

Use of General Principles of International Law in International Long-Term Contracts



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Where contracts do not specify 'choice of law', general principles of international law are held to apply instead – but many of these principles are hotly contested.

In international business relations today, it is widely accepted that the parties to a contract may elect to have their contractual relations governed by general principles of law. It appears particularly appropriate that the parties to an international long-term contract should have the option of submitting their contractual relationship and, perhaps even more importantly, the resolution of any ensuing disputes, to general principles of international law, in that this source of rules may prove to be well adapted to the needs of the international business community and can – contrary to common wisdom – offer greater reliability than the choice of a national law, particularly in the presence of a long-term agreement during the course of which any national legislation may undergo profound modifications. Combined with an arbitration clause, the choice of general principles of law in an international agreement is a means of ensuring that truly international solutions will be found for the resolution of any disputes that may arise.

In this respect, it is also well accepted that arbitrators may choose to apply general principles of law in the absence of any choice of law agreement by the parties. What is remarkable, however, is how the use of general principles of law – also frequently referred to as *lex mercatoria*, or transnational rules – as the applicable law in international contracts and in international arbitration is still the subject of such heated controversy after nearly 35 years of debate.¹ Since the 1960s, the subject of *lex mercatoria* has given rise to an impressive body of legal writing comprising studies published in many different countries (and languages) worldwide.² Interestingly, much of the writing on this subject is today published in common law jurisdictions, traditionally the most reluctant towards *lex mercatoria*.³

The debate is kept alive by authors who question on ideological, theoretical and practical grounds the validity of using general principles of law to govern international contracts and ensuing disputes resolved through international arbitration. These criticisms will be addressed in more detail below, but tend to portray *lex mercatoria* as an incomplete set of vague and contradictory rules unsuitable for application to international commercial relationships.

Difficulties with the terminology employed

further cloud the situation. For the sake of clarity, the terms 'general principles of international law' and 'transnational rules' are preferred here to '*lex mercatoria*' because they imply that the solution to the problems of the business community may be found in national legal systems. Whereas the concept of *lex mercatoria* seems to suggest the specificity of transnational norms, the terms 'transnational rules' or 'general principles' more accurately reflect that such rules are rooted in national legal systems, allowing the international commercial relationship to be governed by a body of rules derived from different national legal systems, rather than the law of a single jurisdiction.

It is precisely because solutions are found in this wider body of rules that general principles are so well suited to satisfy the needs of international commercial activity. It will thus come as no surprise that those who accept that the source of validity of an international arbitral award is found in the legal orders of the sum of all states that are willing, on certain conditions, to enforce the award – and not exclusively the legal order of the seat of the arbitration – tend to accept the idea that parties may choose, and arbitrators may apply, general principles of international law. It is largely because the controversy surrounding *lex mercatoria* is often linked to the debate on whether the source of binding authority of the arbitral award is the law of the seat or the law of all states of potential enforcement that the topic remains so controversial. Indeed, it is indicative of the dividing line between two different philosophies of international commercial arbitration.

The controversy is also fuelled by certain highly prevalent misconceptions as to what transnational rules are. The present study will thus briefly discuss the content, or rather method, of general principles of international law and examine their application to international commercial relations by arbitrators, before addressing the grounds on which the transnational rules method is often criticised.

General principles method

A frequent criticism of the transnational rules method stems from the perceived difficulty of determining the content of such rules with any precision. Naturally, an analysis of the content of

transnational rules is a subject that can only be fully analysed through extensive comparative law studies. Fundamentally, however, it must be emphasised that transnational rules are a method, not a list.

An influential article on *lex mercatoria* written by Lord Mustill for the 25th anniversary of the subject⁴ gave rise to a certain amount of misunderstanding. In setting forth a list of 20 transnational rules encountered in arbitral practice, Lord Mustill by no means intended to defend *lex mercatoria*. His point was rather to emphasise the relative poverty of the method, with a mere 20 principles, particularly in contrast with the wealth of municipal legal systems. However, certain supporters of *lex mercatoria*, whether genuinely or not, expressed satisfaction with the large number of principles listed. In addition, the fact that some of the principles so listed are of an extremely specific nature (such as those on interest and damages) provided further support for the view that the rules are not so general as to have no practical utility.⁵

Such a presentation of general principles of law as a list of principles is in fact misguided. General principles of law are not a list, but rather a method, to be used to determine the rules applicable to an international commercial relationship.

The starting point for any analysis of the method for determining applicable rules of law must be the choice of law clause itself. When general principles of law are applied to a contractual relationship, most often the task of arbitrators or counsel, the first step is thus to ascertain whether the parties themselves have given any indication as to how the applicable rules should be determined. This will be the case, for example, when the parties have selected as the applicable law, principles common to two or more legal systems. Thus, the parties to the *Eurotunnel* contract selected 'the principles common to English and French law' and, failing that, 'the principles of international commercial law as they have been applied by national and international tribunals' to govern their contractual relationship.⁶ Similarly, arbitrators sitting in ICC case no 5163 had to apply 'the principles common to the laws of the Arab Republic of Egypt and the United States of America'.⁷ The parties may also use geographical criteria to restrict the applicable general principles, by selecting for example the 'general principles of law applicable in Western Europe' or the general

principles of law applicable in 'Northern Europe'. In other cases, the parties submitted their agreement first to a particular national law, and failing that to general principles of international commercial law.⁸ In all cases, any instructions provided by the parties as to the method of determining the applicable rules, such as a specified hierarchy between the various given sources or instructions to apply only principles common to certain regions of the world, must take precedence.

Failing a clear identification by the parties of the principles to be applied, the second step of the process involves an analysis of comparative law, international instruments and arbitral case law, generally carried out by counsel and arbitrators, in order to establish the relevant rule or rules.

Comparative law is a fundamental source of general principles of international law. In using this source, it is necessary to establish that national laws converge on the particular points at issue, thereby reflecting a transnational rule that is capable of being applied.⁹ That is not say, however, that to be recognised as a general principle of law, a rule must find unanimous support in comparative law. Indeed, if such a view were to prevail, it would amount to granting veto power to those legal systems incorporating the most isolated tendencies, when the aim of the transnational rules method is rather to identify generally accepted legal principles. To require unanimity, thereby applying the method only to determine rules already present in every legal system, would in any event render the general principles method meaningless. In fact, not only does the support for the rule not need to be unanimous, but the support may even be exclusively regional.

As seen earlier, parties who do not wish to submit their potential disputes to the rules of a particular national law may choose to have regional general principles such as 'general principles of law applicable in Western Europe' or 'general principles applicable in Northern Europe' apply to their contract. The applicable regional principles of law must then be determined in the same way as for the identification of the content of general principles of international law. The relevant sources will include international conventions applicable to or ratified by countries in the region, the comparative law of the relevant countries and the case law of the international tribunals that operate in the region. In the absence of agreement of the parties to apply such regional principles, however, it seems preferable to apply rules that have broad support in

comparative law, international arbitral practice and leading international conventions, rather than applying rules which, although they may come from the same legal tradition, nonetheless lead to different results. Such a divergence between laws from the same legal tradition may in fact indicate that principles from a region or from a similar legal tradition are not sufficiently well established, thus making it necessary to apply principles that are accepted as generally applicable. In this way, the universalist approach reflected in the transnational rules method will prevail over the divergent positions of national laws.

A further, highly authoritative source of general principles of international law is the body of international treaties on a particular subject matter. The fact that a certain number of states have adopted a rule by signing or ratifying a treaty in which that rule is contained, is a clear indicator of the international recognition of such rule. The greater the number of states that are party to the treaty in question, and the more diverse their origin, the more authoritative the rule. It is not surprising that as regards the international sale of goods, for example, many arbitral awards now make reference to the Vienna Convention of 11 April 1980 on Contracts for the International Sale of Goods.¹⁰ Even when a convention is not yet in force, it possesses a certain degree of authority in that it represents the opinion of the delegates from the various states that negotiated the convention.¹¹

Monographs on comparative law are also a useful source, especially if they specifically address the determination of transnational rules.¹² The Arbitration Committee of the International Law Association has devoted a series of studies to the following transnational rules: change of economic circumstances and *pacta sunt servanda*, estoppel, the duty to cooperate in long term-contracts, the *exceptio non adimpleti contractus*, *force majeure*, the determination of recoverable damages and interest.¹³

Particular mention must be made of the remarkable contribution of the UNIDROIT Principles of International Commercial Contracts published in 1994.¹⁴ These principles are specifically intended to be applied 'when the parties have agreed that their contract be governed by "general principles of law", the "lex mercatoria" or the like'.¹⁵ The collection comprises 108 principles presented in the style of a codification or 'restatement', and accompanied by commentary explaining the meaning of each principle. Some of

these principles will, no doubt, be challenged. Nevertheless, the publication of the results of this extensive study of applied comparative law is a most valuable contribution to the determination of transnational rules.¹⁶ The UNIDROIT principles also evidence the fact that the support for transnational rules provided by comparative law need not be unanimous.¹⁷

Naturally, arbitrators also tend to refer to arbitral case law in determining the content of general principles of international law. In the area of general principles of law, perhaps more than any other area, the previously contentious issue of whether 'arbitral case law' actually exists has clearly been overtaken by arbitral practice,¹⁸ and given the increasing accessibility of arbitral case law through the publication of numerous awards in legal periodicals, arbitral tribunals have a strong tendency to use precedents established by arbitral awards rendered in similar circumstances. The case law of permanent international courts, such as the International Court of Justice, may also be relevant, both when the parties expressly provided that it should apply and when, more generally, it reflects widely accepted rules of law.¹⁹

Because general principles of international law are in essence a method, to present a list of principles will inevitably lead to excessive simplification, and examples of general principles of law, many of which specifically apply to long-term agreements, have been discussed at length elsewhere.²⁰ This study will thus rather turn to the use of general principles of law in practice. Indeed, no legal mechanism can be properly evaluated without examining how it is actually applied. The general principles method is thus best understood by examining its application in arbitral practice.

Application of general principles of law in international arbitration

When the parties have chosen to have their contractual relationship, and hence any ensuing disputes, governed by general principles of international law by referring, in the applicable law provision of their agreement, to general principles of international law, principles common to certain legal systems, *lex mercatoria*, etc, the arbitrators are bound to give effect to that choice, whether or not they consider the choice appropriate. Indeed, most of the recent legislation on international arbitration recognises the parties' right to choose general

principles of law to govern their contractual relations, by providing that arbitrators are required to apply 'the rules of law' rather than 'the law' chosen by the parties.²¹ Even in England, a jurisdiction traditionally strongly opposed to the application of transnational rules, it has been recognised first by the courts and then in the 1996 Arbitration Act (Section 46), that the parties can validly choose transnational rules as their applicable law.²²

A more controversial question is whether the arbitrators, in the absence of an agreement between the parties on the law applicable to the merits of the dispute, can choose to apply transnational rules rather than a national law selected by means of traditional choice of law rules. Certain legal systems discourage this solution, as does the UNCITRAL Model Law, known for its relative conservatism; Article 28 (2) of the Model Law provides that, absent a choice by the parties, 'the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable'. Despite the fact that it is generally based on the UNCITRAL Model Law, the German statute of 22 December 1998 has departed from the formula with respect to the choice of law rule. It followed in this respect the Swiss model and holds that '[t]he arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute' (Article 1051 (1) of the ZPO). Nevertheless, it follows the UNCITRAL Model Law in limiting the choice of the arbitrators to 'the law' as opposed to the 'rules of law' most closely connected with the dispute absent a choice of the parties. In contrast, other recent laws permit arbitrators to apply transnational rules if they deem it appropriate and absent agreement by the parties.²³ In any case, most national laws, in following Article 36 of the Model Law, do not permit the arbitrator's decision on applicable law to be subject to review of state courts during *exequatur* proceedings or an action to set aside the award, thus providing arbitrators with a large degree of latitude.

The notion that arbitrators may apply general principles of law in the absence of any agreement of the parties as to applicable law was embodied in a resolution adopted by the International Law Association in Cairo on 28 April 1992, which stated that: 'the fact that an international arbitrator has based an award on transnational rules (general principles of law, principles common to several jurisdictions, international law, usages of trade, etc.) rather than on one law of a particular State should

not in itself affect the validity or enforceability of the award; (1) where the parties have agreed that the arbitrator may apply transnational rules or; (2) where the parties have remained silent concerning the applicable law'.²⁴

The main criticism made regarding the application of these rules in the absence of agreement between the parties, as will be discussed in more detail in the next section of this study, is based on a sense of uncertainty as to their content, which contrasts with the perceived certainty of the solutions provided by national law. Nevertheless, in practice, when the parties to international agreements have not chosen the applicable law, to require the arbitrators to choose between available national laws will often be less in accordance with the policy imperatives of predictability and consistency, than to allow them to apply general principles drawn from international arbitral practice and comparative law. This is illustrated in particular when two or more legal systems are equally closely linked to the dispute, as in the *Norsolor* case, decided in 1979 by an arbitral tribunal²⁵ sitting in Vienna.²⁶

One of the situations in international arbitration where the traditional choice of law method is the most inappropriate is when the arbitrators are asked to rule on the existence and validity of the arbitration agreement from which their own authority is derived. Indeed, the principal choice of law rules of national legal systems are not well suited to apply to arbitration agreements. Applying the law of the place of signature of the arbitration agreement, for instance, would leave the question of the validity of the arbitration agreement to chance or to the manoeuvring of the parties, which is hardly consistent with the purpose of the choice of law approach. Basing the choice of applicable law on the habitual residence of the party performing the obligation that is characteristic of the contract is meaningless in the context of an agreement to arbitrate, and the law of the place of performance is scarcely of more relevance. Of course, the question could be resolved by reference to the law of the seat of the arbitration, but the seat is often chosen for reasons of geographical or other convenience that have no bearing on the issue of whether the arbitration agreement is valid or not. Further, the application of the law of the seat is inappropriate as it would again leave the validity of the arbitration agreement to chance or to the manoeuvring of the parties.²⁷

This in no way signifies that the arbitration

agreement will be systematically held to be valid when examined in the light of general principles of international law. The agreement will be held to be void if it is found that one of the parties did not consent to arbitration, or if, for example, consent was obtained by duress or through the corruption of the signatory. On the other hand, atypical national laws (requiring, for instance, the reiteration of the arbitration agreement once litigation has begun) will not, even if they have links with the case, lead arbitrators applying substantive transnational rules to hold the arbitration agreement to be void. Here again, the solution reached is consistent with the international character of arbitration and should be unreservedly approved. Such a solution will not prevent courts from refusing to enforce an award based on generally accepted principles, if they consider that the approach taken in their own jurisdiction reflects fundamental domestic public policy. However, this solution does prevent the uncertainties of the conflicts method from giving rise to the application of substantive rules that are not adapted to an international context.

Furthermore, even when arbitrators elect to use choice of law rules in order to determine the law applicable to the dispute before them, those choice of law rules will often be of transnational origin. Indeed, the application of the choice of law rules of the seat of the arbitration, as advocated by those who see the seat as amounting to a domestic forum,²⁸ is a method which is poorly adapted to the international nature of commercial arbitration, generally leading to results which are unpredictable and therefore failing to meet the very policy imperatives of reliability often advanced to justify the conflicts method. By applying what are often referred to as general principles of private international law in seeking to determine the most appropriate applicable law (or, if the seat is in jurisdictions such as Switzerland, Germany, or Egypt, in seeking to determine the law that has the 'closest connections' with the case), the arbitrators assess the respective value of each of the different factors (such as the place of signature of the contract, the place of performance, or the habitual residence of the parties) which are likely to lead to the application of one of the connected laws. In so doing, arbitrators will of course look to arbitral awards rendered in analogous situations, as well as the solutions adopted in the various relevant systems of private international law.²⁹

The application of general principles of law is thus entirely legitimate when selected by the parties

to govern their contractual relationship or, according to the widely held view, when the parties have remained silent and the arbitrators deem appropriate the recourse to general principles of law. Of course, the general principles method is in no way intended to compromise the effectiveness of the parties' choice of a particular national law to govern their contractual relationship. In this respect, various theories have been put forward seeking to restrict the effects of the parties' choice even where, as is very often the case in practice, the parties have expressly chosen to have their potential disputes governed by a particular national law. According to one such theory, where the chosen national law is silent on a given issue, arbitrators should fill the gaps or *lacunae* by using *lex mercatoria*, general principles of law, or, if a state contract is involved, the principles of public international law.³⁰

An example of this theory put into practice can be seen in an award rendered in a 1992 ICSID arbitration. In its award on the merits, the tribunal in the *SPP v The Arab Republic of Egypt*³¹ arbitration held that even if, as the Arab Republic of Egypt argued, Egyptian law was applicable as the law chosen by the parties, this did not exclude the application of principles of international law in order to fill any *lacunae* in Egyptian law. Applying this line of reasoning, the tribunal concluded that Egyptian law did not contain any rule governing the determination of the starting point in the calculation of interest, and that it was therefore necessary to resolve the issue by reference to international law,³² begging the question of how Egyptian judges manage to cope with the need to calculate the amount of interest due in disputes governed solely by domestic law. This solution is so blatantly wrong that it suffices to discredit the method used.

However, it is the idea that national laws contain *lacunae*, rather than the concept of transnational rules, that is unsound. When a court is faced with a difficulty such as that raised in the *SPP* case, it will resolve it, if need be by drawing from general principles of the applicable national law.³³ The concept of *lacunae* is unnecessarily harmful in that it leads to the conclusion that certain legal systems contain more *lacunae* than others, and hence that there exist some legal systems insufficiently 'developed' to handle all the questions raised by major international ventures. Therefore, the application of general principles of law by an arbitrator in the face of the parties' express choice of a given national law to govern their contractual

relations and any ensuing disputes on the grounds of supposed *lacunae* in that legal system constitutes an inappropriate use of the general principles method.

A final application of general principles of law by arbitrators occurs when arbitrators apply rules of transnational public policy. State courts, in actions to set aside or enforce an award, will ensure that the award does not violate the conception of international public policy of the forum.

Undoubtedly, the conception of international public policy of the forum will not be the same as that of domestic public policy, but it is nonetheless a body of rules of national origin. The 1958 New York Convention recognises this explicitly when it addresses the review of the conformity of the award with the public policy of the country in which recognition and enforcement are sought.³⁴

Arbitrators, on the other hand, are free to retain a truly transnational conception of international public policy³⁵ and need only take into consideration the requirements of conformity of the award with the international public policy of the seat of the arbitration, or any other state in which the enforcement of the award may be sought, to the extent necessary to avoid having the award set aside. In the rare cases where it appears that the conflict between the conception of international public policy of the seat and that of truly international public policy cannot be resolved, the latter concept should nonetheless prevail before the arbitrators, as it alone is in keeping with the international nature of arbitration.³⁶ One arbitral award has already made tentative steps in this direction,³⁷ as has the case law of countries like France which allow for the enforcement of an award that has been set aside in the country of the seat of the arbitration, provided that the award satisfies the relevant conditions imposed in the country of enforcement.³⁸ These precedents clearly support the thesis that the source of validity of an international arbitral award is found in the sum of all of the legal systems in which the award may ultimately be enforced.

Critical analysis of the use of the general principles method

Since its first appearance in the 1960s, the concept and application of the general principles method have been heavily criticised. On the ideological front, some critics have characterised *lex mercatoria* as a 'less than candid pseudo-legal caprice',³⁹ or, in slightly more moderate terms, 'essentially . . . a

doctrine of *laissez-faire* benefiting only parties from industrialised nations.⁴⁰ A theoretical criticism made of *lex mercatoria* is that it does not have the characteristics of a complete legal system,⁴¹ which naturally leads to the conclusion that *lex mercatoria* does not exist⁴². Finally, on a practical level, the use of general principles of law has been criticised on the basis of difficulties in determining their precise content; for many, *lex mercatoria* is only 'vague law',⁴³ bringing together principles allegedly as contradictory as the binding force of contracts and the theory of unforeseeability.⁴⁴ It has also been suggested that the tremendous amount of academic attention devoted to *lex mercatoria* has only given rise to a very limited number of principles.⁴⁵

The first, 'ideological' criticism levelled against the general principles method ultimately reflects the concern that the general principles method can be used as a simple substitute for the theory which permits the existence of a contract with no governing law ('*contrat sans loi*'), by making the principle *pacta sunt servanda* the cornerstone of *lex mercatoria*, prevailing over all other principles whenever such principles are in conflict. Such criticism is not altogether unfounded. Indeed, certain arbitral awards emphasise the primacy of the binding force of contracts to such an extent that they give some credence to the concern that having the contract governed by *lex mercatoria* would lead to the terms of the contract prevailing over any other rule.

Nevertheless, the transnational rules method does not necessarily imply that the binding force of contracts should be viewed as the ultimate rule. The principle of the binding force of contracts is without question found in most legal systems, and it is clear that such a principle must also be taken into account by arbitrators called upon to decide a case by reference to general principles of law. It does not follow, however, that this principle is the only rule of transnational contract law, and that its application is subject neither to preconditions nor to limitations. For a contract to be binding on the parties, it must have been lawfully entered into, which means in particular that the parties must have entered into the contract on the basis of informed consent and not as a result of fraud or mistake.⁴⁶ In addition, if the failure to perform a contract is to give rise to an action for specific performance or damages, the failure to perform must not be the result of *force majeure* or some other event legitimately excusing performance.⁴⁷ Furthermore, the calculation of the extent of

recoverable loss is also subject to rules that have a bearing on the outcome of a dispute.⁴⁸ In all these areas, arbitral tribunals applying general principles have reached decisions from which it is clear that, no more than in any given national law, the principle of the binding force of contracts is not the only rule governing the resolution of contractual disputes.

In other words, the transnational rules method is perfectly able to address the policy concerns of defending the interests of parties needing protection, and of encouraging fair business practice. Furthermore, as the examples above show and in response to the 'theoretical' criticism that *lex mercatoria* cannot constitute a genuine legal order, general principles of law are becoming increasingly specialised in arbitral practice. Through the specialisation process, a coherent set of rules emerges which, although incomplete, displays at least one of the essential characteristics of a legal order: more general rules give rise in turn to more specific rules.⁴⁹ Of course, it is by no means established that to constitute a valid choice of applicable law, the rules selected must necessarily be organised in a distinct legal order.⁵⁰

The body of rules developed in arbitral practice on the subject of corruption provides a useful illustration of the fact that *pacta sunt servanda* is not the only general principle of law applied to contractual disputes. There is now little doubt that, in spite of resistance in some quarters,⁵¹ a transnational rule has been established according to which an agreement reached by means of corruption of one of the signatories, be it a government agency (in a public law context) or an employee of a party (in a private law context), is void, or, at the very least, may not give rise to an award based on such contract.⁵²

This example also shows that the 'practical' criticism that transnational rules are too few in number and often contradictory rests on an inaccurate assumption. The principle of the binding force of contracts, and the various principles limiting its scope, are not at all in contradiction. On the contrary, they follow the logic of 'principle – conditions – exceptions' that recurs in all legal systems. In the same way, the view that *lex mercatoria* contains contradictory principles such as *pacta sunt servanda* and *rebus sic stantibus*⁵³ is ill-founded. Should the theory of unforeseeability in fact be considered as a general principle of international commercial law,⁵⁴ its acceptance as such would be no more contradictory with the

theory of the binding force of contracts than it is in each of the various legal systems in which the same two theories are found.⁵⁵

Properly understood, the general principles method cannot be criticised for being vague or incomplete. However detailed the question at issue, the transnational rules method will produce a solution, in the same way as national law. The example of limitation periods, often cited as highlighting the inadequacies of the transnational rules method, is very telling in this respect. If an item, sold under an international sale of goods contract with no applicable law provision, has a latent defect, and one of the parties alleges that the claim based on the defect is time-barred by limitation rules, the arbitrators may, justifiably, not want to have the resolution of this dispute dependent upon the national law of one of the parties, particularly if the case has equally strong connections with more than one national law. In such an instance, the application of the general principles method is an adequate alternative, and can be arrived at by reference to international rules,⁵⁶ such as the Vienna Convention of 1980 on the International Sale of Goods or the UNIDROIT Principles,⁵⁷ as well as by reference to a comparison of the various legal systems connected to the case.

Lastly, to those who flag the supposedly poor results in quantitative terms of *lex mercatoria* it can only be said that this criticism denotes a misconception of the general principles method, which is indeed a method, not a list. The application of this method in fact enables an almost unlimited number of principles to be identified and applied to the relevant dispute.

Conclusion

The impassioned reactions surrounding *lex mercatoria* and the general principles method clearly entail more than an academic debate over the content and applicability of transnational rules. In fact, manifested in one's attitude towards the general principles method is an entire philosophy of international arbitration. Although sometimes presented as a 'misconception',⁵⁸ it is beyond doubt that it is the truly international character of arbitration – with arbitrators, parties and counsel of different nationalities, and hearings held in many different locations – that prompts arbitrators to resort to rules which are not strictly those of a single legal system. It is precisely because arbitrators, as

opposed to judges, have no forum as such, that arbitral tribunals will more readily apply rules of international origin.

It is no coincidence that those who consider the seat of the arbitral tribunal to amount to the forum of a national court are also those who have the most difficulty accepting the general principles method. Conversely, those who believe that the source of validity of an international arbitral award is found in all the legal systems likely to enforce such award are more willing to accept the idea that arbitrators can use the general principles method, even if this only means using transnational choice of law rules to select the applicable national law. For those who take a truly internationalist view of international arbitration, the general principles method is not only an appropriate and useful means of identifying rules common to many legal systems and well adapted to international situations such as international long-term contracts, but also an important step towards the recognition of a truly international legal order, embracing the legal systems of a community of states, which lends international agreements governed by general principles of international law and international arbitral awards their validity and binding force. ■

Notes

- * This article was presented by the author at the Second IBA International Arbitration day in Düsseldorf, November 1998. Jenny Edelstein, an associate of Shearman & Sterling, Paris, in the International Arbitration Practice Group, assisted in the preparation of this report.
- 1 On this issue, generally, see Berthold Goldman, *Frontières du droit et 'lex mercatoria'*, in *Archives de philosophie du droit*, Vol ix, le droit subjectif en question 177 (1964); Berthold Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives*, 106 *JDI* 475 (1979); Berthold Goldman, *Nouvelles réflexions sur la Lex Mercatoria*, in *Etudes de droit international en l'honneur de Pierre Lalive* 241 (1993); Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 *ICSID Rev – FILJ* 208 (1995); *Lex Mercatoria and Arbitration* (T E Carbonneau ed, rev ed, 1998); Felix Dasser, 'Internationale Schiedsgerichte und Lex Mercatoria – Rechtsvergleichender Beitrag zur Diskussion über ein Nichtstaatliches Handelsrecht' (1989); Jan A S Paulsson, *La Lex Mercatoria dans l'arbitrage CCI*, *Rev Arb* 55 (1990). See also Filali Osman, 'Les principes généraux de la lex mercatoria: Contribution à l'étude d'un ordre juridique anational' (1992); Filip J M de Ly, 'International Business Law and Lex Mercatoria' (1992); Dominique Bureau, 'Les sources informelles du droit dans les relations privées internationales' (Thesis, University of Paris II, 1992).
- 2 For an overview of judicial decisions on this subject in various jurisdictions (Germany, England, Austria, Belgium,

- United States, France, Italy, Netherlands) *see* F Osman, *supra* note 1 at 495 *et seq.* Adde D Rivkin, *Enforceability of Arbitral Awards Based on Lex Mercatoria*, 9 Arb Int'l 67 (1993).
3. *See, eg*, Draetta, Lake and Nanda, 'Breach and Adaptation of International Contracts: An Introduction to Lex Mercatoria' 9 (1992) and the cited references.
 - 4 M Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, in *Liber Amicorum Lord Wilberforce* 149 (1987), repr 4 Arb Int'l 86 (1988).
 - 5 *See, eg*, Ph. Kahn, *Les principes généraux du droit devant les arbitres du commerce international*, JDI 305, 325 (1989). For a response to the argument that the list is short, *see also* A Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, 6 Arb Int'l 133 (1990) and B Goldman, *Nouvelles Réflexions sur la Lex Mercatoria*, *supra* note 1 at 243.
 - 6 Clause 68 of the Conditions of Contract signed with the Construction Contract of 13 August 1987 by Eurotunnel and Transmanche Link (ed of 27 January 1987).
 - 7 Unpublished clause. On the 'tronc commun' method, which is one of the specific ways in which the transnational rules method is applied, *see esp* M Rubino-Sammartano, *Le tronc commun des lois nationales en présence: réflexions sur le droit applicable par l'arbitre international*, Rev Arb 133 (1987).
 - 8 *See, eg*, the unpublished arbitration clause seen in ICC case no 5331: 'This agreement shall be given effect and shall be applied and interpreted in accordance with the terms of this Agreement, then with the Federal law of the United Arab Emirates and then with generally recognised principles of international commercial law.' On the meaning of this language which, in the context of ICSID arbitration, corresponds, failing agreement of the parties, to the application of Art 42(1) of the Washington Convention, *see* E Gaillard, JDI 181 (1991).
 - 9 It must also be noted that to respect due process in arbitral proceedings, the arbitrators cannot decide the dispute by applying a particular transnational rule without having heard the parties' views as to the rule's existence and content. This is particularly important in the situation where, failing agreement of the parties as to applicable law, the arbitrators decide on their own to resolve the dispute by reference to general principles of law.
 - 10 *See, eg*, the ICC award rendered in 1992 in case no 7153, 119 JDI 1006 (1992), Note D Hascher.
 - 11 *See, eg*, the ICC award rendered in 1989 in case no 5885, YB Com Arb 91, 92 (1991).
 - 12 *See, eg*, F Osman, *supra* note 1.
 - 13 *See* the respective contributions of H van Houtte, P Bowden, P Bernardini, Ph O'Neill and N Salam, D Rivkin, B Hanotiau and P Karrer in 'Transnational Rules in International Commercial Arbitration', 105 (E Gaillard ed, 1993). *See also* the excellent article by E Loquin, *La réalité des usages du commerce international*, Rev Gen Dr Eco 163 (1989).
 - 14 Publication of UNIDROIT, 1994.
 - 15 *Id*, preamble at 1.
 - 16 *See* the working papers of the ICC-UNIDROIT Symposium on the UNIDROIT Principles of International Commercial Contracts: held in Paris on 20-21 October 1994. Adde M J Bonell, 'An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts' (1994).
 - 17 *See* introduction to UNIDROIT Principles at page viii: 'the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems. Since however the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted'.
 - 18 *See* Philippe Fouchard, Emmanuel Gaillard, Berthold Goldman, 'Traité de l'arbitrage commercial international' at 199 *et seq* (1996).
 - 19 On the use of the case law of the International Court of Justice as a basis for the principle of estoppel by representation in international trade law, *see, eg*, the first ICSID award in *Amco Asia Corp v The Republic of Indonesia*, dated 25 September 1983, 23 ILM 351, 381 (1984); for a French translation, *see* 113 JDI 200 220 (1986), and observations by E Gaillard.
 - 20 For an analysis of a number of general principles of international law, *see* Fouchard, Gaillard, Goldman, *supra* note 18 at 36 *et seq* and references cited therein.
 - 21 *See, eg*, Article 1496 of the French NCPC, Article 1054(1) of the Dutch Civil Procedure Code, Article 187 of the Swiss LDIP or Article 28(1) of the UNCITRAL Model Law; Article 1051(1) of the German ZPO (law of 22 December 1997).
 - 22 *See*, the 24 March 1987 Court of Appeal decision in *Rakoil*, 2 Lloyd's Rep 246 (1987); Pierre Lalive, *Arbitrage en Suisse et lex mercatoria (note sur un important arrêt anglais)*, 1987 Bull Asa 165; David W Rivkin, *Enforceability of Arbitral Awards Based on Lex Mercatoria*, 9 Arb Int'l 67, 72 *et seq* (1993).
 - 23 *See, eg*, Article 1496 of the French NCPC, Article 1054 (2) of the Dutch CPC or Article 187 of the Swiss LDIP. *See generally* Fouchard, Gaillard, Goldman, *supra* note 18 at 814 *et seq*.
 - 24 Report of the Sixty-Fifth Conference, Cairo 1992 and commentary in 'Transnational Rules in International Commercial Arbitration', *supra* note 13 at 37 *et seq*.
 - 25 Composed of B Cremades, President, Ghestin and Steiner, arbitrators.
 - 26 ICC case no 3131, Rev Arb 525 (1983). On the subsequent proceedings, *see, eg*, B Goldman, *Une bataille judiciaire autour de la lex mercatoria: L'affaire Norsolor*, Rev Arb 525 (1983).
 - 27 For a case in which the arbitral tribunal, as well as the French courts reviewing the award, applied general principles of law to decide on the validity of an arbitration clause, *see* *Municipalité de Khoms El Mergeb c Société Dalico*, Cour de Cassation Civ 1ère, Decision of 20 December 1993, Rev Arb 116 (1994), note Gaudemet-Tallon; 121 JDI 432 (1994), note E Gaillard.
 - 28 *See, eg*, the Resolution of 1957 of the Institut de Droit International and G Sauser-Hall's Report, *Annuaire de l'institut de droit international* 469 (1957). In English thinking, *see* F A Mann, *Lex Facit Arbitrum*, *Etudes Domestiques* at 197 (1987). Compare the less mainstream view of J Lew, 'Applicable Law in International Commercial Arbitration' (1978).
 - 29 *See also* P Lalive, *Les règles de conflit de lois appliquées au fond du litige par l'arbitre international siégeant en Suisse*, Rev Arb 155, 181-182 (1976); A Bucher, *Le nouvel arbitrage international en Suisse*, at 249; Fouchard, Gaillard, Goldman, *supra* note 18 at 886-888.
 - 30 This position was maintained by certain authors during the

- discussion that led to the passing, in Cairo, in April 1992, of the International Law Association's resolution on the application of transnational rules in international commercial arbitration, Rev Arb 211 (1994). It explains why a draft resolution condemning the application of transnational rules where the parties have expressly chosen a specific legal system to govern their contract has not been adopted. See the discussion in 'Transnational Rules in International Commercial Arbitration', *supra* note 13 at 86-87.
- 31 Composed of Jimenez de Arechaga, President, Petrowski Jr, and El Mahdi, arbitrators, the latter dissenting.
- 32 121 JDI 229 (1994), note, E Gaillard.
- 33 See also, G Delaume, *The Pyramids Stand – The Pharaohs Can Rest in Peace*, 8 ICSID Rev – FILJ 231 (1993); the dissenting opinion of M El Mahdi, 32 ILM 986, 1030 (1993); note E Gaillard, 118 JDI 183 (1991).
- 34 Article V, para 2(b).
- 35 P Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, ICCA Congress Series 257 (1987); *Ordre public transnational (ou réellement international) et arbitrage international*, Rev Arb 329 (1986). Adde L. Matray, *Arbitrage et ordre public transnational*, Etudes Sanders 244 (1982).
- 36 For an opposing view, see P Mayer, *La règle morale dans l'arbitrage international* in Etudes Offertes à Pierre Bellet 379, 390 (1991), who, on the basis that the arbitrators do not have a forum, considers the will of the arbitrator to be the justification for displacing a rule that would otherwise apply, when such a rule is contrary to the arbitrator's conception of morality.
- 37 See the award rendered in 1984 by E Jimenez de Arechaga, K H Böckstiegel and J H Pickering in ICC case no 4695, 11 YB Com Arb 149 (1986).
- 38 See *Société Hilmarton Ltd c. Société Omnium de Traitement et de Valorisation*, Cour de Cassation Civ 1ère, Judgment of 23 March 1994, 121 JDI 701 (1994), note, E Gaillard. See also, E Gaillard, *Enforcement of Awards Set Aside in the Country of Origin: the French Experience*, Report presented to ICCA Congress in Paris, May 1998; E Gaillard, *L'exécution des sentences annulées dans leur pays d'origine*, 3 JDI 645 (1998).
- 39 A Zaki, l'état de l'arbitrage 225 *et seq* (1979).
- 40 M Mustill, *supra* note 4 at 181; F de Ly, *supra* note 1 at 289.
- 41 See esp P Lagarde, *Approche critique de la lex mercatoria*, Etudes Goldman 125 (1982). Adde, same author, note on *Compania Valenciana de Cementos c Primary Coal*, Cour d'Appel, Paris, Judgment of 13 July 1989, in Rev Arb 663 (1990).
- 42 C W O Stoecker, *The Lex Mercatoria: To What Extent Does It Exist?*, 7 J Int'l Arb 101 (1990).
- 43 See, eg, A Kassis, 'Théorie générale des usages du commerce' 561 *et seq* (1984); G Delaume, *The Proper Law of State Contracts and Lex Mercatoria: A Reappraisal*, 3 ICSID Rev – FILJ 79 (1988).
- 44 A Kassis, *supra* note 43 at 349 *et seq*.
- 45 Mustill, *supra* note 4, at 180; see also G Delaume, *supra* note 44; Stoecker, *supra* note 42 at 125, E Gaillard, *Centre International pour le Règlement des Différends Relatifs aux Investissements (CIRDI) – Chronique des sentences arbitrales*, 113 JDI 197, 199 (1986).
- 46 See, eg, the ICC award rendered in 1981 in case no 3527, 109 JDI 971 (1982), note, Y Derains. On transnational rules regarding the validity of a contract, see Fouchard, Gaillard, Goldman, *supra* note 18 at 833 *et seq*.
- 47 See, eg, the ICC award rendered in 1974 in case no 2142, 101 JDI 892 (1974), note, RT. On transnational rules regarding *force majeure* and similar defences, see Fouchard, Gaillard, Goldman, *supra* note 18 at 842 *et seq* and Rivkin, *Lex Mercatoria and Force Majeure*, in 'Transnational Rules in International Commercial Arbitration', *supra* note 13 at 161.
- 48 See, eg, the ICC award rendered in 1968 in case no 1526, 101 JDI 914 (1974), note, Y Derains. On the transnational rules on damages, see Fouchard, Gaillard, Goldman, *supra* note 18 at 845 *et seq*; B Hanotiau, *La détermination et l'évaluation du préjudice réparable: principes généraux et principes en émergence*, in 'Transnational Rules in International Commercial Arbitration', *supra* note 13 at 209.
- 49 See on the example of the detrimental reliance, derived from the more general principle of good faith, Emmanuel Gaillard, *L'interdiction de se contredire au détriment d'autrui comme principe général du droit du commerce international (le principe de l'estoppel dans quelques sentences arbitrales récentes)*, Rev Arb 241 (1985) and Philippe Pinsolle, *Distinction entre le principe de l'estoppel et le principe de bonne foi dans le droit du commerce international*, to appear in 4 JDI 905 (1998); more generally, on the numerous rules derived from the principle of good faith in the performance of contracts, see E Gaillard, *Observations on the 21 October 1983 ICSID award in Klöckner v République Unie du Cameroun*, 114 JDI 137, 141 (1987); on the various rules derived from the obligation of the parties to cooperate with each other, see Loquin, *supra* note 13, at 190.
- 50 See Fouchard, Gaillard, Goldman, *supra* note 18 at 820 *et seq*.
- 51 See B Oppetit, *Le paradoxe de la corruption à l'épreuve du droit du commerce international*, 114 JDI 5 (1987).
- 52 On the question of whether corruption renders the subject matter non-arbitrable or whether, as is generally accepted today, arbitrators must retain jurisdiction and declare the agreement void, see Fouchard, Gaillard, Goldman, *supra* note 18 at 367 *et seq*; but see G Wetter, *Issues of Corruption Before International Arbitral Tribunals: The Authentic Text and True Meaning of Judge Lagergren's Award in ICC Case no 1110*, 10 Arb Int'l 277 (1994).
- 53 A Kassis, *supra* note 43 at 349 *et seq*.
- 54 See for a negative answer, H Van Houtte, *Changed Circumstances and Pacta Sunt Servanda*, in 'Transnational Rules in International Commercial Arbitration', *supra* note 13 at 105 *et seq* and, in the affirmative, the UNIDROIT Principles, Articles 6.2.1 to 6.2.3.
- 55 For an analysis of comparative law on unforeseeability, see, eg D M Philippe, 'Changement de circonstances et bouleversement de l'économie contractuelle' (1986).
- 56 See esp Article 38 *et seq* of the Convention.
- 57 See esp Article 7.2.2 of the Principles.
- 58 M Mustill, *supra* note 4 at 152.