answers. The questions pertaining to the addressees' experience in contract negotiation and contract drafting cover 79 countries, the questions referring to arbitration cover 75 countries from all regions of the world.

This uneven country-by-country distribution of answers lies in the very nature of a world-wide enquiry of this kind. It has to be taken into account when evaluating the answers of the Study. The Study also covers a broad range of transactions. Sales contracts, joint ventures, construction, distribution, licensing contracts and contracts for the exploitation of natural resources and M&A contracts figure prominently among the transactions to which the addressees have referred in their questionnaires. The number of transactions indicated by the addressees, however, was not significant enough to establish correlations between the type of transaction involved and the use of transnational commercial law.

2. Positive Responses

The first group of results refers to the responses of those addressees who have replied positively to the hypothesis on which the Study is based.

a. Awareness of the Use of Transnational Law in Legal Practice

One of the most important result of the CENTRAL Enquiry relates to the international practitioners' awareness of the use of transnational law in international practice. This refers to both their own practice or to cases which they had heard of.
About one third of those addressees who replied to the enquiry indicated that they were aware of the use of transnational commercial law in international contract negotiations and choice of law clauses[^46]. The result was even higher (266 addressees = 42 %) in the context of international commercial arbitration[^57]. This difference is not surprising given the liberal character of arbitration proceedings and their isolation from traditional rules of domestic conflict of laws doctrine which provides the ideal background for the use and development of transnational legal principles and rules, detached from the constraints of domestic legal rules[^48].

It is for this very reason that in the context of contract drafting, the overwhelming majority (85 %) of those addressees who had indicated that they had been in touch with transnational law in the context of contract drafting indicated that the contract contained an arbitration clause[^49]. The transnational character of arbitration also explains why more attorneys than corporate lawyers tended to reveal practical experience with transnational law. While corporate lawyers have only occasional contact with arbitration, many attorneys included in the Enquiry were arbitration specialists.

What is surprising is the fact that such a high percentage of the addressees indicated their awareness of the use of transnational law in legal practice. When evaluating this rate of positive responses, it has to be borne in mind that there was a high number of arbitration experts among the addressees of the questionnaire[^50]. They show a natural favorable tendency towards comparative decision making[^31] as a basic prerequisite for the concept of transnational commercial law[^52]. It is due to this fact that international arbitrators are generally regarded as one of the creators of the new law merchant[^53]. In spite of this reservation, the high percentage of positive responses is surprising given that the alleged rejection by international legal practice serves as one of the main arguments for those who oppose the existence of an autonomous legal system of international trade law. The significance of this data is underscored by the fact that in all three categories (contract negotiations, contract drafting and arbitration) a significant number of addressees indicated that they were aware not just of one single case but of 2 - 5 cases in which transnational commercial law had been used[^54]. A significant number of addressees even indicated that they were aware of 6 -10 cases where transnational law concepts had been used[^55].

**b. Subject Matters of the References to Transnational Law**

It is important to note that due to the inherent vagueness of the concept of transnational law, these replies have to be viewed against the background of what exactly had been referred to in the cases which the addressees were actually aware of. Again, the Enquiry shows a relative consistent pattern in all three categories (contract negotiation, contract drafting and arbitration). 'General Principles of Law' was the terminology which had been used most often[^56], followed by 'Lex Mercatoria[^57]', and 'UNIDROIT Principles of International Commercial Contracts[^58]. Also, reference to 'Transnational Principles of Law' has been made quite frequently[^59]. These figures, however, are not very indicative since the term 'Transnational Principles of Law' can only be regarded as a catch-all category without any general significance. Again, this result confirms both general commercial practice and the theory of transnational commercial law.

In legal theory, general principles of law are regarded as the major components of an autonomous system of the new law merchant both with respect to their genetic function as regards concrete and specific legal rules and with respect to their function as reference points for the valuation processes within this legal system[^60]. In legal practice, the reference to transnational principles of law has always been the major approach towards the 'internationalization' of international commercial contracts[^61]. The fact that in a comparatively large number of cases reference has been made to the 'lex mercatoria[^62]' is surprising. In the context of the use of transnational law in legal practice, it is frequently the use of the terminology which plays a major role in the discussion about the rejection or acceptance of this concept. It has therefore been rightly suggested that the term 'lex mercatoria' should be abandoned in favor of the broader terminology 'transnational commercial law[^63] Given the severe dispute about the viability of a doctrine of transnational commercial law, it can be assumed that many practitioners perceive the term 'lex mercatoria' to be overloaded with the alleged doctrinal and practical difficulties that are usually attached to the concept of the transnationalization of commercial law[^64]. One of the addressees, an eminent arbitration specialist from Europe, responded to the Enquiry:

"In these [arbitration] cases as well as in many others, I did invoke in my briefs, memorials or oral arguments..., rules of transnational law or the lex mercatoria, but, on practically all occasions, although all these cases were won, the arbitrators, if I remember correctly, preferred in general to avoid any specific reference to transnational law or lex mercatoria! I may add...that, according to my experience, most of the distinguished arbitrators I have been dealing with preferred to invoke "general principles of law" or "legal principles common to the parties" opposed in the case rather than one of these new concepts!

... On a number of occasions, the arbitrators have indeed resorted to these somewhat new legal concepts but
they left them nameless. They have, sometimes upon the suggestion of one or the other member of the tribunal, avoided to mention these formulae *expressis verbis*. They were apparently afraid to open the door to an appeal for nullity of the award by the losing party.

Thus, practitioners frequently tend to avoid the term 'lex mercatoria' or, since their publication in May 1994, prefer to make reference to the 'UNIDROIT Principles of International Commercial Contracts'. In their Preamble, these Principles provide that they 'may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like'. The direct selection of the Principles by the parties or arbitraries, however, has the advantage of allowing the parties to make a reference to a set of neutral, workable and concrete principles and rules just as if they were making reference to their domestic code instead of a vague and abstract notion of transnationalism with which many parties or arbitraries would not feel comfortable. Even though the Principles do not necessarily 'codify' the new law merchant, reference to the Principles helps counsel and arbitraries to avoid the emotions and misunderstandings which are necessarily connected with any discussion on the dogmatic or practical viability of the doctrine of transnational commercial law. This explains why they have been mentioned so often in the CENTRAL Enquiry. This result is in line with the UNIDROIT Enquiry undertaken in 1997. 59% of the addressees who had replied to that study indicated that they had used the Principles as guidelines in contract negotiations, 13.1% had referred to the Principles in support of a solution adopted in an arbitral award. The frequent reference to arbitration in both studies is confirmed by recent studies on the use of the principles in international commercial arbitration. They have revealed that the Principles do in fact help international arbitrators to find 'better' solutions for international commercial disputes.

c. Possible Function of the Reference to Transnational Law

The CENTRAL Enquiry has revealed a further important factor for the understanding of the functioning of the concept of transnational law in legal practice. This point relates to the function which a reference to the new law merchant may play in contract negotiations, contract drafting and arbitration. It is important to note at the outset that the knowledge of a case where transnational law has been used does not necessarily mean that it has been used as the applicable law.

In all three categories (contract negotiations, contract drafting and arbitration), the number of addressees who had indicated that transnational law had been used 'in connection with domestic law', *i.e.* above all with respect to the supplementation and interpretation of domestic law tended to be higher than the number of addressees who indicated that transnational law served to actually replace domestic law as the *lex causae*. It has to be emphasized that these figures can only serve to support a general trend since multiple answers were possible. Still, this distribution of answers serves as an indication for the flexible character of transnational law. It also reveals the 'Cartesian pragmatism' with which international legal practice is approaching the issue of the transnationalization of the global legal process today. Rather than entering into time-consuming discussions on the benefits of transnational law as opposed to domestic law, this concept is used within the framework of domestic laws to arrive at solutions which are better able to meet the needs of the international businessman. In the context of international arbitration this approach is reflected in the notion of the 'internationally useful construction' of domestic laws as been used, through the medium of the UNIDROIT Principles, by an ICC arbitrator when applying Dutch law to an international contract.

A second significant group of responses relates to the use of transnational law to supplement or interpret international uniform instruments. This approach has always been the major focus of attention of both practice and theory. It serves the important function of avoiding the dilution or 'nationalization' of international uniform law once it has been transformed into a domestic legal system where it is exposed to the traditional methods of construction of that particular jurisdiction. It is for this reason that the UNIDROIT and Lando Principles make explicit reference to their function as a means to 'interpret or supplement international uniform law instruments'.

Finally, it should not be overlooked that a significant number of responses referred to the use of transnational law as a 'means to improve the understanding between parties from different legal systems and with different languages'. This result is in line with UNIDROIT's 1997-Study, where 30.9% of the persons who replied had indicated that they had used the Principles as a means to overcome language barriers in contract negotiations or arbitration. These problems are obvious and well-known to everybody who is practicing international commercial law. However, it is not just the language alone but the different legal concepts of the jurisdictions which frequently prevent an understanding of the parties. The negotiations of the Channel Tunnel Construction Contract provide a perfect example for this dilemma. Transnational law is based on the functional legal comparison, a methodology that tends to look behind the dogmatic differences of domestic legal systems by distilling common legal values and concepts out of seemingly different domestic legal rules. This methodology provides an excellent means to overcome the barriers imposed by different languages and different legal concepts in contract negotiations and arbitration. Ultimately, this function of transnational legal concepts in removing
language barriers in the law and practice of international trade provides additional impetus for the development of the new law merchant. Again, this reveals that the new lex mercatoria is born out of practical needs of the business community and not out of the theoretical discussions of some learned law professors.

d. Individualization of Certain Principles or Rules

The CENTRAL questionnaire also asked the addressees to state exactly to which principles of transnational law reference had been made during contract negotiations (Question 3). The answers received confirmed the expectations of the Research Team that it is hardly possible to receive enough answers to accumulate significant data with respect to the use of certain principles or rules. The only relevant answers referred to ‘good faith’, ‘pacta sunt servanda’ and ‘hardship/force majeure’. One addressee indicated that certain transnational rules and principles have been used as ‘contractual compromise solutions’ or ‘lowest common denominator’ without, however, indicating individual rules which have been used in this context.

These answers are significant only insofar as they relate to principles and notions which have always been criticized as too vague and broad and as the major examples for the uselessness of the lex mercatoria concept. These data relate to the value that is attached by international legal practice to the notions of legal certainty and predictability. Again, these notions have for a long time served as standard arguments against the lex mercatoria. They become even more relevant in the second major group of answers in the CENTRAL Enquiry to be discussed immediately below.

3. Negative Responses

‘Negative’ responses are those which did not confirm the hypothesis of the Research Team with respect to the use of transnational commercial law in legal practice. It is in this context that the CENTRAL Enquiry has revealed a major gap between the theory of transnational commercial law and legal reality. For decades those who have so vigorously opposed the theory of the new law merchant have referred to the fact that the lex mercatoria does not provide a complete legal system, that the principles and rules are too vague and lack the necessary certainty and predictability and that awards based on transnational commercial law might not be enforceable before domestic courts.

The CENTRAL Enquiry shows that the alleged incompleteness of the lex mercatoria and enforcement concerns do not play a major role in legal practice even though the Study has also revealed that practitioners attach substantial if not overwhelming weight to the issue of enforceability in general. More important, answers referring to the vagueness and uncertainty of transnational commercial law are by far outweighed by those replies that refer to the lack of practical experience and the fact that no information has been available on the subject of transnational commercial law. When evaluating these data it has to be borne in mind that the questionnaire contained pre-formulated answers as to the lack of experience and information while arguments relating to the vagueness and uncertainty of the lex mercatoria had to be filled in by the addressees under the general heading ‘suitability’ or ‘other reasons’. Even under this caveat, these results seem to confirm the view that in international business, forseeability and legal certainty are no absolute and dominant values. They also seem to confirm that international legal practice does not follow the misleading argument that the viability of transnational commercial law necessarily requires the completeness of its rules and principles. Instead, it seems that many practitioners simply lack the necessary experience or information about the use of transnational law. One addressee stated that ‘among legal counsel and parties, transnational law is practically not known’. In the eyes of many addressees this lack of knowledge would cause too much need for explanation and thus too much time during contract negotiations or arbitration. Other addressees indicated that ‘we would need a stable, established definition of transnational law in order to use it; since we are not conversant with its application/definition, we are unlikely to refer to it’. Yet another one simply stated: ‘I want to see how it operates in practice first’. Also, many addressees stated that it was due to this lack of knowledge that in their view, the lex mercatoria lacks the necessary legal certainty. One addressee stated:

‘When a legal relationship between the parties may be perfectly framed in a set of (specific, well-known and complete) rules of transnational law, I would agree that the advantages that would arise from the knowledge of both parties of the applicable rules would be large’.

Another addressee spoke for many others and complained that ‘information on transnational law (such as reference books, court decisions and arbitration awards in prior cases etc.) is not available’. Finally, one addressee emphasized that knowledge of one side of the contract negotiations or the arbitration might not be sufficient to have transnational law applied in certain cases:
'I think that there is an additional reason why as counsel I would not rely on principles of international law: Advising clients to use these principles might imply my responsibility, since the predictability of their application is low. In negotiations, one tends not to innovate too much. Negotiating with another party by invoking these principles requires that the other party is as well assisted by somebody who is aware of these principles and knows how to handle them. This is not always the case'.

Thus, the CENTRAL Enquiry with its world-wide coverage confirms the results that Gordon achieved in his small scale study in Florida. That study also revealed the poor knowledge of practitioners about CISG and the UNIDROIT Principles. It can be assumed that this lack of information and practice is one of the reasons why a large number of addressees still prefers the use of national law. 

It is important to note that according to the data derived from the CENTRAL Enquiry, pragmatic reasons seem to prevail among legal practitioners over principal dogmatic reservations against the use of the concept of transnational commercial law. In fact, international business practice seems to be trapped in a different vicious circle today. 276 of the addressees (43.19 %) have indicated that the issue of 'acceptance' of transnational commercial law is an important or even very important factor for their evaluation of the pros and cons of the lex mercatoria. Without information, however, there is no chance for acceptance of the new law merchant among international legal practitioners.

Conclusion

Every evaluation of the data derived from the CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration is subject to a number of caveats. Thus, those addressees already familiar with the concept were probably more inclined to respond to the Enquiry than those who had no contact with transnational law so far. Also, those who responded informally but refused to fill out the questionnaire or provided answers that were not useful and where therefore left outside the data processing procedure were likely to have no contact with transnational law or to be opposed to the concept. Finally, the CENTRAL Enquiry could not and was not intended to provide a representative picture of the world-wide attitude of legal practice vis à vis the concept of transnational commercial law.

In spite of these reservations, the CENTRAL Enquiry has generated data to support two important tentative conclusions.

First, transnational commercial law is being used in international legal practice. However, there are indications that lawyers from common law jurisdictions are traditionally more reluctant to accept the concept than lawyers from civil law systems. Secondly, there is a substantial gap between the assumptions of lawyers who discuss the theory of transnational commercial law and the assumptions and viewpoints of international legal practice. It seems that the dissemination of information about transnational law was not able to keep pace with the globalization of legal practice and the transnationalization of the legal process. This explains why 275 (43.04 %) of the addressees replied that they were not sure whether to use transnational law in the future while only 125 (19.56 %) refused to use transnational law concepts in the future. Taking into account the 165 addressees (25.82 %) who were sure to use transnational law in the future, 440 (68.86 %) out of the 639 'useful' questionnaires reveal a positive or neutral attitude towards the new lex mercatoria while only 19.56 % rejected this concept altogether.

These results of the CENTRAL Enquiry pose new challenges to those who are involved in the proliferation of knowledge about international business law around the globe. They face the formidable task of spreading the knowledge about transnational law on a world-wide basis. As one addressee stated, 'knowledge about transnational law belongs to the arsenal of every internationally oriented lawyer'. Thus, 'marketing strategies' are required for the success of the new law merchant. Law school courses, continuing legal education, law review articles and moot courts are possible ways to solve the problem. Another approach is to adopt a pragmatic solution and to make the contents of transnational law visible, accessible and workable for the international legal practitioner. This can be done through the Restatements of international contract law published by UNIDROIT and the Lando-Commission on European Contract Law. Another option is the publication of a legal database which provides the international legal practitioner with an easy-to-access and up-to-date working tool in the field of transnational commercial law. CENTRAL together with the support of its Board of Trustees will publish a comprehensive Online Database on Transnational Commercial Law in early 2001.
The authors are members of the CENTRAL Research Team. They are grateful to Professor Bilsky, Münster University and to the 'Zentrum für Umfragen, Methoden, Analysen (ZUMA)', Mannheim for their support in the design of the questionnaire and to Holger Vormann for his excellent support in collecting, processing and evaluating the data derived from the Enquiry. The generous financial support of the Volkswagen Foundation is gratefully acknowledged.

1 See generally Berger, The Creeping Codification of the Lex Mercatoria, 1999, p. 32 et seq.
5 See Berman/Dasser, in: Carbonneau (ed.), Lex Mercatoria and Arbitration, 2nd edn 1997, pp. 21, 27, stating that it is difficult to refute these objections since most authors ‘do not indicate what degree of clarity, objectivity, generality, and universality is required before a set of concepts, standards, principles, rules, procedures, and institutions can be said to constitute a system of ‘law’”.

6 Mustill, Arb.Int'l 1988, 86, 114 et seq.: ‘Our hypothetical adviser is not an academic lawyer, established at an institution of learning in one of those European cities where the lex is most at home’; cf. also Schlesinger (ed.), Formation of Contracts, Vol. I, 1968, p. 10 et seq.: ‘In the absence of available comparative studies, it is exceedingly difficult for counsel to assemble the necessary data for the ad hoc purpose of a particular case pending before an international tribunal’.


10 Selden, id., 113.
11 Selden, id., 114 and 119.
14 Gordon, id., 375.
15 Gordon, id., 370.
16 See infra VI.2.
17 See Berger, supra n. 2.
20 See Berger, supra n. 2.
21 See supra Introduction, after n. 8.
22 In the CENTRAL Project, the mailing costs alone amounted to a sum of ca. 15.000 Deutsche Mark; this was a cost factor which the Research Team had underestimated in the initial phase of the Project.
23 Hart (ed.), American Chamber of Commerce in Germany, Commerce Germany, Top 50 US Companies in Germany, August/September 1997.
29 See supra n. 27.
30 For further details on the regional distribution of the addresses see Berger, The Practice of Transnational Law, 2000 (forthcoming).
For further details please refer to the questionnaire reprinted in Berger, supra n. 30.


See Berger, supra n. 1, p. 37 et seq.; the notion of transnational law was first introduced by P. Jessup, Transnational Law, 1956; as one addressee stated: 'It is true that it is often not easy to give a clear and encompassing definition of transnational law or of lex mercatoria... In my practice as attorney and international lawyer...we have received many letters from young lawyers applying for a job in our firm with the formula: "I am interested in international law [or in transnational law, or in international trade law]..." One of our standard replies was: "Please let us know what you mean exactly by 'international law' or by 'transnational law'?" The majority of replies, if any, has generally been somewhat discouraging!'

See UNIDROIT Study, supra n. 12, p. 1; Bonell, supra n. 12, p. 235.

Leaving aside those answers who contained an outright refusal to fill out the questionnaire, this amounts to 89 % (718) of the returned questionnaires.

SPSS for Windows, Version 8 and 9.

For details on the definitions of the categories see Berger supra n. 30.

See supra III.1.

See Berger, supra n. 30 for a listing of all countries responses were received from.

1.67 % were sent out to lawyers residing in Germany, 10.9 % to lawyers residing in Switzerland.

See supra III.1.f.

See Berger, supra n. 30 for details on the regional distribution of addresses.

See Berger, supra n. 30 for further details.

See Berger, id. for details.

See supra II.

206 addressees (32 %) for the category 'contract negotiations' and 202 (32 %) for the category 'contract drafting'.

See Berger, supra n. 30.

Schmitthoff, International Trade Usages, 1987, No. 71: 'Substantive law is often born in the womb of procedure. In keeping with their international character, the law which these international arbitral bodies create is transnational. It is the new lex mercatoria'; see also David, Le Droit du Commerce International, 1987, p. 127 et seq.

185 out of 202 addressees who had indicated in question 7 that they were aware of cases where transnational law had been used in contract drafting.

See Berger, supra n. 30.

See Berger, supra n. 2.


See supra n. 2.

64 (10.02 %) addressees for the category 'contract negotiations', 66 (10.32 %) addressees for the category 'contract drafting' and 71 (11.27 %) in the category 'arbitration'.

24 addressees (3.76 %) for the category 'contract negotiations', 19 addressees (2.97 %) for the category 'contract drafting' and 19 addressees (2.97 %) for the category 'arbitration'.

51 addressees (23.32 %) for the category 'contract negotiations', 136 addressees (21.28%) for the category 'contract drafting' and 183 addressees (28.64%) for the category 'arbitration'.

86 addressees (13.45%) for the category 'contract negotiations', 78 addressees for the category 'contract drafting' (12,21%) and 117 addressees (18,31%) for the category 'arbitration'.

72 addressees (11,27%) for the category 'contract negotiations', 53 addressees for the category 'contract drafting' (8,29%) and 85 addressees (13,30%) for the category 'arbitration'.

50 addressees (7,82%) for the category 'contract negotiations', 36 (5,63%) for the category 'contract drafting' and 67 (10,49%) for the category 'arbitration'.


See, e.g. Delaume, ICSID Rev.-FILJ 1988, 79 et seq.

See supra n. 5.


See Molineaux, J.Int'l Arb. No. 1, 2000, p. 147: '...there is apparently even a fourth, sub rosa, category: arbitrators who covertly support the lex mercatoria concept but do not want their predilection bruited about for fear of being labelled as devotees of an allegedly uncertain, unpredictable system'.

See Berger, supra n. 2.

See supra I.2.

See UNIDROIT, supra n. 12, p. 2.


96 addressees (15,02% of all addressees and 46,60% of those 206 addressees who had indicated that they were aware of the use of transnational law) used it to "supplement domestic law" and 58 addressees (9,08% / 28,16%) used it...
to "interpret domestic law" for the category 'contract negotiations'. 110 addressees (17.21% of all addressees and 54.46% of those 202 addressees who had indicated that they were aware of the use of transnational law) used it "in connection with domestic law" for the category 'contract drafting'. 145 addressees (22.69% of all addressees and 54.51% of those 266 addressees who had indicated that they were aware of the use of transnational law) used it to "supplement domestic law" and 90 addressees (14.08% / 33.83%) used it to "interpret domestic law" for the category 'arbitration'.

70See Berger, supra n. 2.
71See Berger, supra n. 1, p. 183 et seq.; Berger, Festschrift Sandrock, 2000, p. 49 et seq.
72ICC Award No. 8486, Clunet 1998, 1047 with Note Derains, id., 1050 (English translation in Yearbook Commercial Arbitration XXIV (1999), at 162 et seq.); see also Berger, supra n. 1, p. 140; Bonell, supra n. 12, p. 243.
7329 addressees (4.54 % of all addressees and 14.08% of those 206 addressees who had indicated that they were aware of the use of transnational law) used it to "supplement international uniform law" and 16 addressees (2.50 % / 7.77%) used it to "interpret international uniform law" for the category 'contract negotiations'. 47 addressees (7.36 % of all addressees and 23.27 % of those 202 addressees who had indicated that they were aware of the use of transnational law) used it "in connection with international uniform law" for the category 'contract drafting'. 38 addressees (5.95% of all addressees and 14.28% of those 266 addressees who had indicated that they were aware of the use of transnational law) used it to "supplement international uniform law" and 23 addressees (3.60% / 8.65%) used it to "interpret international uniform law" for the category 'arbitration'.
7593 addressees (14.55 % of all addressees and 45.15 % of those 206 addressees who had indicated that they were aware of the use of transnational law) for the category 'contract negotiations' and 83 (12.99 % of all addressees and 31.2 % of those 266 addressees who had indicated that they were aware of the use of transnational law) addressees for the category 'arbitration'.
76See UNIDROIT, supra n. 12, p. 2.
77Berger, supra n. 2.
78Cf. Hyland, VIJIL 1994, 405, 406: 'However different things may seem, the dominant method in comparative law usually seeks to demonstrate that the differences are merely apparent. What is to be sought is a deeper level at which the legal systems in question share a common vision' (emphasis added); Kötz, RabelsZ 54 (1990), 203, 209 et seq.: 'The initial question of any comparative work has to be...posed in a purely functional manner, i.e. the problem under review has to be cleared in a hard-hearted manner from the systematic notions and values of one's own legal system and has to be formulated in a language which describes the problem in a manner that makes the inherent collision of interests understandable for every listener, whether lawyer or layman, German or not' (translation by the author); see also Esser, Grundsatzz und Norm in der richterlichen Fortbildung des Privatrechts, 4th ed. 1990, p. 346; Ripert, Rec.Cours 1933-II, 569, 579 et seq.
7934 addressees (5.32 %) referred to 'good faith/fairness/equity', 16 (2.50 %) to 'pacta sunt servanda' and 9 (1.41 %) to 'honesty/force majeure'.
80See supra II.
81See Mann, BYIL 1957, 20, 36: 'They [i.e. transnational legal principles] may, on occasion, be useful to fill a gap but in essence they are too elementary, too obvious and even to platitudinous to permit detached evaluation of conflicting interests, the specially legal appreciation of the implications of a given situation. In short, they are frequently apt to let discretion prevail over justice'.
82See for an extensive discussion of standard arguments against the lex mercatoria Berger, supra n. 1, p. 43 et seq.
83In the category of 'contract negotiations', 8 addressees (1.25 %) referred to 'incompleteness' and 10 (1.56 %) to enforcement concerns. In the category 'contract drafting, this ratio was 10/8, and in the category of 'arbitration' the ratio was 7/7.
84310 out of 413 addressees (75.09 % of 413/78,51 % of 639) who filled out Section D. of the questionnaire ('General Evaluation') completely have indicated that the enforceability of the award is 'important' or even 'very important' for their evaluation of transnational commercial law.
85In the category of 'contract negotiations' 48 addressees (7.51 %) referred to 'vagueness' and 58 (9.08 %) to the lack of 'certainty and predictability', while 162 (25.35 %) referred to their 'lack of experience' and 124 (19.41 %) to the lack of information available. In the category of 'contract drafting', the ratio was 17/25 (2.66 % / 3.91 %) and 184/100 (28.79 % / 15.65 %).
86See Berger, J.Int'l.Arb. No.4 (1992), 5, 11; Berger, supra n. 1, p. 61; see also Wiedemann, Festschrift Larenz, 1993, p. 199 et seq.
87See Berger, supra n. 1, p. 101.
88See supra I.3.
8965 addressees (10.17 %) in the category 'contract negotiations', 61 addressees (9.55 %) in the category 'contract drafting, and 41 addressees (6.42 %) in the category arbitration.
90See supra Introduction, after n. 8.
66.82% of those 413 addressees who filled out completely Section D. (General Evaluation) of the questionnaire. Addressees who did not fill in Section D. completely were not counted!

See Berger, supra n. 30.

See supra V.1.a; it must be emphasized that this was only a small number of addressees when compared with the overall number of answers received.

See supra VI.2.a.

Answers from English lawyers to the questions K 1 to K 6 in Section D. (General Evaluation) revealed a more reluctant attitude than answers from lawyers from other jurisdictions, see Berger, supra n. 30 for details. One English lawyer replied: 'I am afraid that I have common lawyer’s preference for certainty (derived from the Norman conquest) and therefore would always have an initial preference for choosing a national law. If need be, however, I would not reject more general principles, providing I felt that the forum for resolving the dispute would give my side fair hearing’

See supra VI.3.

See for this categorization supra V.1.a.

See Blase, Vindobona Journal 1999, 3, 13 et seq.

See Gordon, supra n. 13, 368: 'It is encouraging that not one of the respondents [from private legal practice] suggested that either of the topics would not be an appropriate subject for both CLE and Florida Bar article coverage’.

Blase, supra n. 98, 14.