THE UNIDROIT PRINCIPLES OF COMMERCIAL CONTRACTS AND INTER-AMERICAN CONTRACTS CHOICE OF LAW

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At first glance, the objectives listed in the UNIDROIT Principles' preamble appear remarkably modest: the Principles apply only when the parties have agreed upon their application, they may serve as a default law, a model, or an aid in construing international uniform laws. The drafter's true, and highly ambitious, aim is buried in the Preamble's third paragraph, according to which the Principles may be applied when the parties have agreed that their contract be "governed by 'general principles of law', the '*lex mercatoria*' or 'the like". Implicit in this provision is the real purpose of the drafters' endeavor: to codify the new law merchant, the supranational commercial law of our times.[2]

I

Codifications of commercial law used to have the opposite objective, namely to nationalize the erstwhile transnational law merchant by encapsulating it in domestic statutes. Since their provisions differed, these national codifications balkanized commercial law and almost managed to obliterate its supranational character. Henceforth, to cope with the legal issues posed by international transactions, courts had to resort to choice-of-law rules, which—as anyone familiar with the conflict of laws knows—is a cumbersome and unsatisfactory way to deal with transnational problems. It is also a questionable way of dealing with them because, as jurists have pointed out, national laws may not be well attuned

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2 In view of the fact that the UNIDROIT Principles represent a system of rules intended to enunciate principles which are common to the existing legal systems and/or best adapted to the special requirements of international commercial contracts, they could be considered a sort of modern "*ius commune*". Bonnel, Michael Joachim, *An International Restatement of Contract Law,* 120 (1994). The literature on the *lex mercatoria* is vast. See generally *Lex Mercatoria and Atributation* (Thomas E. Carbonneau ed., 1990).

to international exigencies. Thus the eminent Uruguayan scholar Quintín Alfonsín remarked,

> ¿será adecuado un derecho privado *nacional* [...] para regular una relación *extranacional?* No. El derecho privado de A fue creado por el Estado A para satisfacer las necesidades de la sociedad A; por lo tanto, no puede ser aplicado a una relación que, por ser extranacional, supone otras necesidades que las meramente nacionales.[3]

Luckily, as with Mark Twain's death, the rumors of the *lex mercatoria*'s demise proved to be exaggerated. If one can believe their words, those who drafted the Uniform Commercial Code assumed the law merchant's continued existence.[4] In fact, they maintained that the Code "is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries."[5] Quintín Alfonsín explained the existence of such a supranational law as follows:

> [L]as relaciones jurídicas extranacionales suponen la existencia de un *commercium* internacional, y éste a su vez supone una sociedad humana donde se desarrola. Ahora bien; si el derecho privado siempre es obra de la sociedad cuyas necesidades contempla, debe existir un derecho privado de la sociedad internacional aplicable a las relaciones extranacionales: *ubi societas ibi jus*.[6]

Other scholars, notably the French jurist Berthold Goldman,[7] adduced empirical evidence for the proposition that a *lex mercatoria* is currently being used to resolve actual disputes in commercial practice, especially in international arbitration.

3 Quintín Alfonsín, *Teoría del derecho privado international*, 19, 1955 [emphasis in original].

4 "Unless displaced by particular provisions of this code, the Principles of law and equity, including the law merchant [...] shall supplement its provisions." U.C.C. 1-103.

5 U.C.C. 1-105 cmt. 3.

6 Alfonsín, *supra* note 3, at 22.

7 See Goldman, Berthold, "La *lex mercatoria* dans les contrats et l'arbitrage internationaux", 106 *Clunet* 475 (1979).

II

Doubtless, the notion of a supranational commercial law is anathema to those who —as probably most lawyers still do— believe in the Austinian idea that only the sovereign can make law. But legal positivism is unable to explain away the simple fact that an overwhelming percentage of international commercial transactions escape the reach of national judges and legislatures. Using their autonomy to designate a non-national forum, most enterprises resort to arbitration to resolve their disputes. In that forum, they are free to designate any law they wish to apply. As René David, the great French comparativist, scathingly remarked:

> Let us have no illusions: the lawyer's idea which aspires to submit international trade, in every case, to one or more national systems of law is nothing but bluff. The practical men have very largely freed themselves from it, by means of standard contracts and arbitration, and states will be abandoning neither sovereignty nor prerogatives if they open their eyes to reality and lend themselves to the reconstruction of international law.[8]

Arbitrators are apt to follow their natural inclination to disfavor the application of national law that violates tenets of good faith and common sense. In refusing to apply substandard positive rules, on one pretext or another, they are honoring the *lex mercatoria* indirectly. Sometimes, however, arbitrators eschew mere pretexts and openly admit their recourse to supranational norms as rules of decision. Far from chastising the boldness and creativity arbitral panels display when they invoke the *lex mercatoria*, several national supreme courts have upheld awards that were based on that source.[9] Much as this may displease teachers of private international law (who have a definite interest in not seeing their field threatened by the emergence of norms that eliminate conflicts of

8 David, René, "The International Unification of Private Law", in 2 *International Encyclopedia of Comparative Law*, Note 580 at 212, 1971.

9 See, *e.g.*, Judgment of Oct. 22, 1991 (Compañía Valenciana de Cementos Portland S. A. *v.* Sté. Primary Coal, Inc.,), Cass civ. 1re, 1991 Bull. Civ. I No. 1354 (France); Judgment of Dec. 9, 1981 (Banque de Proche-Orient *v.* Société Fougerolle), Cass. civ. 2e, 1983 D.S. Jur. 235 (France); Judgment of Nov. 18, 1982 (Norsolor), 1984 *Y.B. Com. Arb.* 161 (Austria); Ole Lando, "The *Lex Mercatoria* in International Commercial Arbitration", 34 *Int'l & Comp. L. Q.*, 747-8, 756-61 (1985).

laws), the normative force of fact is more powerful than any doctrinal scruples.

Some conflicts teachers have nevertheless doubted the power of private parties to free themselves from the fetters of national law. They have argued that arbitration does, after all, depend on national laws that allow parties to select an arbitral forum and that provide for the enforcement of awards.[10] This argument does not ring true. Most arbitral awards are paid off voluntarily. For those that are not, the holder of an award is usually not limited to any one particular court; rather, the winning party has the power to pick and choose among all of the nations in which assets can be found and most nations are party to the New York Convention. The award creditor's ability to forum shop effectively reduces his dependence on any particular national enforcement mechanism.

III

It is, however, true to say that, to this day, the *lex mercatoria* exists primarily in the practices and customs of commercial enterprises and of arbitrators who are called upon to resolve the disputes between them. But in contrast to judges, whose courtrooms are decorated with national symbols that remind them of the loyalty they owe to domestic laws and constitutions, an arbitral panel consisting of, say, a Mexican, an American and a Swedish arbitrator who listen to the parties' allegations in a Geneva hotel room will not feel beholden to the law of any particular state or nation. At least in those countries that are parties to the Vienna Convention on the Interntional Sale of Goods, judges are bound to become familiar with the Principles, which are needed to fill the lacunae left by the Convention. Once they are familiar with the Principles, it may be only a question of time until they realize, on the one hand, that international contracts require approaches that differ from those appropriate for purely domestic disputes and, on the other, that it is undesirable if arbitration leads to different (and often more desirable) results than litigation.

10 See Lagarde, Paul, "Approche critique de la *lex mercatoria*", *Le Droit des relations économiques internationales: Etudes offertes à Berthold Goldman*, 125, 147-49 (1982).

Hence, the reference in the Principles' preamble to a "model for national and international legislators' is perhaps overly restrictive: even judges may eventually take into account the international character of a contract dispute they have to adjudicate and apply the Principles, rather than some national law. Recourse to the Principles would be especially advisable, for instance, if the court concludes that a particular foreign rule violates the forum's public policy. Does it not make more sense in such a case for the judge to apply, as stop-gap law, a rule of decision specifically designed for international cases, rather than the *lex fori*, which does not even claim application pursuant to the forum's conflicts rule? Is it not, in any event, fairer to choose a neutral source, as opposed to the home-state law of one of the parties?

IV

One may consider it a drawback that the Principles amount to a mere restatement or model code, instead of a statute, and that they have no binding effect unless the parties agree upon their application. However, the Principles' drafters had good reasons for choosing this format, instead of a binding international convention. Deliberately following the example of the American restatements and model laws,[11] they were able to create a cohesive whole while avoiding much of the haggling and nit-picking that besets the process of legislation and the framing of conventions. Because of perceived state and national "interests," such positive enactments often reflect dubious compromises. For this reason, the Principles are more sophisticated and progressive than, for instance, the Vienna Convention on the International Sale of Goods. Moreover, they offer the guaranty of a built-in flexibility,[12] in contrast to international conventions that, once ratified, are almost impossible to amend.

Yet, the fact that the UNIDROIT work product, unlike the Vienna Convention, is not positive law does create a peculiar problem: in some legal systems the contracting parties' selection of the Principles as the law governing their agreement may not be effective. According to Lagarde, one of its two rapporteurs, the Rome Convention's provisions on

11 See Bonnell, *supra* note 1, at 4-5, 8-9.
12 See *id.* at 15.

party autonomy limit the parties' choice to a positive law.[13] While the Rome Convention does not *prohibit* the parties from designating the *lex mercatoria* or the UNIDROIT Principles, such choice-of-law clauses are treated as if the parties had failed to make a selection, so that the validity of such clauses depends on the otherwise applicable law. This rather unsatisfactory "solution" seems to have been inspired by the preoccupation of French conflicts scholars with the "*contrat sans loi*". From the point of view of sound policy it seems regrettable that the drafters of the Rome Convention have seen fit to put in jeopardy the parties' eminently sound decision to denationalize their agreement, leaving its efficacy to the vagaries of national laws that may well vitiate their stipulation.[14]

The Rome Convention's curious approach to choice-of-law clauses that designate a non-positive law is of course at odds with the fundamental proposition underlying the principle of party autonomy, namely that the parties know best and that they ought to be free to plan their transactions free from the state's tutelage. The reasons for curtailing the parties freedom may, in part, have been rooted in the *lex mercatoria*'s allegedly nebulous nature and the lack of an "*ensemble*" of rules.[15] These reasons were unconvincing even before the Principles were promulgated. The parties to a contract are of course at liberty to choose any positive law, however deficient it may be; why, then, should they be precluded form selecting a law based on fundamental notions of good faith and fair dealing? Now that we have the Principles, which are as self-sufficient as any commercial code, the positivists' objections have become baseless.

V

Fortunately, the positivist attitude reflected in the Rome Convention's aversion to the *lex mercatoria* has had no influence on this Continent's effort to devise a legal infrastructure for the inter-American market. The national delegates who gathered in Mexico City under the auspices of the Organization of American States for the Fifth Inter-American Spe-

13 See Lagarde, Paul, "Le nouveau droit international privé des contrats après l'entrée en vigeur de la Convention de Rome du 19 juin 1980", 80 *Rev. Crit. D. I. P.*, 287, 300-01, 1991.

14 *Cfr*. Kropholler, Jan, *Internationales Privatrecht*, 401, 2a. ed., 1994.

15 See Lagarde, *supra* note 10, at 130-33.

cialized Conference on Private International Law followed a more common-sensical approach to choice of law in international contracts than the European drafters did.[16] Article 7(1) of the Mexico City Treaty grants the parties to a contract full autonomy to select any law they wish, be it the law of some state or nation or a non-positive law such as the Principles.

More importantly, the Principles may apply even in the absence of a choice by the parties. The second paragraph of article 9, which lists the factors a court should look to in determining the legal system that has the closest relationship with the contract, contains the following sentence: "It shall also take into account the general principles of international commercial law recognized by international organizations".

This language reflects a deliberate compromise. The United States delegation submitted a proposal that would have gone much farther in recognizing the Principles as the law that applies in the absence of a contractual choice. The proposal read as follows:

> If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the general principles of international commercial law accepted by international organizations.

The rationale for providing that, in the absence of a choice-of-law provision, the Principles apply, is simple and straightforward. The parties to an international agreement have no reason to complain, should they have failed to stipulate the law they prefer to govern their dispute —be it because of inattention, bad legal advice or because they simply could not agree— if a law of superior quality, which is specifically designed to govern transnational contracts, becomes applicable. As noted earlier, it also seems far more sensible to apply a neutral transnational law, rather than the home-state law of either party. The United States proposal, however, encountered considerable resistance, probably because learned law is hard law and legal positivism remains the prevalent legal philosophy to this day, especially in countries where Kelsen's teachings are still believed to be the *ratio scripta*.

16 See generally Juenger, Friedrich K., "The Inter-American Convention on the Law Applicable to International Contracts: Some Highlights and Comparisons", 42 *Am. J. Comp. L.*, 381, 1994.

Though the battle was lost, the war may not be over. Clearly, arbitrators who, as a rule, are pragmatic people and have sufficient legal sophistication to be conversant with the Principles, can be expected to prefer them to an obscure or inappropriate provisions found in some code or statute. But there also are sophisticated judges, who will not feel beholden to an outdated philosophy that is at odds with current realities and the exigencies of international commerce. Such judges will be inclined to resolve the conflict between an obsolete or otherwise inferior statutory provision and a rule found in the Principles in favor of the latter. Clearly, in those nations that have ratified it, the Mexico City Convention grants the judiciary sufficient leeway to do so. But even in countries that fail to ratify the Convention, its provisions can be considered an expression of inter-American policy on which courts ought to consult in rendering their decisions. Once courts as well as arbitrators begin to rely on them, the Principles can furnish the necessary legal infrastructure for this Continent's ever-increasing economic and legal integration.