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GENERAL PRINCIPLES OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION – CHALLENGING THE MYTHS

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I. INTRODUCTION

The debate over the question of whether arbitrators can resort to general principles of law rather than the legal system of a given State in order to resolve issues related to the merits of a dispute has been obfuscated by questions of vocabulary. The very meaning of the word 'general' is ambiguous: are the principles 'general' because they operate at a level of generality such that they are limited to broad precepts such as good faith or *pacta sunt servanda*, or are they 'general' because they are accepted in a large number of legal systems around the world? The confusion is all the more persistent that certain principles are general in both meanings, while others are 'general' only in the latter sense. Good faith is a broad precept and is recognized in virtually all legal systems. A party's duty to mitigate its losses is a very specific rule pertaining to the assessment of damages; it is nonetheless 'general' in that it is accepted in the vast majority of legal systems. Only the second meaning comes into play when one considers the arbitrators' discretion to resort to general principles of law.

Another source of confusion stems from the fact that the early proponents of the application of 'general principles' in arbitration chose to treat this question in the context of the existence of a '*lex mercatoria*.' It would be misleading, however, to equate 'general principles' with '*lex mercatoria*.' The doctrine of '*lex mercatoria*' itself is intrinsically ambiguous in that it sought to identify rules which are perceived as ideally suited for international commercial transactions – something that national laws were

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assumed to be incapable of achieving but that the community of merchants could generate spontaneously – while, at the same time, borrowing from solutions found in national laws which it would then apply under its own umbrella. These two aspects need to be carefully distinguished. Indeed, one does not have to adhere to the theme of the so-called inadequacy of national laws, which aimed at identifying rules specific to international trade and capable of meeting the 'needs of the community of merchants,'[1] to accept that an arbitrator, faced with a choice of law issue, may choose to apply either a given national law or rules selected because they are accepted in a large number of national legal systems. Accepting that general principles common to a majority of national legal systems can be chosen by arbitrators as the applicable law assumes nothing more than the aptitude of States, as opposed to a hypothetical 'community of merchants,' to craft solutions that meet the needs of international trade. Unlike '*lex mercatoria*,' the terms 'general principles of law' and 'transnational rules,' which may be referred to interchangeably, both acknowledge that the rules falling within these categories are rooted in national legal systems and identified through a comparative law analysis.[2]

General principles are sometimes viewed as rules generated spontaneously by a community of merchants, whereas, in reality, they are rooted in national legal systems. This may explain the confusion surrounding the source of transnational rules or general principles, and the strong resistance met in certain quarters to these concepts in international commercial arbitration – still inextricably associated with the *lex mercatoria* doctrine – and the fact that such resistance remains, today, extremely vivid.[3] The challenges to transnational rules or to the

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[1] In French legal thinking, '*les besoins propres des opérateurs du commerce international*', a recurring theme of the *lex mercatoria* doctrine in the second half of the XX Century.

[2] *See also* Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REV. 208 (1995).

[3] *See, e.g.,* J.H. Dalhuisen, *Legal Orders and Their Manifestation: the Operation of the International Commercial and Financial Legal Order and its Lex Mercatoria*, 24 BERKELEY J. INT'L L. 129 (2006); Richard Howarth, *Lex Mercatoria: Can General Principles of Law Govern International Commercial Contracts?*, 10 CANTERBURY L. REV. 36 (2004).

general principles of law in international commercial arbitration are threefold and bring to light three different myths: first, arbitrators who have embraced a transnational approach will apply general principles in virtually all situations; second, general principles are inherently vague and unpredictable; finally, the arbitrators' recourse to general principles in fact reveals a hidden agenda, that of signaling a comparative law expertise to monopolize the market of arbitration services. Each of these three myths will be addressed in turn.

II. WHEN MAY GENERAL PRINCIPLES OF LAW BE RESORTED TO BY ARBITRATORS?

Not all situations warrant the applicability of general principles of law. Nor does the recognition of their applicability imply that they are intended to supersede the applicable domestic law chosen by the parties. In reality, two situations should be distinguished.

The first scenario is that in which the parties have expressly chosen the law or rules of law governing their relationships. Where the parties have chosen a given national law, there is no issue of applicability of general principles of law. Arbitrators have a duty to respect the parties' choice. This is also true when the arbitration rules chosen by the parties refer the arbitrators to "trade usages." Article 21 of the 2011 ICC Arbitration Rules, for example, provides in its first paragraph that "[t]he parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute." It then goes on to set forth in its second paragraph that the arbitral tribunal shall take account of the provisions of the contract and the relevant trade usages. Similarly, Article 28 of the ICDR Arbitration Rules provides that "1. The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. . . . 2. In arbitrations involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account usages of the trade applicable to the contract."[4]

[4] *See* UNCITRAL Arbitration Rules, art. 35(3) (2010) ("In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction."); *see*

This by no means implies that arbitrators are invited to apply anything other than usages pertaining to specific industries, such as oil & gas usages or shipping usages. On the other hand, these usages cannot be understood as giving leeway to the arbitrators to displace the provisions of the law expressly chosen by the parties. In other words, the concepts of trade usages on the one hand, and transnational rules or general principles of law on the other hand, cannot be equated.[5] In the different situation in which the parties have expressly referred the arbitrators to general principles of law, for example the UNIDROIT Principles of International Commercial Contracts,[6] or any other formula which evidences the parties' intention to resort to rules other than those of a single national legal system, the arbitrators' duty is similarly to respect this choice.

The second scenario is that in which the parties have remained silent as to the law applicable to their relationship. In such circumstances, laws on arbitration and arbitration rules provide for the arbitrators' power to determine the applicable law. The difficult question is whether the arbitrators' power is limited to the selection of a given national legal system or also includes, among possible options, the selection of rules of a transnational nature. In this respect, the debate has focused on the legal nature of such rules. Could they be considered as "the law" that can be selected by the arbitrators to govern the merits of the dispute?

The question arises in situations where laws on arbitration or arbitration rules provide that, in the absence of a choice of law by the parties, arbitrators should apply a "law." This is, for example, the option chosen by the UNCITRAL Model Law[7] and the

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also UNCITRAL Model Law on International Commercial Arbitration, art. 28(4) (1985 with amendments in 2006) (displaying the same language).

[5] *See* Emmanuel Gaillard, *La distinction des principes généraux du droit et des usages du commerce international*, *in* ETUDES OFFERTES A PIERRE BELLET 203 (1991).

[6] On the relationship between general principles of law and the UNIDROIT Principles, *see* Klaus Peter Berger, *The Relationship Between the UNIDROIT Principles of International Commercial Contracts and the New Lex Mercatoria*, 5 UNIF. L. REV. 153 (2000).

[7] *See* UNCITRAL Model Law on International Commercial Arbitration, art. 28 (1985) (stating that "(2) Failing any designation by the parties, the arbitral

UNCITRAL Arbitration Rules, including in their 2010 iteration.[8] In this case, those who believe that transnational rules meet the requirements of completeness – a structured character, an evolving nature and predictability – accept that they qualify as a "law" that can be chosen, among other options, by the arbitrators in such situations.[9]

The difficulty has been resolved more squarely by the arbitration statutes or rules which have expressly included the possibility for the arbitrators to apply not only "the law" but also the "rules of law" they deem appropriate. This choice has been made by laws on arbitration in France,[10] Switzerland,[11] the Netherlands,[12] and Egypt,[13] among others,[14] and by a number of

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tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.").

[8] *See* UNCITRAL Arbitration Rules, art. 33 (1976) (stating that "1. The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. . . . 3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction."); *see also* UNCITRAL Arbitration Rules, art. 35 (1976, 2010 amendments) (stating that "1. The arbitral tribunal shall apply the rules of law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law which it determines to be appropriate. . . . 3. In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract, if any, and shall take into account any usage of trade applicable to the transaction.").

[9] *See* Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision Making?*, 17 ARB. INT'L 59 (2001), also published *in* THE PRACTICE OF TRANSNATIONAL LAW 53-65 (Klaus Peter Berger ed., 2001).

[10] *See* French Code of Civil Procedure (resulting from the Decree of May 12, 1981); *see also* French Code of Civil Procedure, art. 1511 (replacing art. 1496(1) as of May 1, 2011).

[11] *See* Switzerland's Federal Code on Private International Law (CPIL) (1987), art. 187(1).

[12] *See* Netherlands Code of Civil Procedure (1986), art 1054(1) and (2).

[13] *See* Article 39(2) of the Egyptian Arbitration Law No. 27 (1994), art. 39(2).

[14] *See also* Belgium Judicial Code (1998), art. 1700; Kenya Arbitration Act (1995), art. 29(3); Lebanese New Code of Civil Procedure (1983), art. 813(1);

arbitration institutions such as the ICC,[15] the LCIA,[16] the ICDR,[17] the HKIAC,[18] and the KCAB.[19] When these rules on arbitration apply, there is no question that the arbitrators enjoy the discretion to resort to general principles of law in the same way they can select a given national law. However, the recognition of this discretion to the arbitrators does not make the applicability of general principles of law automatic in all cases in which the parties have remained silent as to the applicable law. Simply, it is an option given to the arbitrators which they may or may not use in light of the circumstances of the case. When, in a given situation, the connecting factors are scattered or torn between two antagonistic poles, recourse to general principles of law, as opposed to a single national legal system, might be an appealing option.

III. HOW ARE GENERAL PRINCIPLES OF LAW IDENTIFIED?

The second myth surrounding the applicability of general principles of law is that such principles are inherently vague and unpredictable. The early critics of the use of transnational rules by arbitrators, which was discussed at the time as part of the *lex mercatoria* debate, insisted on the scarcity of such rules as opposed to the supposed abundance of rules contained in each

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Peru Legislative Decree Regulating Arbitration (2008), art. 57(2); Oman Law of Arbitration in Civil and Commercial Disputes (1997), art. 39(2); Syrian Law on Arbitration (2008), art. 38(2); Uganda Arbitration and Conciliation Act (2000), art. 29(3).

[15] *See* International Chamber of Commerce (ICC) Rules of Arbitration (2011), art. 21(1).

[16] *See* LCIA Arbitration Rules (1998), art. 22.3.

[17] *See* American Arbitration Association, International Dispute Resolution Procedures (including Mediation and Arbitration Rules) (ICDR Arbitration Rules) (2009), art. 28.1.

[18] *See* Hong Kong International Arbitration Centre (HKIAC) Administered Arbitration Rules (2008), art. 31.1 ("The arbitral tribunal shall decide the case in accordance with the rules of law agreed upon by the parties or, in the absence of a choice of law, by applying the rules of law with which the dispute has the closest connection").

[19] *See* Korean Commercial Arbitration Board (KCAB) International Arbitration Rules (2007), art. 25(1).

national legal system.[20] In light of the number of codifications of transnational rules in the areas of law which are commonly dealt with through international arbitration, such as the law of contracts or commercial matters generally, the criticism became clearly inapposite. One only needs to look at the UNIDROIT Principles, the second edition of which contains 11 Chapters of rules broken down into 211 Articles,[21] to realize that such a codification is nothing less than an international restatement of the law of contracts, with provisions whose degree of specificity is no different than that of rules found in national laws.[22]

More fundamentally, the debate over the existence of a list of rules and the required level of specificity of such rules was founded on a wrong understanding of the true function of transnational rules. Where confronted with the conflicting positions of the parties in relation to a point of law, arbitrators may either use a choice of law approach to select the single law which will provide the answer, or assess – on the basis of existing codifications of transnational rules, international conventions, arbitral case law, or, if need be, a specific comparative law analysis – which of the parties' positions best corresponds to a generally accepted solution, as opposed to a rule found only in a minority of legal systems. The first option corresponds to a choice of law method; the second to the transnational law method. By choosing the latter in situations where, by definition, the parties have not selected the applicable law, arbitrators are less likely to upset the parties' expectations. Because the

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[20] *See*, *e.g.*, Michael J. Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, 4 ARB. INT'L 86 (1988); *but see* Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, *supra* note 2, at 209.

[21] UNIDROIT Principles of International Commercial Contracts (2010); *see also* THE UNIDROIT PRINCIPLES 2004, THEIR IMPACT ON CONTRACTUAL PRACTICE, JURISPRUDENCE AND CODIFICATION. REPORTS OF THE ISCD COLLOQUIUM (8/9 JUNE 2006) (Eleanor Cashin Ritaine & Eva Lein eds. 2007); STEFAN VOGENAUER & JAN KLEINHEINSTERKAMP, COMMENTARY ON THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS (2004) (OUP, 2009).

[22] *See also* TransLex-Principles, Center for Transnational Law (CENTRAL), University of Cologne, Germany (updated regularly), *and* Principles of European Contract Law (regional); *see* Bénédicte Fauvarque-Cosson, *Les Principes UNIDROIT Relatifs aux Contrats du Commerce International: Nouvelles Perspectives, Nouveaux Enjeux*, *in* LE CODE DE COMMERCE 1807-2007, at 737 (2007).

applicability of general principles of law relies on a method, as opposed to a list, this conclusion holds equally true in the absence of a codification or international conventions providing a specific answer. Indeed, the transnational rule method enables the arbitrators to identify the applicable rule – namely, the most generally accepted rule as opposed to a possibly idiosyncratic or outdated provision – by resorting to a comparative law analysis.

Only a very formalistic view of the predictability of solutions will lead to a contrary conclusion. Such a view, for example, was expressed by Professor Goode in an article authored on transnational law.[23] Having agreed that "it is possible after the event for an arbitrator, armed with all the relevant facts, to identify a rule of the *lex mercatoria* applicable to the case in hand," he moves on to take the view that "[i]t is quite another [thing] to extrapolate from this *ex post* identifiability the *ex ante* ability to determine that the *lex mercatoria* would be suitable as a governing law for a dispute that has not yet arisen and the nature of which may be difficult, if not impossible, to foresee."[24] Irrespective of the questionable reference to the terminology of *lex mercatoria* when discussing the applicability of transnational rules, this view overlooks the fact that, in situations in which the parties have chosen not to choose – or were unable to choose – the law applicable to their relationship, the *ex ante* predictability of the solutions is an empty quest.

Predictability is similarly unachievable through the choice of law approach to the extent that the solution to a given question of law including, for example, that of the validity of the contract or a provision thereof will depend on the application of choice of law standards allowing for a broad discretion on the part of the arbitrators. For example, in an ICC or LCIA arbitration in which the arbitrators have to determine whether a sales contract between a French seller and a Kuwaiti buyer for distribution purposes in the entirety of the Middle East is void in the absence of a sufficiently determined price, and assuming that French law answers the question in the affirmative while all other legal

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[23] Roy Goode, *Rule, Practice, and Pragmatism in Transnational Commercial Law*, 54 ICLQ 539 (2005).

[24] *Id*. at 552.

systems having a connection with the case answer the same question in the negative, maximum uncertainty will arise from the arbitrators' application, as mandated by the arbitration rules of "the rules of law which it determines to be appropriate"[25] or "the rules of law which it considers appropriate."[26] The ordinary businessman looking *ex ante* at the contract it just signed will hardly be reassured in knowing that, in the event of a dispute, the supposedly predictable choice of law methodology will enable the arbitrators to select the law they see fit and that, in the event French law is selected, this may lead to the annulment of the entire contract for lack of a sufficiently determined price. By contrast, the same businessman may get some reassurance from the idea that, were the arbitrators to apply the transnational law method, they may disregard the outdated provisions of French law should they find that the general trend in comparative law is to assess less and less restrictively price determination requirements.[27] In other words, a methodology designed to allow general trends to prevail over idiosyncratic or outdated rules is, by definition, more predictable than that in which the outcome will depend on the hazards of a choice of law assessment.

IV. DO ARBITRATORS HAVE A HIDDEN AGENDA WHEN RESORTING TO THE GENERAL PRINCIPLES OF LAW?

In recent years, a further myth has seen the light in relation to the arbitrators' recourse to general principles of law or other forms of transnational commercial law. Certain sociologists have suggested that the proponents of the transnational approach were pursuing a hidden agenda, namely that of protecting their own corporatist interests.

In their notorious study published in 1996 and entitled "Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order", Yves Dezalay and Bryant G. Garth have taken the view that "[t]he flexibility of the

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[25] ICC Arbitration Rules (2011), art. 21(1).

[26] LCIA Arbitration Rules (1998), art. 22.3.

[27] On the slow evolution of French law on price determination, *see La détermination du prix: nouveaux enjeux un an après les arrêts de l'Assemblée plénière*, *in* REVUE TRIMESTRIELLE DE DROIT COMMERCIAL 1 (1997).

lex mercatoria . . . allowed its inventors to gain time . . . , preserving their position when confronted with the new law firm offensive in this market."[28] They also submitted that:

> The preeminence of learned debate in the little world of arbitration contributes to select the most lettered among the new generations of practitioners in this market. The new entrants then maintain the market value of the form of specific competence that the grand masters possessed – and still possess – better than anyone else among their potential competitors. The preservation of the value of learned capital assures a measure of continuity in the passage of power from the generation of notables to that of the technicians of arbitration.[29]

In other words, the "doctrine of *lex mercatoria*" has "served to prolong the hegemony of the learned jurists."[30] This vision has found an echo in the arbitration legal thinking. Professor Christopher Drahozal, in an essay on "Contracting Out of National Law: An Empirical Look at the New Law Merchant," published in 2005,[31] has referred to the Dezalay & Garth study in the following terms:

> I agree with Dezalay and Garth that the explanation may be found in the market for international arbitration services, but offer a somewhat different suggestion – that scholarly publications on the new law merchant constitute signaling behavior by prospective international arbitrators. It certainly is plausible that prospective international arbitrators would seek to signal their quality to parties. Only limited information is available to a party deciding whom to select as an arbitrator. . . . By publishing books and articles and speaking at conferences on transnational law, prospective arbitrators may be signaling that they have what Stephen R. Bond calls 'legal internationalism': an

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[28] YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND THE CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 89 (1996).

[29] *Id*. at 90-91.

[30] *Id*.

[31] Christopher Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 NOTRE DAME L. REV. 523 (2005).

> appreciation of 'the various different national legal systems and the reasons for the differing assumptions, presumptions, expectations and demands of the parties.' . . . Even if parties do not want to have their dispute resolved according to principles of transnational law . . ., they may still prefer an arbitrator with a transnational outlook and expertise as to a number of legal systems. What is visible thus may be the supply side of the market for arbitration services, rather than any significant demand for transnational commercial law.[32]

Assuming that speaking at conferences is mainly aimed at offering one's services as a potential arbitrator, the suggestion that the choice of transnational rules as a speaking topic – as opposed to topics such as the applicability of mandatory rules other than those found in the legal system chosen by the parties, or the promotion of state of necessity as an exoneration factor of State responsibility in investment treaty arbitration – provides a competitive advantage is simply puzzling. One may wonder if what lies at the heart of the criticism is not, in reality, the very fact that the system operates through arbitrators selected by the parties, in practice by other legal practitioners. In other words, the criticism appears to target the fact that arbitrators are private judges appointed and remunerated by the parties to provide adjudicatory services, not transnational rules as such.

An arbitrator has nothing to gain personally from resorting to general principles of law – as opposed to the law of a given State – in situations in which the parties have selected those rules to govern their relationship or, in the absence of a choice of law by the parties, where allowing the outcome of the dispute be determined by the hazards of connecting factors with one or several jurisdictions would prove artificial. From a policy standpoint, according to the arbitrators a degree of flexibility in the determination of the law or rules of law applicable to the dispute is no more troubling than allowing them to determine whether the plant which is the subject of the dispute has been built according to specifications or assessing the amount of damages arising from a contractual breach.

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[32] *Id*. at 550-551 (internal citations omitted).

International law has long recognized general principles of law as a source of law.[33] That arbitration law has equally allowed this methodology to be used by arbitrators in discharging their adjudicatory powers in private relationships is nothing more than the natural trend in the evolution of any legal system.

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[33] *See* Statute of the International Court of Justice (1945), art. 38.