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Choice of Law in Third-Millennium Arbitrations

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Choice of Law in Third-Millennium Arbitrations: The Relevance of the UNIDROIT Principles of International Commercial Contracts†

Fabrizio Marrella*

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† Editor's Note: The Editorial Board generally checks cited material for both substance and "Bluebook" form. This article relies extensively on foreign-language arbitration reporters and other European sources our library was unable to obtain. With the author's kind assistance, such sources have been checked for the proper "Bluebook" form to the extent possible, but have not been substantively checked.

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I. INTRODUCTION

In 1584, Lanfranco da Oriano, one the first scholars of commercial arbitration in the period of the Law Merchant, published an essay in Venice in which he noticed that the “subject of arbitration is of a great utility but it is always badly explained by legal scholars.”¹ Five centuries later, many businessmen still agree with Lanfranco since their perception of the law of international trade seems completely different from that of many legal scholars, including their lawyers.

In truth, a reconciliation of the two visions is possible since it is the most important task of any (good) international arbitrator. This task is easier today with reference to the UNIDROIT Principles for international commercial contracts. The growth of a global economy rooted in the cosmopolitan nature of commerce and the development of new means of transportation and communication demand the prompt formation of a uniform transnational commercial law.²

1. Lanfranco da Oriano, *Materiam arbitratorum utilem fore et quotidianam a nostrisque doctoribus male esplicatam*, in TRACTATUS DE ARBITRIS 206 (1584). See generally FABRIZIO MARRELLA & A. MOZZATO, ALLE ORIGINI DELL'ARBITRATO COMMERCIALE INTERNAZIONALE. L'ARBITRATO A VENEZIA TRA MEDIOEVO ED ETÀ MODERNA (2001).

2. International Institute for the Unification of Private Law (UNIDROIT), Principles of International Commercial Contracts (1994), 34 I.L.M. 1067 (1995) [hereinafter UNIDROIT Principles]. See *Le droit commercial uniforme au XXI siècle*, Actes du Congrès de la CNUDCI, New York, May 18-22, 1992, U.N. Doc. A/CN.9/SER.D/1, 1995; see generally FRANCESCO GALGANO, LEX MERCATORIA (2001) (discussing the ancient Law Merchant and its afterlife); Fabrizio Marrella & Fabian Gélinas, *The UNIDROIT Principles for International Commercial Contracts in ICC Arbitration*, 10 ICC INT'L COURT OF ARB. BULL. 26, 26-119 (1999) (discussing the

Whether one agrees or disagrees with *lex mercatoria* doctrines, one must accept the fact that a significant number of awards have made reference to them, whatever that means.³ Legal scholars have tried to

application of the UNIDROIT Principles of International Commercial Contracts in ICC arbitration); Fabrizio Marrella, *UNIDROIT Principles of International Commercial Contracts in ICC Arbitration (1999-2001)*, 12 ICC INT'L CT. OF ARB. BULL. 49, 49-115 (2001) (discussing the latest applications); Fabrizio Marrella, *La nuova lex mercatoria*, in TRATTATO DI DIRITTO COMMERCIALE E DI DIRITTO PUBBLICO DELL'ECONOMIA DIRETTO DA FRANCESCO GALGANO (2003) (discussing results and further applications).

3. See Berthold Goldman, *Arbitrage international et droit comun des nations*, 1956 REV. ARB. 115, 115 and accompanying notes; *Frontières du droit et lex mercatoria*, [1964] ARCHIVES DE PHILOSOPHIC DU DROIT 177, 177 and accompanying notes (1964); Berthold Goldman *La lex mercatoria dans les contrats et l'arbitrage international: réalité et perspectives*, 106 J. DU DROIT INT'L 475, 475-99 (1979); *La volonté des parties et le rôle de l'arbitrage dans l'arbitrage international*, 1981 REV. ARB. 469-81; see generally *The Applicable Law: General Principles of Law—the Lex Mercatoria*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113 (Julian D.M. Lew ed., 1986); *L'arbitre, les conflits de lois et la lex mercatoria*, in ACTES DU LER COLLOQUE SUR L'ARBITRAGE COMMERCIAL INTERNATIONAL 103 (Prujiner Antaki ed., 1986); *Nouvelles réflexions sur la lex mercatoria*, in ETUDES P. LALIVE 241 (1993); PHILIPPE KAHN, LA VENTE COMMERCIAL INTERNATIONAL; Philippe Kahn, *Lex mercatoria et Euro-obligations*, in FESTSCHRIFT C. SCHMITTOFF 240 (1973); PHILIPPE KAHN, LEX MERCATORIA ET PRATIQUE DES CONTRATS INTERNATIONAUX; Philippe Kahn, *L'essor du non droit dans les relations commerciales internationales et le contrat sans loi*, in L'HYPOTHESE DU NON DROIT 231 (1978); Philippe Kahn, *Droit international économique, droit du développement et Lex mercatoria, concept unique ou pluralisme des ordres juridiques*, in LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES, ETUDES OFFERTES A BERTHOLD GOLDMAN 97 (Litec ed., 1982); Philippe Kahn, *Rapport français*, in LE ROLE DE LA PRATIQUE DANS LA FORMATION DU DROIT 247 (Henry Capitant ed., 1985); PHILIPPE KAHN, DROIT ET MONNAIE: ETATS ET ESPACE MONETAIRE TRANSNATIONAL (1988); Philippe Kahn, *Les principes généraux du droit devant les arbitres internationaux*, 116 J. DU DROIT INT'L 305 (1989); Philippe Kahn, *La lex mercatoria, point de vue français après quarante ans de controverse*, 37 MCGILL L.J. 413 (1992); Philippe Kahn, *L'internationalisation de la vente*, in ETUDES PLANTEY 297 (1995); Philippe Kahn, *Les Principes d'UNIDROIT comme droit applicable aux contrats internationaux*, in CONTRATTI COMMERCIALI INTERNAZIONALI E PRINCIPI UNIDROIT 39 (Michael Joachim Bonell & F. Bonelli eds. 1997); Philippe Kahn, *Vers l'institutionnalisation de la lex mercatoria: a propos des principes d'UNIDROIT relatifs aux contrats du commerce international*, in LIBER AMICORUM COMMISSION DROIT ET VIE DES AFFAIRES 125 (1988); Philippe Kahn, *Les contrats internationaux de coopération scientifique et technique inter-entreprises face aux Principes d'UNIDROIT*, RDU/ULR 519-24 (1988); Philippe Kahn, *A propos de l'ordre public transnational: quelques observations*, in MELANGES FRITZ STURM 1539-50 (1999); Philippe Kahn, *A propos des sources du droit du commerce international*, in MELANGES FARJAT 185 (1997); Jacques Beguin, *Le développement de la lex mercatoria menace-t-il l'ordre juridique international*, 30 MCGILL L.J. 478, 478-538 (1985); J. Mousseron, *Lex mercatoria: bonne mauvaise idée ou mauvaise bonne idée?*, in MELANGES L. BOYER 469 (1996); René David, *Il diritto del commercio internazionale: un nuovo compito per i legislatori nazionali o una nuova lex mercatoria?*, RIV. DIR. CIV. 578 (1976); Aleksander Goldstajn, *The New Law Merchant*, J. BUS. L. 12-17 (1961); Aleksander Goldstajn, *The New Law Merchant Reconsidered*, in *Law and International Trade*, in FESTSCHRIFT FUER CLIVE M. SCHMITTHOFF ZUM 70 GEBURTSTAG 171 (1973); Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221 (1978); Bernado M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317 (1984); Ole

Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L COMP. L.Q. 747 (1985); Ole Lando, *Lex mercatoria 1985-1996*, in 2 FESTSKRIFT TILL STIG STRÖMHOLM 576-84 (Ake Frandberg ed., 1997); F. Bortolotti, *La "nuova" Lex mercatoria: Costruzione dottrinarina o strumento operativo?*, in CONTRATTO E IMP./EUROPA 734 (1996); I. Strenger, *La notion de lex mercatoria en droit du commerce international*, 11 R.C.A.D.I. 207, 207-355, tbl. 227 (1991); F. DASSER, INTERNATIONALE SCHIEDSGERICHTE UND LEX MERCATORIA (1989); P.F. WEISE, LEX MERCATORIA: MATERIELLES RECHT VOR DER INTERNATIONALEN HANDELSSCHIEDSGERICHTSBARKEIT (1990); RICCARDO MEYER, BONA FIDES UND LEX MERCATORIA IN DER EUROPÄISCHEN RECHTSTRADITION (1994); U. STEIN, LEX MERCATORIA: REALITÄT UND THEORIE 1-318 (1995); RICARDO MONACO, *Note sulla qualificazione della lex mercatoria*, in STUDI GORLA 1249-66 (1984); Klaus Peter Berger, *The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts*, 28 LAW & POLY INT'L BUS. 943 (1997); Emmanuel Gaillard, *Trente ans de lex mercatoria; pour une application sélective de la méthode des principes généraux du droit*, 122 J. DU DROIT INT'L 5 (1995); Hilmar Raeschke-Kessler, *The UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?*, ICC/DOSSIER 167 (1995); LEX MERCATORIA AND LEGAL PLURALISM: A LATE THIRTEENTH-CENTURY TREATISE AND ITS AFTERLIFE (C. Donahue, Jr. ed., 1988); PHILIPPE DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA 260 (1992); Philippe de Ly, *Lex mercatoria (New Law Merchant): Globalization and International Self-Regulation*, DIR. COMMERCIALE INT'L 555, 555-90 (2000); Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, RDU/ULR 171 (2000); Barton S. Selden, *Lex mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look*, in GOLDEN GATE U. SCHOOL OF LAW ANNUAL SURVEY OF INTERNATIONAL AND COMPARATIVE LAW (1995); MICHAEL JOACHIM BONELL, LA MODERNA LEX MERCATORIA TRA MITO E REALTÀ 315-32 (1996); Michael Joachim Bonell, *Voce Lex Mercatoria*, DIG. SEZ. COMM. 11, 11-17 (1993); *Viè spazio per una lex mercatoria?*, in SIDI, LA RIFORMA DEL DIRITTO INTERNAZIONALE PRIVATO 200 (1999); Friedrich K. Jeunger, *The Lex Mercatoria and Private International Law*, 60 L.A. L. REV. 1133 (2000); LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT (Thomas E. Carbonneau ed., 1988) (especially essays by Audit, Smit, and Lowenfeld); KLAUS PETER BERGER, THE CREEPING CODIFICATION OF LEX MERCATORIA (1999); Eric Loquin, *Où en est la lex mercatoria?*, in MÉLANGES PHILIPPE KAHN 23-51 (2000); A. Pellet, *La lex mercatoria, "tiers ordre juridique"? Remarques ingénues d'un internationaliste de droit public*, in MÉLANGES PHILIPPE KAHN 54-74 (2000); W. LAWRENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 639 (2000). For critics of the doctrine, see generally Paul Lagarde, *Approche critique à la lex mercatoria*, in MÉLANGES GOLDMAN 145 (1987); ANTOINE KASSIS, THÉORIE GÉNÉRALE DES USAGES SU COMMERCE, DROIT COMPARÉ, CONTRATS ET ARBITRAGE INTERNATIONAUX, LEX MERCATORIA (1984); Gbenga Bamodu, *Exploring the Interrelationships of Transnational Commercial Law, "The New Lex Mercatoria" and International Commercial Arbitration*, AFR. J. INT'L & COMP. L. 31 (1998); Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration*, 14 AM. U. INT'L L. REV. 657, 658-59 (1999); Keith Hight, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613 (1989); Lord Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, in LIBER AMICORUM LORD WILBERFORCE 181 (1987):

Essentially, the *lex mercatoria* is a doctrine of *laissez-faire*. In very many parts of the world it is considered that the exercise of free consent by individual parties must be subordinated to broader economic and political considerations bearing on international trade. Furthermore, the disfavour with which transnational groups or corporations are now regarded in some quarters cannot but hinder the general acceptance of a doctrine whose legitimacy is seen, rightly or wrongly, as derived at least in part from the existence of such bodies . . . the proponents of the *lex mercatoria* claim it to be the law of the international business community: which

solve the Babel of law dilemma, which was announced with much worry by the French comparatist René David, by creating a compilation of principles intended to provide one codified answer to the challenge of *lex mercatoria*. The dawn of the third millennium witnesses the spread of one of the twentieth century's most striking legal innovations: the codification of general principles of international commercial contract law under a nonbinding format by an international organization. New actors of international trade call for new rules, and the winds of change are affecting the regulatory activity patterns of some international organizations. A striking example is UNIDROIT.

The International Institute for the Unification of Private Law (UNIDROIT) was established at the beginning of the 20th century in order to promote the international uniformity of state legislations. However, UNIDROIT has elaborated an international code in which general principles of contract law specifically adapted for non-national transactions have been compounded.⁴ Paradoxically, this Institute aimed at conventional unification of law⁵ has carried out the work of scientific unification of transnational commercial law, something never tried before.

Today, every reader of the imposing legal literature on the UNIDROIT Principles is confronted by a phenomenon which has reunited international, private, and comparative law scholars in common reflection, and has torn down the common state-centered

must mean the law unanimously adopted by all countries engaged upon international commerce. . . . Such a claim would have been sustainable two centuries ago. But the international business community is now immeasurably enlarged. What principles of trade law, apart from those which are so general as to be useless, are common to the legal systems of the members of such a Community?

Andrea Giardina, *La lex mercatoria et la sécurité du commerce et des investissements internationaux*, in *HOMMAGE À FRANÇOIS RIGAUX* 223 (1993); F. De Castro, *El arbitraje y la nueva "Lex mercatoria"*, 4 *A.D.C.* 619 (1979); J.M. Gondra, *La moderna Lex mercatoria y la unificación del derecho del comercio internacional*, *REV. DE DERECHO MERCANTIL* 738 (1973); *DERECHO DEL COMERCIO INTERNACIONAL* 46 (J. Fernandez Rozas ed., 1996); Gilberlo I. Boutin, *Autour de la reception de la lex mercatoria en droit positif panameen: Developpement historique et definition d'un jus mercatorum au Panama*, *RDU/ULR* 305, 305-11, nn.2-3 (1998); M. Virgos Soriano, *Lex mercatoria*, in *DICCIONARIO JURIDICO* 3993-94 (1997); Joachim Mertens, *Lex mercatoria, A Self-applied System Beyond National Law?*, in *GLOBAL LAW WITHOUT A STATE* 37 (Gunther Teubner ed., 1997); PIERRE MAYER, *DROIT INTERNATIONAL PRIVÉ* 465 n.702 (5th ed. 1994).

4. It is clear that the UNIDROIT Principles are not an international convention, nor an international organization resolution. They are basically a restatement of international contract law which represents rules common to the world market.

5. See generally, e.g., R. Monaco, *Istituto Internazionale per l'Unificazione del diritto privato*, in *ENC. GIUR. TRECCANI* (1988).

partitions of legal science, at least in continental Europe.⁶ A leading Italian scholar has warned that we might face a turning point in the legal thinking of international trade:

[T]he effectiveness of this new Digest relies on the ongoing number of international arbitral awards that, in resolving disputes by applying *lex mercatoria*, make textual reference to the UNIDROIT principles, assuming them to be a credited source. The essence of this compilation resides in the blend of contractual practice with universally accepted general principles of law. Here, the political mediation of competing interests, peculiar to the law created by States is replaced, just like in the ancient times of *lex mercatoria*, by the cultural mediation of legal scholars.⁷

Further evidence of the growing importance of *lex mercatoria* and the UNIDROIT Principles is offered in the European Commission green paper “on the conversion of the Rome Convention of 1980 on the law applicable to contractual obligations into a Community instrument and its modernisation.”⁸ In Europe, it is now time to transform the 1980 Rome Convention into an E.C. regulation, and the Commission has pointed out that “traditionally, most academic writers have ruled out the possibility of choosing non-state rules, particularly because there is not yet a full and consistent body of such rules.” However, in 2003 the situation seems different from the one prevailing in 1980. The hundreds of scholars throughout the world who repeat that *lex mercatoria* (and the UNIDROIT Principles) does not exist, or worse, is not applied to international contracts, risk to be outdated.

Hence, the European Commission suggests a modification of Article 3 of the Rome Convention (on choice of law by the parties) to encompass a choice of transnational rules. Such a modification is necessary because:

[I]t is common practice in international trade for the parties to refer not to the law of one or other state but direct to the rules of an international convention such as the Vienna Convention of 11 April 1980 on contracts for the international sale of goods, to the customs of international trade, to the general principles of law, to the *lex mercatoria* or to recent private codifications such as the UNIDROIT Principles of International Commercial Contracts.⁹

The present analysis aims to build up some *models* of application of transnational rules, including the UNIDROIT Principles, on the basis of patterns observed in arbitral jurisprudence. This will help to

6. For an extensive bibliography, see <http://www.unilex.info>.

7. Translated from Francesco Galgano, *Diritto ed economia alle soglie del nuovo millennio*, in 1 CONTRATTO E IMPRESA 205 (2000).

8. European Commission, Green Paper, On the Conversion of the Rome Convention of 1980 into a Community Instrument and Its Modernisation, 654 (Jan. 14, 2003) (on file with author).

9. *Id.* at 22.

estimate, in a more accurate way, the role of these rules in the development of international commercial arbitration law at the dawn of the third millennium.¹⁰

Since their official presentation in May 1994, the UNIDROIT Principles on international commercial contracts have received various applications, either in the framework of institutional arbitration, or in the context of ad hoc arbitration.¹¹ The importance of ICC institutional arbitration leads one to focus the present study on patterns of international jurisprudence rendered in that specific framework. In this respect, a recent study on those awards has shown that the UNIDROIT Principles on international commercial contracts have been applied in at least 38 awards in the period comprising May 1994 to December 31, 2000.¹²

The preamble to the UNIDROIT Principles states that these rules become applicable: “[w]hen the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by ‘general principles of law,’ the ‘*lex mercatoria*’ or the like.” Moreover, “they may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law. They may be used to interpret or supplement international uniform law instruments. They may serve as a model for national and international legislators.”¹³

10. See generally STEPHEN M. SCHWEBEL, *INTERNATIONAL ARBITRATION: THREE SALIENT PROBLEMS* (1987); JOHN J. BARCELÓ III ET AL., *INTERNATIONAL COMMERCIAL ARBITRATION: CASES AND MATERIALS: A TRANSNATIONAL PERSPECTIVE* (1999); MICHAEL REISMAN, *INTERNATIONAL COMMERCIAL ARBITRATION: CASES, MATERIALS AND NOTES ON THE RESOLUTION OF INTERNATIONAL BUSINESS DISPUTES* (1997); ALAN REDFERN & MARTIN HUNTER, *LAW & PRACTICE OF INTERNATIONAL COMMERCIAL ARBITRATION* (3d ed. 1999); FOUCHARD, GAILLARD & GOLDMAN, *ON INTERNATIONAL COMMERCIAL ARBITRATION* (Emmanuel Gaillard & John Savage eds., 1999); H. Grigera Naon, *Choice of Law Problems in International Commercial Arbitration*, 289 R.C.A.D.I. 9 (2001).

11. See Michael Joachim Bonell, *The UNIDROIT Principles and Transnational Law*, 5 RDU/ULR 1 (2001).

12. See Fabrizio Marrella & Fabian Gélinas, *The UNIDROIT Principles for International Commercial Contracts in ICC Arbitration*, 10 ICC INT’L CT. OF ARB. BULL. 26 (1999); Fabrizio Marrella & Fabian Gélinas, *Principes UNIDROIT relatifs aux contrats du commerce international dans l’arbitrage de la Chambre de Commerce Internationale*, 10 BULLETIN DE LA COUR INT’L D’ARBITRAGE DE LA CCI 26 (1999) (French version). On the latest applications, see FABRIZIO MARRELLA, *UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS IN ICC ARBITRATION (1999-2001)* 49-115 (2002).

13. The official comment to the UNIDROIT Principles states:

The Principles set forth general rules which are basically conceived for ‘international commercial contracts.’

1. “International” contracts

The international character of a contract may be defined in a great variety of way. The solutions adopted in both national and international legislation range from a reference to the place of business or habitual residence of the parties in different countries to the adoption of more general criteria such as the contract

having "significant connections with more than one State," "involving a choice between the laws of different States," or "affecting the interests of international trade."

The Principles do not expressly lay down any of these criteria. The assumption, however, is that the concept of "international" contracts should be given the broadest possible interpretation, so as ultimately to exclude only those situations where no international element at all is involved, *i.e.* where all the relevant elements of the contract in question are connected with one country only.

2. "Commercial" contracts

The restriction to "commercial" contracts is in no way intended to take over the distinction traditionally made in some legal systems between "civil" and "commercial" parties and/or transactions, *i.e.* to make the application of the Principles dependent on whether the parties have the formal status of "merchants" (*commerçants, Kaufleute*) and/or the transaction is commercial in nature. The idea is rather that of excluding from the scope of the Principles so-called "consumer transactions" which are within the various legal systems being increasingly subjected to special rules, mostly of a mandatory character, aimed at protecting the consumer, *i.e.* a party who enters into the contract otherwise than in the course of its trade or profession. The criteria adopted at both national and international level also vary with respect to the distinction between consumer and non-consumer contract. The Principles do not provide any express definition, but the assumption is that the concept of "commercial" contracts should be understood in the broadest possible sense, so as to include not only trade transactions for the supply or exchange of goods or services, but also other types of economic transactions, such as investment and/or concession agreements, contracts for professional services, etc.

3. The Principles and domestic contracts between private persons

Notwithstanding the fact that the Principles are conceived for international commercial contracts, there is nothing to prevent private persons from agreeing to apply the Principles to a purely domestic contract. Any such agreement would however be subject to the mandatory rules of the domestic law governing the contract.

4. The Principles as rules of law governing the contract

a. Express choice by the parties

As the Principles represent a system of rules of contract law which are common to existing national legal systems or best adapted to the special requirements of international commercial transactions, there might be good reasons for the parties to choose them expressly as the rules applicable to their contract, in the place of one or another particular domestic law.

Parties who wish to adopt the Principles as the rules applicable to their contract would however be well advised to combine the reference to the Principles with an arbitration agreement.

The reason for this is that the freedom of choice of the parties in designating the law governing their contract is traditionally limited to national law. Therefore, a reference by the parties to the Principles will normally be considered to be a mere agreement to incorporate them in the contract, while the law governing the contract will still have to be determined on the basis of the private international law rules of the forum. As a result, the Principles will bind the parties only to the extent that they do not affect the rules of the applicable law from which the parties may not derogate.

The situation may be different if the parties agree to submit disputes arising from their contract to arbitration. Arbitrators are not necessarily bound by a particular domestic law. This is self-evident if they are authorised by the parties to act as *amiable compositeurs* or *ex aequo et bono*. But even in the absence of such an authorisation there is a growing tendency to permit the parties to choose "rules of law" other than national laws on which the arbitrators are to base their decision. See in particular Article 28(1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration; *see also* 1965 Convention on the Settlement of Investment Disputes between States and Nationals of other States art. 42(1) [hereinafter *ICSID Convention*].

In line with this approach, the parties would be free to choose the Principles as the "rules of law" according to which the arbitrators would decide the dispute, with the result that the Principles would apply to the exclusion of any particular national law, subject only to the application of those rules of domestic law which are mandatory irrespective of which law governs the contract (see Art. 1.4). In disputes falling under the ICSID Convention, the Principles might even be applicable to the exclusion of any domestic rule of law.

b. The Principles applied as *lex mercatoria*

Parties to international commercial contracts who cannot agree on the choice of a particular domestic law as the law applicable to their contract sometimes provide that it shall be governed by the "general principles of law," by the "usages and customs of international trade", by the *lex mercatoria*, etc. Hitherto, such reference by the parties to not better identified principles and rules of a supranational or transnational character has been criticised, among other grounds, because of the extreme vagueness of such concept. In order to avoid, or at least considerably to reduce, the uncertainty accompanying the use of such vague concepts for the determination of their content, it might be advisable to have recourse to a systematic and well-defined set of rules such as the Principle.

5. The Principles as a substitute for the domestic law otherwise applicable

The Principles may however become relevant even where the contract is governed by a particular domestic law. This is the case whenever it proves extremely difficult if not impossible to establish the relevant rule of that particular domestic law with respect to a specific issue and a solution can be found in the Principle. The reasons for such a difficulty generally lie in the special character of the legal sources and/or the cost of access to them.

Recourse to the Principles as a substitute for the domestic law otherwise applicable is of course to be seen as a last resort; on the other hand it may be justified not only in the event of the absolute impossibility of establishing the relevant rule of the applicable law, but also whenever the research involved would entail disproportionate efforts and/or cost. The current practice of courts in such situations is that of applying the *lex fori*. Recourse to the Principles would have the advantage of avoiding the application of a law which will in most cases be more familiar to one of the parties.

6. The Principles as a means of interpreting and supplementing existing international instruments

Any legislation, whether of international or national origin, raises questions concerning the precise meaning of its individual provision. Moreover, such legislation is by its very nature unable to anticipate all the problems to which it will be applied. When applying domestic statutes it is possible to rely on long established principles and criteria of interpretation to be found within each legal system. The situation is far more uncertain with respect to instruments

The issue of choice of law in international arbitration has long been debated in specialized private international law literature by international commercial arbitration scholars.¹⁴ Today, there is little

which, although formally incorporated into the various national legal systems, have been prepared and agreed upon at international level.

According to the traditional view recourse should, even in such cases, be had to the principles and criteria provided in domestic law, be it the law of the forum or that which would, according to the relevant rules of private international law, be applicable in the absence of the uniform law.

At present, both courts and arbitral tribunals tend more and more to abandon such a "conflictual" method and seek instead to interpret and supplement international instruments by reference to autonomous and internationally uniform principle. This approach, which has indeed been expressly sanctioned in the most recent conventions (see, e.g., Art. 7 of the 1980 *UN Convention on Contracts for the International Sale of Goods (CISG)*), is based on the assumption that uniform law, even after its incorporation into the various national legal systems, only formally becomes an integrated part of the latter, whereas from a substantive point of view it does not lose its original character of a special body of law autonomously developed at international level and intended to be applied in a uniform manner throughout the world. Until now, such autonomous principles and criteria for the interpretation and supplementing of international instruments have had to be found in each single case by the judges and arbitrators themselves on the basis of a comparative survey of the solutions adopted in the different national legal system. The Principles could considerably facilitate their task in this respect.

7. The Principles as a model for national and international legislators

In view of their intrinsic merits the Principles may in addition serve as a model to national and international law-makers for the drafting of legislation in the field of general contract law or with respect to special types of transaction. At a national level, the Principles may be particularly useful to those countries which lack a developed body of legal rules relating to contracts and which intend to update their law, at least with respect to foreign economic relationships, to current international standard. Not too different is the situation of those countries with a well-defined legal system, but which after the recent dramatic changes in their socio-political structure have an urgent need to rewrite their laws, in particular those relating to economic and business activities.

At an international level the Principles could become an important term of reference for the drafting of conventions and model law.

So far the terminology used to express the same concept differs considerably from one instrument to another, with the obvious risk of misunderstandings and misinterpretation. Such inconsistencies could be avoided if the terminology of the Principles were to be adopted as an international uniform glossary.

UNIDROIT Principles, *supra* note 2, cmts. 1-7; *see generally* Marrella & Gélinas, 10 ICC INT'L CT. OF ARB. BULL., *supra* note 10.

14. *See generally* P. NYGH, CHOICE OF FORUM AND LAWS IN INTERNATIONAL COMMERCIAL ARBITRATION 1 (1997); M. Pyles, *Choice of Law Issues in International Arbitration*, 63 ARB. 200 (1997); PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 380-590 (Albert Jan van den Berg ed., 1996); PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL 783-895 (1996); NAON H. GRIGERA, CHOICE OF LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION 1 (1991); Berthold Goldman, *Les conflits de lois dans l'arbitrage international de droit privé*, II

doubt that arbitrators are, to a large extent, free from the constraints imposed by conflict-of-law rules of the seat of the arbitration, the *lex situs arbitri*.

Conversely, if an international arbitrator opposes the rules of the *lex situs arbitri*, it follows that the arbitrator will face more complex

R.C.A.D.I., 351, 351-483, tbl. 109 (1963); Berthold Goldman, *Frontières du droit et lex mercatoria*, supra note 3; Berthold Goldman, *La lex mercatoria dans les contrats et l'arbitrage international: réalité et perspectives*, 106 J. DU DROIT INT'L 475, 481 (1979); Berthold Goldman, *La volonté des parties et le rôle de l'arbitrage dans l'arbitrage international*, 1981 REV. ARB. 469; Berthold Goldman, *Une bataille judiciaire autour de la lex mercatoria. L'affaire Norsolor*, 1983 REV. ARB. 379; Berthold Goldman, *V Arbitrage en droit international privé*, in ENCYCLOPEDIE DALLOZ-DROIT INTERNATIONAL (1989); Berthold Goldman, *Instance judiciaire et instance arbitrale internationale*, in ETUDES BELLET 219; S.R. Shackleton, *The Applicable Law in International Arbitration under the New English Arbitration Act 1996*, 13 ARB. INT'L 375 (1997); Frederick Alexander Mann, *The Proper Law in the Conflict of Laws*, 36 INT'L COMP. L.Q. 437 (1987); Piero Bernardini, *Contratti internazionali e diritto applicabile*, 393 DIR. COMM. INT. (1987); G. BERNINI, *L'ARBITRATO DIRITTO INTERNO CONVENZIONI INTERNAZIONALI* 347 (1993); JULIAN D.M. LEW, *THE APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION* 1 (1978); Yves Derains, *La jurisprudence des arbitres du commerce international en matière de détermination du droit applicable au contrat*, 4 INT'L BUS. L.J. 514, 514-30 (1996); Yves Derains, *The ICC Arbitral Process Part VIII: Choice of the Law Applicable to the Contract and International Arbitration*, 6 ICC INT'L CT. ARB. BULL. 10, 10-18 (1995); Yves Derains, *Attente légitime des parties et droit applicable au fond en matière d'arbitrage commercial international*, in TRAVAUX DU COMITE FRANÇAIS DE DROIT INTERNATIONAL PRIVE 80-92 (1985); Philippe Kahn, *A propos des sources du droit du commerce international*, supra note 3, at 185 (1991); C. Leben, *Retour sur la notion de contrat d'Etat et sur le droit applicable a celui-ci*, in MELANGES OFFERTES A HUBERT THIERRY 247-80 (1988); Hans Smit, *Proper choice of law and the lex mercatoria arbitralis*, in LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 59-75 (1990); Riccardo Monaco, *Le droit applicable au fond du litige dans la Convention européenne sur l'arbitrage*, 9 NEDERLANDS TIJDSCHRIFT VOOR INTERNATIONAAL RECHT 331 (1962); John R. Crook, *Applicable Law in International Arbitration: the Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT'L L. 278 (1981) (for applications in US-Iran Claims Tribunal); John R. Crook, *The Applicable Law in an International Commercial Arbitration: Is It Still a Conflict of Laws Problem?*, 16 INT'L LAW. 613, 613-45 (1982); Campbell MacLachlan, *Splitting the Proper Law in Private International Law*, 61 BRIT. Y.B. INT'L L. 311 (1990); L. Fumagealli, *La legge applicabile al merito della controversia nell'arbitrato commerciale internazionale*, RIV. DIR. INT. PRIV. E. PROC. 465 (1985); Mark Garavaglia, *In Search of the Proper Law in Transnational Commercial Disputes*, 12 N.Y.L. SCH. J. INT'L & COMP. L. 29 (1991); T.C. Hartley, *Beyond the Proper Law: Mandatory Rules under Draft Convention on the Law Applicable to Contractual Obligations*, 4 EUR. L. REV. 236 (1979); K. Lionnet, *Should the Procedural Law Applicable to International Arbitration be Denationalised or Unified? The Answer of the UNCITRAL Model Law*, 8 J. INT'L ARB. 5 (1991); A. Mebroukine, *Le droit applicable aux contrats internationaux des entreprises publiques économiques algériennes: Tendances actuelles*, 68 REV. DE DROIT INT'L ET DE DROIT COMPARE 51 (1991); N. Parisi, *Spunti in tema di clausola arbitrale nei contratti internazionali alla luce della recente prassi italiana*, DIR. COMMERCIALE INT'L 781 (1997); E. Spiro, *Re-examination of the Proper Law*, in LAW AND INTERNATIONAL TRADE; D.R. Thomas, *Commercial Arbitration: Arbitration Agreements as a Signpost of the Proper Law*, LLOYD'S MAR. & COM. L.Q. 141 (1984); Veijo Heiskanen, *Theory and Meaning of the Law Applicable in International Commercial Arbitration*, 4 FIN. Y.B. INT'L L. 98, 98-129 (1993).

issues than would be faced by domestic courts. In fact, sometimes the obligation or the chance to apply the *forum law* by a domestic court is a good excuse to avoid further research for the most appropriate rules of law to resolve the disputes. International arbitrators, on the other hand, do not have the chance to hide behind the simple application of the *forum law*. They do not render the award in the name or on behalf of the state in which the *situs arbitri* is located. Rather, their decision is the result of a jurisdictional activity which finds its roots in the parties' will. Thus, the international arbitrator is called to realize a particular kind of multistate (or better *transnational*) justice where conflict rules and the consequent determination of the proper law of the contract should lead to the application of rules and general principles of substantive law enjoying wide international consensus.¹⁵

The implication of the UNIDROIT Principles for contemporary private international law applied to arbitration can be summarized by referring to four issues: characterization, discussed in Section II; preliminary questions, discussed in Section III; the concept of foreign law, discussed in Section IV; and the relationship between foreign law and state control mechanisms, discussed in Section V. All these issues will be addressed with reference to institutional arbitration, leaving aside specific problems of ad hoc arbitration.

II. ON CHARACTERIZATION

Whenever determining the applicable law, domestic courts and even international arbitration tribunals may face problems of *characterization* (or classification).¹⁶ Despite different perceptions of

15. See generally Rudolf B. Schlesinger & Herbert J. Gündisch, *I principi generali del diritto come norme oggettive nei procedimenti arbitrari. Un contributo alla teoria della denazionalizzazione dei contratti*, RIV. DIR. CIV. 311 (1997); Arthur T. von Mehren, *Choice of Law and the Problem of Justice*, 41 LAW & CONTEMP. PROBS. 27, 29 (1977); Luther L. McDougal III, "Private" International Law: *Ius Gentium v. Choice of Law or Approaches*, 38 AM. J. INT'L L. 521 (1990); FREIDRICH K. JUENGER, CHOICE OF LAW AND MULTI-STATE JUSTICE (1993); René David, *Arbitrage et droit comparé*, 11 REV. INT'L DE DROIT COMPARE 11 (1950); Berthold Goldman, *La Lex Mercatoria dans les contrats et les arbitrages internationaux*, 106 J. DU DROIT INT'L 475, 481 (1979); Emmanuel Gaillard, *Trente ans de Lex Mercatoria. Pour une application sélective des principes généraux du droit*, 122 J. DU DROIT INT'L 5, 27 (1995). For contributions of traditional conflict of laws scholars, see RONALD HARRY GRAVESON, CONFLICT OF LAW, PRIVATE INTERNATIONAL LAW 7-8 (7th ed. 1974); Jean George Sauveplanne, *New Trends in the Doctrine of Private International Law and their Impact on Court Practice*, II R.C.A.D.I. 78, 78-82, tbl. 175 (1982); Bernard Audit, *Le caractère fonctionnel de la règle de conflit*, III R.C.A.D.I. 255, 256-58, tbl. 186.

16. Kent Lipstein, *International Arbitration Between Individuals and Governments and the Conflicts of Law*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL LAW 177, 182-89 (Bin Cheng & E. D. Brown eds., 1988); see also P. A. Freund, *Characterization with Respect to Contracts in the Conflict of Laws*, in LECTURES ON THE CONFLICT OF LAWS AND INTERNATIONAL CONTRACTS 158-64 (Hessel

this problem developed in U.S. and European doctrines,¹⁷ there are few doubts that it concerns a process of labeling legal issues by deciding if they fall into the category of “contracts” or “torts,” and if they pertain to matters of “substance” or “procedure.”¹⁸ Arbitral case law has so far not offered sharp solutions to this classical problem and pragmatism of arbitrators has been used to escape from these complex issues.

Issues of characterization are, to private international law scholars, of crucial importance. Since connecting factors are different for each of the hereinabove mentioned categories, the applicable law will change, modifying the outcome of the dispute. Different conflict-of-law approaches in the world may invite a plaintiff to shop for the forum that characterizes the issue in a manner leading to the application of the law most favorable to them.

The arbitrator faces rare but peculiar characterization issues both in positive choice-of-law cases and in absence of an express choice-of-law provision by the parties, including situations in which arbitral regulations allow the arbitrator to determine the proper law of the contract by following “conflict of laws rules as [that arbitrator] deems appropriate.”¹⁹ Classical methods for resolving characterization issues have been developed contemplating only domestic courts and not arbitration tribunals. Domestic courts use any of three criteria for characterization:

- *lege fori*
- *lege causae*
- resort to general principles of law

The first technique, *lege fori*, is widely accepted in continental Europe as it has been approved by scholars and applied by courts.²⁰ It clashes, however, with the contemporary de-nationalization movement of arbitral procedure. *L'arbitre n'a pas de for*, arbitrators

E. Yntema ed. 1949); see generally A.H. ROBERTSON, CHARACTERISATION IN THE CONFLICT OF LAWS (1940).

17. EUGENE F. SCOLES ET AL., CONFLICT OF LAWS 119 (2000).

18. A.E. ANTON, PRIVATE INTERNATIONAL LAW 268-73 (1990); Lawrence Craig, William W. Park & Jan Paulsson, *Choice of Substantive Law*, in INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 283-92 (2d ed. 1990).

19. See Rules for the International Chamber of Commerce Court of Arbitration, 1988, art. 13.3; Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, art. 42, 4 I.L.M. 532; U.N. Conventions on International Trade Laws (UNCITRAL) Rules of Arbitration, 1977, art. 33, reprinted in 2 Y.B. COM. ARB. 161 (1977); Model Law on International Commercial Arbitration, 1985, art. 28(2); European Convention on International Commercial Arbitration, May 16, 1961, art. VII, 484 U.N.T.S. 364. See generally B.P. v. Libya, 53 I.L.R. 326 (1979). In addition, if no valid and complete choice is found, the arbitrator must resort to other conflict rules, requiring characterization of the matters in dispute and determination of the proper law.

20. See HENRI BATIFFOL, 1 DROIT INTERNATIONAL PRIVE 240 (1974).

do not have a forum state: they do not pronounce the words of law on behalf of the state of the seat of the arbitration, but they render an award because parties have requested them to do so. Further, this technique may be of limited use whenever one has to characterize certain international business transactions which are unknown under domestic law (in Italy, courts have faced this problems on matters of trusts and *Anstalten*, one-man corporations).²¹ Under an arbitral perspective, there are further peculiar problems which show the inadequacy of characterization *lege fori*.

Two examples may help to illustrate the problem.

If an Italian arbitrator sitting in London has to decide an international dispute between Swiss and Argentinean parties, with Italian law as *lex contractus* why should the arbitrator characterize issues according to English Law (*lex situs arbitri*)? A second example: three arbitrators of different nationalities (Italian, Swiss and Arab) sitting in Zurich, Switzerland have to decide a dispute between a U.S. corporation and the Iranian Government. There is no choice of law, and arbitrators finally decide to apply the UNIDROIT Principles as *lex contractus*.²² Why should they characterize issues according to Swiss Law?

Since characterization *lege fori* may not be the best tool for international arbitrators, another common technique is characterization *lege causae*. The latter seems more adapted to arbitration, but it clashes with academic writings. The strongest objection is a logical one. Characterization is used to interpret choice-of-law rules, and characterization is necessary to determine the *lex causae*. Since the end result of characterization is the *lex causae*, it is nonsense to adopt the *lex causae* in order to determine itself.

With this problem, we face another turning point between conflict-of-law analysis before domestic courts and international arbitration tribunals. International arbitration scholars are naturally oriented towards the theory according to which an issue should be adjudicated by applying the specific law which the parties have chosen, or which they can expect to be applied. By consulting the *lex causae*, characterization issues seem to be consistent with parties' expectations.²³ But, as explained below, the *lex causae* may be a state legal system or the anational legal system, namely, *lex mercatoria* or

21. Now the reform of corporate law is oriented towards recognizing the full validity of corporations with only one stockholder. Before the reform, since a corporation is a contract, it seemed simply paradoxical to contract with oneself; on the other hand the creation of a legal entity from one physical person was perceived as a means to escape civil and tax liabilities.

22. See ICC Award No. 7375, 11 ICC INT'L CT. OF ARB. BULL. 37 (2001).

23. The paradox underlying this method consists in observing that the interpretation of the conflict of laws rule leading to the *lex causae* requires prior characterization.

the UNIDROIT Principles. In the latter case, the UNIDROIT Principles will serve for characterization purposes. Therefore, the second technique, though apparently irrational, seems to be more suited for transnational arbitration. This said, a third technique might perhaps be the best solution to this puzzle.

Recourse to general principles of private law for characterization purposes is ancient only in academic writings and found its strongest advocate in Ernst Rabel, a German scholar who also taught at the University of Michigan, Ann Arbor. More than thirty years ago, Rabel pleaded for a characterization technique based on general principles of law, but his voice remained unheard. The period in which he stated his theory was dominated by what the Belgian François Rigaux has called the "derive positiviste,"²⁴ a movement of thinking that has dominated domestic and international law under the intellectual weight of scholars like Triepel in Germany, Anzilotti in Italy and, to a certain extent, the Austrian Kelsen.

Currently, critiques of the vagueness of general principles of law or, worse, attempts to give political meaning to them in North-South new international economic order claims have been partially overcome by the UNIDROIT Principles. Hence, the UNIDROIT Principles currently represent a system of rules ready to be used by arbitrators for characterization even if the applicable law to substance to the dispute is a national legal system. UNIDROIT principles are also available whenever the applicable law encompasses international conventions, be they of uniform private international law (*i.e.* 1980 Rome Convention on the law applicable to contractual obligations or the Inter-American Convention on the law applicable to international contracts)²⁵ or of uniform substantive law (*i.e.* CISG, international factoring, international financial leasing etc.).²⁶

In conclusion, the UNIDROIT Principles of international commercial contracts seem to offer a viable solution for some characterization issues in international commercial arbitration by avoiding recourse to *lex fori* or *lex causae* and increasing, ipso facto, predictability and certainty of legal solutions for transnational economic disputes. As a matter of fact, the Principles define the scope of contractual matters *vis-à-vis* tort issues. They also provide the key to distinguish matters of *substance* from matters of *procedure*. The question of characterizing the statute of limitations as a matter of substance or procedure, a real nightmare even for the brightest international arbitrators, has been resolved by the forthcoming

24. See generally F. RIGAUX, MÉLANGES PHILIPPE KAHN (2000).

25. Friedrich Juenger, *The Inter-American Convention on the Law applicable to International Contracts: Some Highlights and Comparisons*, 42 A. J. COMP. L. 381, 381-93 (1994).

26. See Italian Private International Law No. 218, art. 2.2 (1995).

UNIDROIT Principles, Part II. The second part of the Principles, to be presented officially in 2004, includes the statute of limitations among substantial issues meaning clearly that, under transnational law, the statute of limitations is part of the rules of law applicable to the merits.²⁷

III. ON PRELIMINARY QUESTIONS

Another field of possible application of the UNIDROIT Principles is that of preliminary questions in international commercial arbitration. As on matters of characterization, classical private international law can be precious for arbitration scholars. An example drawn from a very recent case will help in identifying the issues at stake.²⁸ A European bank had financed a series of export sales contracts by Brazilian producers. In order to cover risk of frustration of the export sales contracts, the same bank entered into insurance contracts subject to French law, with a syndicate of insurance companies. The insurance contract contained an arbitration clause referring to ICC arbitration.

The Brazilian sellers failed to deliver the goods to the buyers because of supervening adverse political events in Brazil. Accordingly, the bank asked the insurers to pay the prize, but the latter objected that the contract did not cover Governmental measures in question. The bank started the arbitration procedure. During litigation, the defendants pleaded that underlying export sales contracts were not valid due to the absence of any determination of the price. The arbitral tribunal, sitting in Paris, had to face a true *preliminary question* since the determination of the validity of the sales contract, a different contract from the one at stake, became a crucial matter to resolve disputes in the latter.

The export sales contracts were silent as to the applicable law. The arbitral tribunal relied, at first, on Brazilian law according to which a sales contract was valid if the price was determinable, as it was in the case at hand where the sugar had a market price. In order to corroborate their decision, the arbitrators stated that sales contracts without an express determination of the price may be valid according to generally accepted principles in international trade as shown by the 1980 Vienna Sales Convention (Article 55) and by the UNIDROIT Principles of International Commercial Contracts (Article

27. Thus, it is neither part of the *lex fori*, nor of the *lex situs arbitri*, nor of the *lex loci executionis*.

28. See ICC Award No. 7819, 12 INT'L CT. OF ARB. BULL. 56 (2001), available at <http://www.unilex.info>.

5.7).²⁹ Here, the reference to the UNIDROIT Principles is welcomed since they resolve a point which is unclear in CISG (which was not applicable to the case), given the apparent contradiction between Article 14 on formation of contracts (stating that offers should have a fixed price or a price-fixing provision) and Article 55 on contracts without *any* price provision.

In private international law, four techniques may be used to solve preliminary questions. First, under the so-called *disjunctive method* one may submit the preliminary question to the *lex fori* regardless of what the *lex contractus* says. Again, this solution is designed for a domestic court, but the arbitrator does not have a *lex fori*, hence this technique is unhelpful.³⁰ A second option is to consult conflict-of-law rules of the *lex causae* in order to resolve the preliminary question. This method seems more adapted for arbitration since it avoids conflict-of-law rules of the *lex situs arbitri* and gives more weight to those pertaining to the law chosen by the parties or designated by arbitrators taking into account parties' expectations.³¹ A third possibility is the *conjunctive method*. By this technique, one may consider the preliminary question as absorbed into the main issue in dispute. Hence, the applicable law both to the preliminary and the principal question in dispute is the same: *lex causae*. For the international arbitrator, the conjunctive method remains a valuable one since it is easier to use and respectful of parties' choices.

Third-millennium arbitrators will probably opt for this method, but they will go beyond classical private international law, since *lex causae* in arbitration can be national or anational. In the latter case, if *lex contractus* are the UNIDROIT Principles or *lex mercatoria*, the preliminary question shall be resolved using the same anational rules. It is then possible to appreciate the potential of a new method of resolution of preliminary questions. Classical private international law has pointed out that it is possible to have recourse to general principles of law to resolve preliminary questions. Today, arbitrators have at their disposal the UNIDROIT Principles, a codification of

29. U.N. Convention on Contracts for the International Sale of Goods, art. 55, concluded at Vienna, Apr. 1, 1980, U.N. Doc.A/Conf. 97/18 (1980), *reprinted in* 19 I.L.M. 671 (1980) [hereinafter Vienna Sales Convention]; UNIDROIT Principles, *supra* note 2, art. 5.7.

30. Accordingly, had the arbitrators in ICC Award No. 7819 used the disjunctive method they would have solved the preliminary question of the validity of the sale contract according to French Law, the *lex situs arbitri*. Hence, the contract would have been considered invalid, since French law does not seem to admit a contract of sale without indication of the price.

31. Following the example, arbitrators should have considered Article 13 of the 1988 ICC regulation. Since French law is the *lex contractus*, French conflict of laws rules would have led to the application to the preliminary question of the law of the seller, namely Brazilian law.

such principles specially adapted for transnational contracts. Arbitrators may use UNIDROIT Principles as a tool for resolving preliminary questions, as an alternative means to localization techniques.³²

IV. ON CHOICE OF LAW APPLICABLE TO THE MERITS OF THE DISPUTE

A. Models of Choice

Often, in institutional arbitration, arbitral regulations will indicate to the arbitrator the path to follow in order to determine the law applicable to the substance of the dispute. This consideration applies in particular to ICC arbitration where Article 17 of the 1998 regulations, states the following:

Applicable Rules of Law

1. The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law that it determines to be appropriate.
2. In all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages.
3. The Arbitral Tribunal shall assume the powers of an *amiable compositeur* or decide *ex aequo et bono* only if the parties have agreed to give it such powers³³

This formula allows either the parties or the arbitrators to choose, *inter alia*, the UNIDROIT Principles as a *lex contractus* without passing through any domestic conflict-of-law rules.³⁴ Similar formulas may be found in other leading arbitration rules such as Article 28, Paragraph 1 of the 1997 AAA International Arbitration

32. In Award No. 7819, arbitrators have made reference to the UNIDROIT Principles among other rules (CISG and Brazilian Law). By using the fourth method it would have sufficed to make reference to Article 5.7 of the UNIDROIT Principles, reaching the same result as did the arbitrators in the actual case.

33. ICC Publication 808, available at <http://www.iccarbitration.org> (last visited Sept. 18, 2003).

34. See generally W. LAURENCE CRAIG, WILLIAM W. PARK & JAN PAULSSON, ANNOTATED GUIDE TO THE 1998 ICC ARBITRATION RULES 111-12 (1998); YVES DERAINS & ERIC SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 217 (1998); Yves Derains, *The ICC Arbitral Process, Part VIII: Choice of the Law Applicable to the Contract and International Arbitration*, 6 BULLETIN DE LA COUR INT'L D'ARBITRAGE DE LA CCI 10 (1995); PHILIPPE FOUCHARD, EMMANUEL GAILLARD & BERTHOLD GOLDMAN, TRAITÉ DE L'ARBITRAGE COMMERCIAL INTERNATIONAL 814 (1996); Marc Blessing, *Keynotes on Arbitral Decisionmaking*, BULLETIN DE LA COUR INTERNATIONALE D'ARBITRAGE DE LA CCI 44 (1997); Marc Blessing, *Choice of Substantive Law in Arbitration*, 14 J. INT'L ARB. 39, 39-65 (1997); Marc Blessing, *Regulations in Arbitration Rules on Choice of Law*, in THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 391 (1996); HANS SMIT & VRATISLAV PECHOTA, A CHART COMPARING INTERNATIONAL COMMERCIAL ARBITRATION RULES OF THE ICC (1998).

Rules,³⁵ Article 22.3 of the 1998 LCIA Arbitration Rules,³⁶ or Article 59 of the 1994 World Intellectual Property Organization Arbitration Regulations.³⁷

Since the most striking event in third millennium international commercial arbitrations is the growing application of anational rules, this section will focus on use of the UNIDROIT Principles of international commercial contracts. The role of transnational rules in international commercial arbitration may be fully enjoyed with reference to models of choice of law. In order to highlight the model of reasoning for choice of substantive law (almost spontaneously) used by international arbitrators, it is important to draw a distinction between cases in which parties made an express positive reference to *lex contractus* and those in which no such choice was made. In the latter case, the choice was made by the arbitrators, pursuant to Article 17 of the ICC Rules of Arbitration of 1998 or Article 13 of the former (1988) version of the Rules.

Thus beyond the “innocent” formula contained in Article 17 of ICC regulations lie the following situations:

- Express choices (positive or negative)

35. AAA International Arbitration Rules (1994), available at <http://www.law.berkeley.edu/faculty/ddcaron/Documents/RPID%20Documents/rp04049.html> (last visited Oct. 22, 2003). According to Article 28, paragraph 1:

The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of laws as it determines to be appropriate.

36. LCIA Arbitration Rules, (1998) available at <http://www.jus.uio.no/lm/lcia.arbitration.rules.1998> (last visited Oct. 22, 2003). According to Article 22, paragraph 3:

The arbitral tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal determines that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate.

37. WIPO Arbitration Rules, WIPO Pub. No. 446(E) (1994). According to Article 59, Section a:

The tribunal shall decide a dispute in accordance with the law or rules of law chosen by the parties. Any designation of the law of a given State shall be construed, unless otherwise express, as directly referring to the substantive law of that State and not to its conflict of laws rules. Failing a choice by the parties, the Tribunal shall apply the law or rules of law that it determines to be appropriate. In all cases the Tribunal shall decide having due regard to the terms of any relevant contract and taking into account applicable trade usages.

On the application of transnational rules in international commercial arbitration, see the Resolution adopted by International Law Association in Cairo on April 26, 1992. TRANSNATIONAL RULES IN INTERNATIONAL COMMERCIAL ARBITRATION (Perio Bernardini ed., 1993).

- Implied choices (positive or negative)
- Absence of any choice of law

It is well established in arbitration literature that parties may choose the law (or rules of law in most modern, widely used arbitration regulations) applicable to their contract. Increasingly, the realm of party autonomy is expanding such that it can encompass situations in which the object of choice is a *national* legal system or an *anational* legal system like *lex mercatoria* and UNIDROIT Principles. All these choices of *lex contractus* may be labeled as *positive choices* since parties declare in their contract, or during proceedings, what law or rules of law they want arbitrators to apply in order to resolve the dispute.

From the standpoint of the private international lawyer, the UNIDROIT Principles represent a new kind of foreign law. By this term, conflict of law scholars refer to a law which is foreign vis-à-vis forum law and that may be applied by a court once conflict of law rules have been activated. For the same reason, in some jurisdictions—but not in Italy after Article 14 of the new PIL—foreign law must be proved by the party claiming its application, since *iura novit curia* is limited to domestic law. Domestic courts may be reluctant to apply a law they do not know and here we touch upon another turning point between state courts and international arbitrators methods.

For international arbitrators there is no foreign law since they do not have a forum law. For them everything is transnational. The UNIDROIT Principles (with *lex mercatoria*) may now be considered as a sort of default law.³⁸ While domestic courts shall have a natural inclination to resort to national law, the arbitrator can apply the UNIDROIT Principles and thus increase the predictability of legal solutions. The Principles are increasingly known by transnational economic operators (and their lawyers) and they may be reasonably known just by consulting the UNIDROIT website for free.

Such positive choices might not need to be expressed in a contract because they could be considered as implied terms in it. This would follow a pattern which has been identified by Article 3, Paragraph 1 of 1980 Rome Convention on the law applicable to contractual obligations.³⁹

38. This point seems to be admitted by Professor Pierre Mayer. See Pierre Mayer, *The Role of the UNIDROIT Principles in ICC Arbitration Practice*, in ICC-UNIDROIT, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 117 (2001).

39. Rome Convention on the Law Applicable to Contractual Obligations, 1980 O.J. (L 266) 1, reprinted in 19 I.L.M. 1497 (1980). Article 3 states:

A contract shall be governed by the law chosen by the parties. The choice must be express or demonstrated with reasonable certainty by the terms of the

Beyond the horizon of positive (express or implied) choices of law, we enter the land of negative choices. Negative choices happen when parties decide that they simply do not want the application of one or more laws to the merits of their dispute. This seems to occur in state contracts where none of the parties accept the application of the other contractor's law. Thus, as a mirror to positive choices, arbitrators may face negative express or implied choices of law. In these situations, arbitrators shall have to determine the applicable law to substance by respecting fully the negative will of parties of avoiding the application of certain legal systems, be they national or anational.

The final chapter is the absence of choice of law applicable to substance. In this situation, most modern arbitration rules, following the model of article 17, mentioned above, allow the arbitrators to apply the rules of law they deem to be the most appropriate to the issue. Does that mean to apply the *lex situs arbitri* to the substance of the dispute? The answer, of course, is no. The arbitrators today have at their disposal a good stock of legal instruments. They can have recourse to classical conflict of laws analysis, to general principles of private international law or—and that is the new entry for third millennium arbitrations—to the UNIDROIT Principles.

Our research in ICC arbitration awards has suggested that this seems to be more characteristic of very large economic arbitrations⁴⁰ than of smaller ones, which consistently prefer a traditional approach based on conflict of (national) laws. Moreover, the application of UNIDROIT Principles in cases where a positive choice of law is absent seems to be more in line with parties' legitimate expectations.⁴¹ Provided that arbitrators ascertain, on a case by case basis, that UNIDROIT Principles are the most appropriate rules to resolve transnational disputes, there is no doubt that the latter will offer a new chapter of arbitration law for third-millennium scholars and practitioners.

In conclusion, the UNIDROIT Principles may be applied by arbitrators:

- As a *positive* (express or implied) choice of law from the parties;
- As a result of a *negative* choice of law analysis;
- As a *neutral* law or *default* law in case of absence of a choice of law by the parties

contract or the circumstances of the case. By their choice the parties can select the law applicable to the whole or a part only of the contract.

Id. art. 3.

40. See ICC Award No. 9797 (where the amount in dispute was more than ten billion dollars).

41. See Yves Derains, *The Role of the UNIDROIT Principles in International Commercial Arbitration: A European Perspective*, in ICC-UNIDROIT, UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 14 (2002).

B. *The UNIDROIT Principles in Action*

Once the role of the UNIDROIT Principles has been appreciated under a theoretical approach, their actual application in transnational economic arbitration can be discussed. Since their official presentation in May 1994, the UNIDROIT Principles have resulted in various applications, even in the context of the well-known "old" formula contained in Article 13 of ICC regulations referring to "appropriate conflict of law rules."⁴² ICC arbitral practice has shown that the UNIDROIT Principles have been applied essentially in three contexts: as a *lex contractus*, as a means of interpretation and supplementation of international uniform law instruments, and, finally, as a means of interpretation or supplementation of a domestic *lex contractus*. A final solution is to exclude, in some cases, the application of the UNIDROIT Principles.

1. UNIDROIT Principles as a *Lex Contractus*

The UNIDROIT Principles have been applied as a *lex contractus* in at least 12 ICC cases out of a total of 38 awards making reference to the Principles (collected between May 1994 and December 31, 2000) meaning approximately 32 percent of ICC awards on UNIDROIT Principles.⁴³ The applications of the Principles have been grounded on the rule contained in Article 13 then in force and, subsequently, in Article 17 of the 1998 ICC regulations. In those awards, the Principles have been applied mostly in cases characterized by the absence of a choice of law by the parties. One could infer that they have been mainly taken into consideration by arbitrators as a useful tool for dispute resolution. It is worth noting the Principles have not just been applied by members of the UNIDROIT working group. On the contrary, when that situation has occurred, arbitrators excluded the application of the Principles despite the formal request of one of the parties.

In some awards, arbitral tribunals have also found that the absence of a positive choice of the applicable law in the contract must be interpreted by taking into consideration the negative implicit will of each of the parties to avoid the application of the other parties' domestic law. This may lead to connecting the contract to a third legal system be it a state legal system or the anational one. In the first instance, it is necessary to find, inside the legal relationship at issue, sufficient contacts to a particular state. The second instance comes about when it is not easy to find evidence of a significant

42. See Marrella & Gélina, *supra* note 2, at 26-119.

43. Other examples of this approach may be found in ICC Awards Nos. 7110, 7375, 8261, 8331, 8874, 8501, 8502, 8503. *See id.*

connection to a third state domestic legal system. In this case, the hypothesis of *lex mercatoria* and the UNIDROIT Principles in particular, becomes reality. Accordingly, the UNIDROIT Principles have been elected via this reasoning by recognizing them as an organic and reconstituted set of principles and rules common to major world legal systems, in tune with the particular needs of international commerce. Two examples serve to clarify this issue.

2. Positive Choice of Law by the Parties: ICC Award Number 7110

The first and most important example of such an approach has been offered by ICC Award Number 7110. In that case, a state party and a British private contractor entered into a number of contracts covering the sale, supply, modification, maintenance, and operation of equipment including support services. Most of the contracts did not contain any choice-of-law clause and some of them referred to “principles of natural justice.” The arbitrators, in a partial award, started their reasoning by analyzing elements leading to implicit choice-of-law stipulations. Six out of nine contracts contained the expressions “natural justice,” “laws of natural justice,” and “rules of natural justice,” in association with the resolution of disputes through arbitration. According to the Tribunal:

It is clear then that the presence of the expressions ‘natural justice,’ ‘laws of natural justice,’ and ‘rules of natural justice,’ which were undoubtedly the subject of careful consideration and negotiation, may not be ignored for assessing if and to which extent the parties have indicated the laws or principles governing the Contracts. However, to elucidate their meaning it would be inappropriate to have recourse, in bootstrap fashion, exclusively to the legal notions of one of the national juristic systems, the application of which is at stake. The fact that the Contracts are drafted in English is not decisive, since the English language has become an international tool for expressing the terms and conditions of sophisticated transactions, even between parties none of which is a national of an English speaking country or entering into transactions wholly unconnected with any such country. Resorting to English when it comes to exteriorizing in black and white the substance of a deal does not necessarily imply espousing the technical meaning that a specific common law jurisdiction would ascribe to the terms utilized.⁴⁴

Yet arbitrators were faced with the issue of characterizing “natural justice” since the determination of the procedural or substantive nature of such an expression would have had an impact on the choice-of-laws process. The arbitrators believed that a general principle of interpretation “widely accepted by national legal systems and by the practice of international tribunals” suggests that in case of

44. See Marrella & Gélinas, *supra* note 2, at 43-44 (discussing ICC Award No. 7110).

doubt or ambiguity, contractual clauses should be interpreted against the drafting party. However, the tribunal added what follows:

On the other hand, the meaning to be ascribed to expressions contained in international transactions ab initio submitted to international commercial arbitration should be consistent with the nature and expected role of the dispute-resolution method chosen by the parties and the concomitant impact of such choice not only on procedural aspects but also on the law governing the merits.

Finally, it is also a generally accepted practice by international arbitral tribunals, predicated upon elementary notions of coherence and rationality, to assume that the same words or expressions shall have the same meaning throughout the documents containing them . . . ⁴⁵

The special character of arbitral justice is revealed with the following words:

In international commercial arbitration, though it is imaginable that the term 'justice' may be utilized only in the sense of procedural justice, i.e. due process and fair trial, it is commonly understood as referring to arbitral justice in a more comprehensive sense, including not only arbitral procedural fairness but also the type of solution regarding the merits—not necessarily the same that would be obtained from national courts—that should be expected by the parties by the very fact of having chosen international commercial arbitration for resolving their contractual disputes. Thus, it is not infrequently stated that often, the parties resort to arbitration in order to have access to a 'justice' other than that which would be obtained by applying a 'national law,' particularly when, on account of the discrete circumstances of the case, a national law would not be adapted to the solution of the dispute at stake. . . . An obvious confirmation that notions of justice in international commercial arbitration are not merely procedural but are also substantive is that the majority of national statutes dealing with international arbitration, international conventions regarding arbitration not just concerned with the recognition and enforcement of arbitral agreements and awards, and arbitration rules contain procedural provisions and choice-of-law provisions, i.e. provisions pointing to choice-of-law solutions only become relevant because the dispute has been submitted to international commercial arbitration and which may well differ from those that would have been otherwise obtained had the decision of the case been left to municipal courts and their private international law systems.⁴⁶

Developing the concept of substantive justice, arbitrators reached the conclusion that the specific case at issue was denoted by the exclusion of the choice-of-law criteria normally applicable by domestic courts. Their conclusion was to resort to general principles of law "which may be only defined in the negative as such rules and principles not exclusively belonging to a single national legal system."

After a thorough reasoning "the Tribunal conclude[d] that the reasonable intention of the parties regarding the substantive law applicable to the Contracts was to have all of them governed by general legal rules and principles in matter of international

45. *Id.* at 44.

46. *Id.* at 45.

contractual obligations such as those arising out of the contracts, which, though not necessarily enshrined in any specific national legal system, are specially adapted to the needs of international transactions like the Contracts and enjoy wide international consensus.”⁴⁷ Combining the above considerations “without prejudice to taking into account the provisions of the Contracts and relevant trade usages, this Tribunal finds that the Contracts are governed by, and should be interpreted in accordance [with], the UNIDROIT Principles with respect to all matters falling within the scope of such Principles, and for all other matters, by such other general legal rules and principles applicable to international contractual obligations enjoying wide international consensus.”⁴⁸

The arbitrators felt that they had to offer further justifications for their choice and accordingly they listed the following reasons:

1) the UNIDROIT Principles are a restatement of international legal principles applicable to international commercial contracts made by a distinguished group of international experts coming from all prevailing systems of the world, without the intervention of states or governments, both circumstances redounding to the high quality and neutrality of the product and its ability to reflect the present stage of consensus on international legal rules and principles governing international contractual obligation in the world, primarily on the basis of their fairness and appropriateness for international commercial transactions falling within their purview; 2) at the same time, the UNIDROIT Principles are largely inspired [by] an international uniform law text already enjoying wide international recognition and generally considered as reflecting international trade usages and practices in the field of the international sales of goods, which has already been ratified by almost 40 countries, namely the 1980 Vienna Convention on the International Sale of Goods; 3) the UNIDROIT Principles are specially adapted to the Contracts being the subject of this arbitration, since they cover both the international sale of goods and supply of services; 4) the UNIDROIT Principles (see their Preamble) have been specifically conceived to apply to international contracts in instances in which, as it is the case in these proceedings, it has been found that the parties have agreed that their transactions shall be governed by general legal rules and principles; and 5) rather than vague principles or general guidelines, the UNIDROIT Principles are mostly constituted by clearly enunciated and specific rules coherently organized in a systematic way.⁴⁹

47. *Id.* at 48.

48. *Id.* at 49.

49. The arbitral tribunal referred to the following UNIDROIT Principles: Articles 1.7 (good faith and fair dealing in international trade), 2.4 (revocation of offer), 2.14 (contract with terms deliberately left open), 2.18 (written modification clause), 7.1.3 (withholding performance) and 7.4.8 (mitigation of harm). See UNIDROIT Principles, *supra* note 2, arts. 1.7, 2.4, 2.14, 2.18, 7.1.3, 7.4.8.

3. Negative Choices and Application of the UNIDROIT Principles by Arbitrators: Award Number 7375

ICC Award Number 7375, rendered in Geneva on June 5, 1996, is crucial to negative choice-of-law doctrine in international commercial arbitration.⁵⁰ It provides an interesting example of cases where a state, and not a private party, decides to commence arbitration against a multinational corporation, which, in turn, tries to resist by attacking the arbitrators' jurisdiction. In Award Number 7375, the Iranian government and the U.S. corporation Westinghouse had signed a series of contracts for the supply of military radars to be installed in Iran. The request for arbitration referred to the whole series of contracts dealing with the delivery or installment or maintenance of radar systems.

The arbitration clause was written in these terms:

All disputes arising out of or in relation to or in connection with this agreement which cannot amicably be settled by discussion and mutual accord, shall be finally settled by arbitration at Zurich, Switzerland, in accordance with the rules then in effect of the International Chamber of Commerce. Notice of arbitration shall be given to the party or parties to whom demand therefore is addressed. Judgment upon the award rendered by the arbitrator or arbitrators may be entered in any court having jurisdiction or application may be made to such court for judicial acceptance of the award and an order of enforcement, as the case may be.⁵¹

The initial issue to resolve was whether the plaintiff had standing in order to claim on the basis of a contract that had been signed between the (pre-revolution) Imperial Government of Iran and Westinghouse. The tribunal found that the Ministry of Defense was the successor in interest to the Imperial Government notwithstanding the fact that the latter had been overthrown by the Iranian revolution. Moreover, Westinghouse itself had argued this theory in other cases when seeking damages from the Islamic Republic of Iran and, therefore, as such the corporation was prevented to present this argument under the light of a good faith criterion.

Westinghouse had argued that arbitration was not validly instituted as the claimant had not obtained Parliamentary approval, thereby violating the Iranian Constitution. The tribunal nonetheless rejected the defendant's argument, *inter alia*, on the basis of Article 177 of the Swiss PIL. The defendant also argued that there was no agreement to arbitrate on all contracts since only one contract contained an arbitration agreement. The tribunal agreed with this argument, rejecting the opposite argument presented by the claimant

50. See ICC Award No. 7375, *supra* note 22. The integral publication of this sentence makes it possible to analyze it without the usual limits of the confidentiality.

51. *Id.*

and aiming to extend arbitral jurisdiction on the basis of an alleged course of dealing.

Once disputes concerning its jurisdiction had been resolved, the arbitrators passed on to the determination of the applicable law. The arbitrators noted that:

[I]n many international disputes, the question of the law which is applicable is of rather peripheral or academic importance only, as the dispute will be decided on the basis of the terms of the relevant contract and, as far as necessary, an interpretation thereof, such that in most cases it will not be necessary to resort to an underlying applicable law for obtaining "legal guidance."⁵²

None of the contracts contained a clause of choice of law and the claimant argued that Iranian law should apply while the defendant wanted Maryland law. The determination of the applicable law was crucial for the solution of the case: under post-revolutionary Iranian law, there is no time bar while under Maryland law, all of the Iranian Government's claims are time-barred on the ground of the four-year statute of limitations.

The arbitrators reported that Iran did not want the application of another state law with these words:

To corroborate its argument, Claimant argues that the application of general principles of law is particularly appropriate in connection with State contracts and says that contracts having a highly political content should be "denationalized" as far as possible.⁵³

Westinghouse, on the other hand, opposed in the strongest of terms both to the application of Iranian law and to the application of general principles of law. In its pleadings, Westinghouse argued that it would not have agreed to enter into the contracts if they had to be made under Iranian law and that it considered the applicable law as Maryland law. In fact, Westinghouse had its place of business in Maryland and it had to manufacture the goods that it was required to supply there. Therefore, by virtue of general principles of international private law, Maryland law was the law with the closest connection to the case.

The tribunal pointed out that the applicable law could be found by two methods, namely the objective and subjective methods. Under the first method, the tribunal had to analyze the issue according to the conflict-of-laws principles thereby determining Maryland law as the applicable law to the case. However, the majority of arbitrators considered this method insufficient to solve the case because it failed to take into consideration the fact that the omission of a choice-of-law provision was not an accident but was specifically wanted by parties. In this case, none of the parties was willing to accept the law of the

52. *Id.*

53. *Id.*

other parties to the contract. Hence a mechanical conflict determination would result in an outcome that nobody wanted. On this basis, the majority of arbitrators considered three possibilities:

- To designate a *neutral* law as applicable;
- To apply the *trunc commun* doctrine
- To rely on general principles of international commercial law including the UNIDROIT Principles.

The first solution was rejected insofar as there are no objective connecting factors pointing towards the law of a third state.⁵⁴ The second solution did not solve the problem since there is no *trunc commun*, or common principles, between Maryland and Iranian law precisely on the statute of limitations. The only method providing the solution for this case may be the application of general contract law principles and the *lex mercatoria*.

In this respect, arbitrators made an important statement. They affirmed that *lex mercatoria* has the function of safeguarding a kind of negative interest of the two parties. *Lex mercatoria* presents the advantage of protecting:

[B]oth Parties against the application of a national law which might contain particular provisions which they had not expected, and which may not be suitable in a truly international context of the present nature. Freeing the parties from the constraints of a national law thus would ascertain and warrant that the dispute shall be decided by having regard to those rules of law and notions which deserve to be qualified as being "generally accepted". Thus a decision based on generally accepted principles has moreover the advantage to ascertain foreseeability of the outcome and certainty of law.⁵⁵

The tribunal stressed the point that applying *lex mercatoria* is far more difficult than applying a particular domestic law:

This is so because an arbitrator, who can simply apply a national law, may not have to scrutinize and be concerned about the 'validity' and 'application-worthiness' of a particular provision; he may and will simply apply the law (sometimes adding his own regrets: '*dura lex, sed lex*').

However, an arbitrator who has to reflect on those rules and principles which truly deserve to be called 'general principles,' or forming part of a *lex mercatoria* (thus being carried by an international '*communis opinio vel necessitatis*'), will have a much more difficult and responsible task to accomplish.⁵⁶

54. *Id.* (arbitrators asking: "Why Swiss Law and not Japanese? The choice of the situs of the arbitration (*in casu* Zurich/Switzerland) cannot in any way justify a conclusion that the Parties had intended to subject themselves to the Swiss substantive [sic] Law").

55. *Id.*

56. *Id.*

Therefore, the arbitral tribunal, by majority vote,⁵⁷ concluded that:

The tribunal will apply those general principles and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned a wide acceptance and international consensus in the international business community, including notions which are said to form part of a *Lex Mercatoria*, also taking into account any relevant trade usages as well as the UNIDROIT Principles, as far as they can be considered to reflect generally accepted principles and rules.⁵⁸

If UNIDROIT Principles and *lex mercatoria* have proven crucial to solve the choice-of-law problem in these cases, one should note that the former do not necessarily represent trade usages or international practice. This is why their application shall always be carried out *cum judicio* and after accurate analysis.⁵⁹

The end of the story was a mutually agreed solution out of court. Yet, the arbitrators clearly pointed out in the award that the principles of good faith in international business transactions prevented Iran from suing Westinghouse a decade after the Iranian revolution had cancelled any evidence defendant might have used for the case at stake.

57. A dissenting opinion was produced by the Iranian arbitrator pleading for the application of Iranian law to the contract. The pleading, however, was based on conceptions which nowadays are outdated. He basically affirmed that in state contracts there is a presumption in favor of municipal law of the contracting state.

58. *Id.*

59. Among other examples of the same approach, it is worth to mention ICC Awards nos. 8261 and 8502. In the first award, the dispute concerned a contract between an Italian company and a Middle Eastern governmental agency. The contract did not contain any choice-of-law clause. In a partial award on the question of the applicable law, the arbitral tribunal decided that it would base its decision on the "terms of the contract, supplemented by general principles of trade as embodied in the *lex mercatoria*". Subsequently, it referred, with no further explanation, to Articles 4.6 (contra proferentem rule), 4.8 (supplying omitted terms), 7.4.1 (right to damages), 7.4.7 (harm due in part to aggrieved party) and 7.4.13 (agreed payment for non-performance) of the UNIDROIT Principles, thereby implicitly considering the latter a source of the *lex mercatoria*. See U.L.R. at 171 (1999). In ICC Award No. 8502, a French and a Dutch buyers entered into a contract with a Vietnamese exporter for the supply of rice. Claimants (the buyers) alleged that Respondent failed to supply the rice. The sales contract contained an arbitration clause referring to ICC rules of arbitration. Respondent refuses to take part in arbitration proceedings. The contract did not contain any choice-of-law clause and the arbitral tribunal decided to base its award on "trade usages and generally accepted principles of international trade. In particular arbitrators applied the 1980 Vienna Convention on Contracts for the International Sale of Goods [hereinafter, Vienna Sales Convention] and to the UNIDROIT Principles, as evidencing admitted practices under international trade law". See Marrella & Gélinas, *supra* note 2, at 73. By referring to Articles 76 of the CISG and 7.4.6 (proof of harm by current price) of the UNIDROIT Principles, arbitrators reached the conclusion that respondent was in breach of its obligations since no case of force majeure preventing him from performing had occurred.

C. Is Renvoi Really Phantomatic?

A final remark on matters of choice of law should be made on *renvoi*. The UNIDROIT Principles, seen as part of an anational legal system, do not contain conflict of laws rules. This character of the UNIDROIT Principles seems to be in line with modern private international law of contracts and with arbitral regulations. The constant rule in modern instruments (see i.e. 1980 Rome Convention on the law applicable to contractual obligations, Article 15) is precisely that whenever there is election of the applicable law, be it by the parties or by the arbitrators, this choice should be limited to substantive rules, excluding conflict of law rules of the *lex contractus*. Although the drafter of the UNIDROIT Principles had this situation in mind, new problems are on the horizon as demonstrated by the Arthur Andersen Award (ICC Award Number 9797).

In that case, the arbitrator resolved a global litigation by referring to the UNIDROIT Principles and to the Principles of European Contract Law (PECL).⁶⁰ The former were further used to establish a number of important conclusions such as: (a) the “member firms’ implicit obligation to cooperate and to pursue their professional practice in accordance with the principles of good faith and fair dealing inherent to international contracts;”⁶¹ (b) party Z’s duty of best efforts “to ensure cooperation, coordination and compatibility among the member firms’ practices;”⁶² (c) release of the parties from their obligation to carry out and receive further performance, upon termination of their contract;⁶³ and (d) the impossibility for party X to

60. UNIDROIT Principles, *supra* note 2, art. 4.1(1) (“A contract shall be interpreted according to the common intention of the parties.”); Principles of European Contract Law [PECL], art. 5:101(1) (“A contract is to be interpreted according to the common intention of the parties even if this differs from the literal meaning of the word”); UNIDROIT Principles, *supra* note 2, art. 4.1(2) (“If such an intention cannot be established, the contract shall be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstance.”); PECL, art. 5:101(3) (“If an intention cannot be established according to (1) or (2), the contract is to be interpreted according to the meaning that reasonable persons of the same kind as the parties would give to it in the same circumstance”).

61. See UNIDROIT Principles, *supra* note 2 (“(1) Each party must act in accordance with good faith and fair dealing in international trade, (2) The parties may not exclude or limit this duty”).

62. See *id.* art. 5.4.2 (“To the extent that an obligation of a party involves a duty of best efforts in the performance of an activity, that party is bound to make such efforts as would be made by a reasonable person of the same kind in the same circumstance”).

63. See *id.* art. 7.3.1(1) (“A party may terminate the contract where the failure of the other party to perform an obligation under the contract amounts to a fundamental non-performance”); *id.* art. 7.3.5(1) (“Termination of the contract releases both parties from their obligation to effect and to receive future performance”).

claim full compensation as defined in Article 7.4.2 of the UNIDROIT Principles.⁶⁴

This award illustrates how third-millennium arbitrations are becoming increasingly affected by the multiplication of general principles of contract law. In Award Number 9797, the arbitrator felt it was necessary to refer to two sets of principles, which is in itself striking as the case was a good example of global litigation, where the UNIDROIT Principles could have sufficed. In this case, this was of little importance: the Principles used to resolve the dispute were almost identical in the two collections (UNIDROIT and PECL). What would happen if they were different? A conflict of principles would have arisen and therefore rules on conflict of principles might be a good solution to avoid such an impasse. A rule like *specialia generalibus derogant* would suffice to resolve these new forms of conflict of rules and should be considered implicit in the UNIDROIT Principles.

Hence, are we facing a new form of *renvoi*? Two European contractors decide to choose as the applicable law the UNIDROIT Principles; since the PECL's sphere of application would match with the case, should the arbitrator apply the PECL because of the unwritten *lex specialis* rule? Are we saying that there is a *renvoi* among national rules? So far, no conclusive answer seems to be available. At the same time, there is a risk that such multiplication may undermine the UNIDROIT Principles and complicate choice-of-law problems in international arbitration.

IV. UNFORESEEN APPLICATIONS OF THE UNIDROIT PRINCIPLES: INTERPRETATION OF THE NATIONAL *LEX CONTRACTUS*

Beyond constituting a *novum genus* of applicable law to substance, *lex mercatoria* and the UNIDROIT Principles are ever more frequently being employed in the context of the application of a domestic law. Here, as the experience of state contracts has shown, arbitrators may combine national law and general principles of law in order to reach a legal conclusion consistent with needs of predictability and capable of enjoying international consensus.

64. The aggrieved party is entitled to full compensation for harm sustained as a result of the non-performance. Such harm includes both any loss which it suffered and any gain of which it was deprived, taking into account any gain to the aggrieved party resulting from its avoidance of cost or harm; Such harm may be non-pecuniary and includes, for instance, physical suffering or emotional distress.

Another species inside this taxonomy of cases can be found whenever international arbitrators interpret the applicable national law and, in particular, the so-called “general clauses”⁶⁵ (*notions à contenu variable; Generalklauseln*) throughout transnational rules including the UNIDROIT Principles.

Peculiarly, the Preamble to the UNIDROIT Principles and their Commentary do not foresee such a use but arbitral practice has shown a clear trend in the opposite sense—rejoining mixed arbitration case law. The Preamble of the UNIDROIT Principles provides only for using the Principles as a substitute for the domestic law otherwise applicable in situations where it is extremely difficult or impossible to determine the relevant rule of the *lex contractus*.⁶⁶ No reference is made to other situations, i.e. if and when the relevant domestic law may be applied taking into account transnational rules. The Commentary states:

The Principles may however become relevant even where the contract is governed by a particular domestic law. This is the case whenever it proves extremely difficult if not impossible to establish the relevant rule of that particular domestic law with respect to a specific issue and a solution can be found in the Principles. The reasons for such a difficulty generally lie in the special character of the legal sources and/or the cost of access to them.

Recourse to the Principles as a substitute for the domestic law otherwise applicable is of course to be seen as a last resort; on the other hand, it may be justified not only in the event of the absolute impossibility of establishing the relevant rule of the applicable law, but also whenever the research involved would entail disproportionate efforts and/or costs. The current practice of courts in such situations is that of applying the *lex fori*. Recourse to the Principles would have the advantage of avoiding the application of a law which will in most cases be more familiar to one of the parties.⁶⁷

The analysis of arbitral practice shows that these planned for situations appear, to the international arbitrator, as somewhat marginal if not insignificant. Instead, the UNIDROIT Principles have been applied under the perspective of interpreting and integrating a domestic *lex contractus* in 18 out of 38 cases that is, about 48 percent of ICC cases.⁶⁸

In this category of applications, arbitrators have applied the proper domestic law analyzing it through the conceptual matrix offered by the Principles. In this way, domestic law has been applied in a sort of de-localized fashion. After giving an example of this line of

65. The common lawyer will greatly benefit from reading the following, though mainly conceived under an Anglo-German perspective: B.S. MARKESINIS ET AL., *THE LAW OF CONTRACTS AND RESTITUTION: A COMPARATIVE INTRODUCTION* 21-23 (1997).

66. UNIDROIT Principles, *supra* note 2, pmbl.

67. *Id.* cmt.

68. See ICC Awards Nos. 5835, 8223, 8240, 8264, 8486, 8540, 8908, 9117, 9333, 9593 and their excerpts, *discussed in Marrella & Gélinas, supra* note 2.

cases, we will point out to what we have called the risk of the *lex cognita* approach.

A. *A New Instrument for International Arbitrators: the TNT Test*

Transnational rules, be they from the *lex mercatoria* or the UNIDROIT Principles, may sometimes be found by selecting those domestic rules that converge with the UNIDROIT Principles. Hence, it becomes clear that another way to avoid local solutions is simply to highlight rules of a specific domestic law enjoying wide international consensus. In other words, UNIDROIT Principles may be used by arbitrators to give a transnational status to (national) applicable law.

From this perspective, the UNIDROIT Principles may be used by arbitrators to carry out what I wish to label as the *transnational test* (or the *T-test*, or even the *TNT test*) of legal solutions found in the applicable domestic law. If what we have observed holds true, it follows that we may face a turning point in the evolution of conflict-of-law methods in arbitration.

Classical criticism, according to which the conflict-of-law method is not adapted to the discipline of transnational economic relations, may be partially overturned. The criticism that the conflict-of-law method—especially under the savignian approach—gives a parochial solution of domestic law to transnational economic transactions may be bypassed through the transnational test carried out *ex post* by arbitrators. Once the proper domestic law has been determined, arbitrators will dispose of an objective instrument to verify if those specific rules drawn from the domestic legal system are in tune with those elementary and universal principles of international contract law contained in the UNIDROIT Principles. Summing up, the method of transnational rules may well represent, in the context of classical private international law,⁶⁹ a new method in matters of adaptation of foreign law.

B. *A First Example: ICC Award Number 8264*

Again, the best explanation of this approach may be found in an actual case: ICC Award Number 8264 rendered in 1997. A U.S. civil engineering equipment manufacturer signed an agreement with an Algerian state-owned industrial development corporation relating to the design, production, start-up and initial management of industrial facilities. Annexed to the agreement was a contract between the same parties providing for the transfer of industrial property rights and know-how useful to the activities covered in the main contract. The

69. See, e.g., DICEY & MORRIS ON THE CONFLICT OF LAWS 1 (Lawrence Collins ed., 1993).

Algerian party agreed to pay a fixed sum and a proportional fee for each machine manufactured.

After some time, the U.S. manufacturer accused the other party of stopping payment of the proportional fees without justification, of furnishing incomplete dispatch reports, and subsequently of sending no reports at all. The Algerian corporation considered itself justified in stopping payment of the fees, due to the claimant's failure to provide improvements likely to be relevant to production. Accordingly, it sought compensation for damages. In the contract, the arbitration clause was formulated as follows: "All differences arising out from this agreement will be resolved definitively according to the Regulations of conciliation and arbitration of the International Chamber of Commerce in Paris, by one or more arbitrators named in accordance with this regulation."⁷⁰

Arbitrators established the seat in Paris and, noting an absence of choice of the applicable law, decided as follows: "[t]he arbitral tribunal will take into account: applicable laws in Algeria which govern this agreement, as well as performance of consequent agreements, of the reasonable forecasts of the parts in the light of the objectives, the reasons and the goals of convention, and the general principles of law and international trade usages."⁷¹ Making reference to general principles in order to determine if incomplete performance depended on any causes of nullity of the contract as pleaded during proceedings, the arbitral tribunal decided that, according to general principles of law, nonperformance (from both sides) of the contract did not mean at all its cancellation or its nullity. Instead, it evidenced the common will of the parties of producing legal effects. That solution was adopted by Article 106 of the Algerian Civil Code, which stated that "the contract makes the laws of the parties. It cannot be revoked nor modified without mutual assent or for the causes envisaged by the law."⁷²

70. ICC Award No. 8264 (author's translation). The original text states:

Tous differends découlant de la présente convention seront tranchés définitivement suivant le Règlement de conciliation et d'arbitrage de la Chambre de Commerce Internationale de Paris, par un ou plusieurs arbitres nommés conformément à ce Règlement.

71. *Id.* (author's translation). The original text states:

Le tribunal arbitral tiendra compte: des lois applicables en Algérie qui régissent cette convention, ainsi que l'exécution des accords qui en sont la suite ou la conséquence, des prévisions raisonnables des parties à la lumière des objectifs, des motifs et des buts de la convention, et des principes généraux du droit et des usages du commerce international.

72. *Id.* (author's translation). The original text states:

Au regard des principes généraux du droit des contrats, son inexécution (qui est d'ailleurs le fait des deux parties) ne saurait entraîner ni son annulation, ni,

Hence, the arbitral tribunal considered the respondent to have fulfilled its duty to forward the dispatch reports and to provide information on the changes made to the licensed products. It then determined that payment of the proportional fees was still outstanding. Additionally, since the U.S. claimant's duty was limited to improvements to the products and equipment covered by the contract, the claimant did not provide necessary information leading to a loss of opportunity for the respondent, thus breaching the rule contained in Article 7.4.3(2) of the UNIDROIT Principles.⁷³ The tribunal also estimated the harm caused at one-tenth of the sum claimed and ordered this to be offset against the fees due by the respondent to the claimant. It decided not to order payment of interest on overdue amounts, as the claimant's omissions were largely to account for the lack of payment. In conclusion, this example illustrates—though in the context of an arbitration clause particularly “open” to application of principles—the possible interplay between a domestic law (i.e. Algerian law) and transnational rules codified in the UNIDROIT Principles.

C. *A New Risk for the Development of International Arbitration: The Lex Cognita Approach*

Ubi commoda et ibi incommoda, we have to acknowledge that finding the convergence between transnational rules and domestic law may sometimes be an illusion. The potential problem, using the UNIDROIT Principles in such a context, is that they may also be used as a good justification for a lack of reasoning in the choice of the applicable rules of law. Arbitrators may face the temptation to use more or less openly what has been called a *lex cognita* approach.⁷⁴ This situation may occur whenever arbitrators apply only the rules of their national law, motivating that the solution would have been the same had the UNIDROIT Principles been applied. The risk is that, instead of representing a step forward in the evolution of

comme les prétend [la demanderesse, n.d.r.] sa caducité. Il reste l'expression de la volonté commune des parties et conserve sa force obligatoire tant qu'il n'a pas été résolu. C'est également la règle du Code Civil Algérien, dont l'article 106 dispose que "le contrat fait la loi des parties. Il ne peut être révoqué ni modifié que de leur consentement mutuel ou pour les causes prévues par la loi.

73. *Id.* (author's translation). The original text states:

En droit du commerce international, 'la perte d'une chance peut être réparée dans la mesure de la probabilité de sa réalisation.' Ainsi s'expriment les Principes d'UNIDROIT relatifs aux commerce international (article 7.4.3, a. l.2), qui consacrent, comme on le sait des règles très largement admises à travers le monde dans le systèmes juridiques et la pratique des contrats internationaux.

74. See generally Marrella & Gélinas, *supra* note 2.

international business law, the UNIDROIT Principles might be used to mask what is in fact a poorly reasoned selection and a strict application of domestic law (the national law of the arbitrator) to an international transaction.

Motivation in arbitration awards becomes a means of control for the parties over the reasons arbitrators have found to choose any set of rules, be they national or anational. Top arbitrators have always shown a real punctilio on choice-of-law issues and the same precision should serve to distinguish good from bad awards. It is now interesting to look at cases in which arbitrators have applied the UNIDROIT Principles as a means to interpret international conventions.

D. *Transnational Rules and International Uniform Law Conventions*

Another category of arbitral applications of the UNIDROIT Principles consists of using them in order to resolve matters of interpretation or, eventually, to fill gaps in international conventions such as CISG.⁷⁵ Without entering into the continuing debate over national versus autonomous means of interpreting and supplementing international uniform law conventions,⁷⁶ we here simply focus on the position of the arbitrator. From this standpoint, transnational rules may become applicable at least through the *renvoi* contained in the convention towards general principles. The theorem is simple in its basic assumption: if and only if the convention is applicable, it follows, *coeteris paribus*, that transnational rules may be applied on the ground of a specific rule contained in the particular convention at issue.

Then again, in case of doubts on the precise meaning of rules of an international uniform law convention, the solution may be found in transnational rules, such as the *lex mercatoria* or the UNIDROIT Principles. After considering the state of the art of ICC arbitral practice on this specific point, including a practical example, I shall illustrate further applications of the interpretation and gap filling method.

1. Arbitral Practice

In ICC arbitral practice, UNIDROIT Principles have been used as a means of interpretation and supplementation of international conventions in at least five cases which, in perspective, allow us to

75. UNIDROIT Principles, *supra* note 2, art. 7.

76. See, e.g., COMMENTARY ON THE UNITED NATIONS CONVENTION ON THE INTERNATIONAL SALE OF GOODS (CISG) (Peter Schlechtriem ed., 2d. ed. 1998); M. Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, 5 UNIFORM L. REV. 683, 683-705 (2000).

estimate this group at approximately 13 percent of all UNIDROIT awards.⁷⁷ In this line of arbitral jurisprudence, arbitrators have employed the Principles mainly in the context of interpreting the 1980 Vienna Convention on the International Sale of Goods (CISG). The nexus between the CISG and the Principles may be found in Article 7 of the Vienna Convention where it is stated that:

(1) In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

(2) Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.⁷⁸

Therefore, the need of “international interpretation” of the CISG is satisfied by UNIDROIT Principles as it will be seen in the following example.

2. One Practical Example: ICC Award Number 8769

A practical example of this line of cases may be found in ICC Award Number 8769.⁷⁹ The parties entered into a manufacturing contract, plus a tooling agreement related to it. The claimant alleged a breach of contract by the respondent, referring to misleading conduct in negotiations, failure to meet technical specifications, misuse of tooling, and non-registration of patent. The respondent objected and filed a counterclaim to cover balance of tooling costs, unused packaging and materials, warehouse costs, settlement payment for termination of licensing agreement, additional machinery costs, outstanding invoices, and lost profits. The sole arbitrator applied French law and the 1980 Vienna Convention on contracts for the international sale of goods (CISG), in accordance with the agreement reached by the parties in the arbitration clause. He rejected the claimant’s demands and granted the respondent’s counterclaims. In awarding interests, he referred to Article 7.4.9(2) of the UNIDROIT Principles relating to the rate of interest.

Thus, Article 7.4.9 of the UNIDROIT Principles has been allowed to fill gaps in Article 78 of the CISG by determining the legal autonomy of the right to interests for failure to pay money whether or

77. See Award Nos. 8128, 8769, 8817, discussed in Marrella & Gélinas, *supra* note 2.

78. Vienna Sales Convention, *supra* note 29, art. 7.

79. *Id.* at 75.

not the non-payment is excused.⁸⁰ The same approach has also been used when arbitrators have been confronted with the problem of

80. UNIDROIT Principles, *supra* note 2, at art. 7.4.9 (interest for failure to pay money states):

- (1) If a party does not pay a sum of money when it falls due the aggrieved party is entitled to interest upon that sum from the time when payment is due to the time of payment whether or not the non-payment is excused; (2) The rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment; (3) The aggrieved party is entitled to additional damages if the non-payment caused it a greater harm.

The UNIDROIT commentary to Article 7.4.9 states:

1. Lump sum compensation for failure to pay a sum of money.

This article reaffirms the widely accepted rule according to which the harm resulting from delay in the payment of a sum of money is subject to a special regime and is calculated by a lump sum corresponding to the interest accruing between the time when payment of the money was due and the time of actual payment.

Interest is payable whenever the delay in payment is attributable to the non-performing party, and this as from the time when payment was due, without any need for the aggrieved party to give notice of the default. If the delay is the consequence of force majeure (e.g. the non-performing party is prevented from obtaining the sum due by reason of the introduction of new exchange control regulations), interest will still be due not as damages but as compensation for the enrichment of the debtor as a result of the non-payment as the debtor continues to receive interest on the sum which it is prevented from paying.

The harm is calculated as a lump sum. In other words, subject to para. (3) of this article, the aggrieved party may not prove that it could have invested the sum due at a higher rate of interest or the non-performing party that the aggrieved party would have obtained interest at a rate lower than the average lending rate referred to in para. (2). The parties may of course agree in advance on a different rate of interest (which would in effect subject it to Art. 7.4.13).

2. Rate of interest

Paragraph two of this article fixes in the first instance as the rate of interest the average bank short-term lending rate to prime borrowers. This solution seems to be that best suited to the needs of international trade and most appropriate to ensure an adequate compensation of the harm sustained. The rate in question is the rate at which the aggrieved party will normally borrow the money which it has not received from the non-performing party. That normal rate is the average bank short-term lending rate to prime borrowers prevailing at the place for payment for the currency of payment.

No such rate may however exist for the currency of payment at the place for payment. In such cases, reference is made in the first instance to the average prime rate in the State of the currency of payment. For instance, if a loan is made in pounds sterling payable at Tunis and there is no rate for loans in pounds on the Tunis financial market, reference will be made to the rate in the United Kingdom.

determining the interest rate to use as a base for determining the total amount of the sum due for the lacking payment.

3. Future Applications

Future applications in this category of cases may concern other international uniform law conventions containing rules of interpretation referring to needs of uniformity in the application of the convention or even a reference to concepts of "good faith in international trade." Actually, these formulas seem recurrent in a certain number of conventions regulating international business law.

We may thus refer to the UNIDROIT Convention on International Factoring of May 28, 1988, where Article 4 states:

1. - In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. - Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.⁸¹

Again, in Article 14 of the 1991 U.N. Convention on the Liability of Operators of Transport Terminals in International Trade, it is stated that: "In the interpretation of this Convention, regard is to be had to

In the absence of such a rate at either place, the rate of interest will be the "appropriate" rate fixed by the law of the State of the currency of payment. In most cases this will be the legal rate of interest and, as there may be more than one, that most appropriate for international transaction. If there is no legal rate of interest, the rate will be the most appropriate bank rate.

3. Additional damages recoverable

Interest is intended to compensate the harm normally sustained as a consequence of delay in payment of a sum of money. Such delay may however cause additional harm to the aggrieved party for which it may recover damages, always provided that it can prove the existence of such harm and that it meets the requirements of certainty and foreseeability (para. (3)).

81. The same approach may be found in Article 6 of the UNIDROIT Convention on International Financial Leasing, May 20, 1988, *available at* <http://www.unidroit.org/english/conventions/c-leas.htm> (last visited Oct. 22, 2003):

1. In the interpretation of this Convention, regard is to be had to its object and purpose as set forth in the preamble, to its international character and to the need to promote uniformity in its application and the observance of good faith in international trade.

2. Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

its international character and to the need to promote uniformity in its application.”⁸²

Finally, another example may be found at Article 3 of the United Nations Convention on the Carriage of Goods by Sea of 30 March 1978 (The Hamburg Rules) where, it is expressly stated that: “In the interpretation and application of the provisions of this Convention regard shall be had to its international character and to the need to promote uniformity.” Moreover, the Hamburg Rules are inspired on the base of the *favor arbitri* as it is revealed at Article 22 of such rules.⁸³

In conclusion, as long as international uniform law conventions provide for such rules of interpretation referring to general principles and the need for a uniform application, it seems that transnational rules such as the UNIDROIT Principles and the *lex mercatoria* may

82. U.N. Convention on the Liberty of Operators of Transport Terminals in International Trade, U.N. Doc. A/CONF. 152/13 (1991), *reprinted in* 30 I.L.M. 1503 (1991).

83. U.N. Convention on the Carriage of Goods by Sea, art. 22, Mar. 30, 1978.

Article 22- Arbitration

1. Subject to the provisions of this Article, parties may provide by agreement evidenced in writing that any dispute that may arise relating to carriage of goods under this Convention shall be referred to arbitration.

2. Where a charter-party contains a provision that disputes arising thereunder shall be referred to arbitration and a bill of lading issued pursuant to the charterparty does not contain a special annotation providing that such provision shall be binding upon the holder of the bill of lading, the carrier may not invoke such provision as against a holder having acquired the bill of lading in good faith.

3. The arbitration proceedings shall, at the option of the Claimant, be instituted at one of the following places:

(a) A place in a State within whose territory is situated:

(i) The principal place of business of the Defendant or, in the absence thereof, the habitual residence of the Defendant; or

(ii) The place where the contract was made, provided that the Defendant has there a place of business, branch or agency through which the contract was made; or

(iii) The port of loading or the port of discharge; or

(b) Any place designated for that purpose in the arbitration clause or agreement.

4. The arbitrator or arbitration tribunal shall apply the rules of this Convention.

5. The provisions of paragraph 3 and 4 of this Article are deemed to be part of every arbitration clause or agreement, and any term of such clause or agreement which is inconsistent therewith is null and void.

6. Nothing in this Article affects the validity of an agreement relating to arbitration made by the parties after the claim under the contract of carriage by sea has arisen.

supply the necessary rules to fill gaps and avoid ambiguities.⁸⁴ Arbitrators are specialists in international trade and business law and they will select with care those transnational rules which are useful to resolve the dispute. In the right hands, the method of transnational rules is a plus and never a minus for international arbitrators.

E. Excluding the UNIDROIT Principles

For a complete analysis of the role of the UNIDROIT Principles and their relationship with *lex mercatoria*, great attention must be paid to awards in which the application of the UNIDROIT Principles has been excluded.⁸⁵ These cases have shown that an arbitration clause pointing to a given domestic law with the express exclusion of every other legal system has the result of excluding the application both of the *lex mercatoria* and of the UNIDROIT Principles. Furthermore, another award has shown that the UNIDROIT Principles do not constitute per se a codification of international trade usages. On the contrary, the characterization of a specific UNIDROIT principle within the category of international trade usages needs demonstration.

International commercial law of the third millennium thus seems to be heading towards a progressive differentiation between principles of contract law including the UNIDROIT Principles and international trade usages.⁸⁶ This process will have a profound impact on the application of the ubiquitous formula common in arbitration regulations, national statutes, and international conventions, according to which the arbitrator shall take account of relevant trade usages. Between 1994 and the end of 2000, three cases (8 percent of the total) mentioned the UNIDROIT Principles in order to exclude their application.⁸⁷ In ICC Award Number 9419, the arbitrator simply declared not to adhere to doctrines of either *lex mercatoria* or the UNIDROIT Principles. Therefore he opted for a

84. In the matters of international bills of exchange, a domain which has represented a sort of laboratory of uniform law, the recent UNCITRAL Convention on International Bills of Exchange and International Promissory Notes, 1988, provides in Article 4, that: "In the interpretation of this Convention, regard is to be had to its international character and to the need to promote uniformity in its application and the observance of good faith in international transaction."

85. This important category of cases has been analyzed by the author in Marrella & Gélinas, *supra* note 2.

86. See Roy Goode, *Usage and Its Reception in Transnational Commercial Law*, 46 INT'L COMP. L.Q. 1 (1997); Emmanuel Gaillard, *La distinction des principes généraux du droit et des usages du commerce international*, in ETUDES BELLET 203.

87. See ICC Awards Nos. 8873, 9029 and 9419, discussed in Marrella & Gélinas, *supra* note 2, at 78-81, 88-96, 104-06.

traditional application of conflict of laws rules in order to localize the contract in a domestic legal system.

ICC Award Number 9029 is far more interesting. In that case, arbitrators faced a choice-of-law clause in favor of Italian law as the applicable law. One of the parties asked for the UNIDROIT Principles or *lex mercatoria* to be applied, *inter alia*, on the basis of Italian rules concerning international commercial arbitration and namely Article 834 of the Italian Code of Civil Procedure in which reference is made to trade usages. The arbitral tribunal rejected such an interpretation in favor of a strict application of the applicable domestic law. Nonetheless, arbitrators went on to show that, had they applied UNIDROIT Principles or *lex mercatoria*, the result would have been the same had Italian law been applied.

The most striking example of this line of cases is, however, ICC Award Number 8873. In connection with the construction of a road in Algeria, the claimant, a French company, entered into a contract with Respondent 1, a Spanish company, whose rights were assigned to Respondent 2, another Spanish Company. As the claimant fell behind schedule in performing the work, Respondent 2 asked it to increase its resources so as to make up the lost time. The claimant's justification for the delay was deterioration in political conditions in Algeria, which, it alleged, prevented it from mobilizing the necessary personnel and extra-work requested by Respondent 2. It suggested that the terms of their collaboration should be renegotiated, filing a claim to cease the work on grounds of *force majeure*.

An amendment was subsequently drawn up and various changes were made to the initial contract. The work continued but fell behind schedule again. Respondent 2, therefore, claimed penalty payments for late performance and made the payment of invoices subject to the claimant's issuing a credit note covering the amount of the penalties. A deadlock ensued, with the claimant refusing to sign the credit notes and asking for sums invoiced to be paid and Respondent 2 refusing to pay the invoices until it had received the credit notes. In the face of this situation, the claimant introduced its request for arbitration referring to hardship and *force majeure* to account for the delay in the performance of the work. Its claims concerned outstanding invoices due for payment by Respondent 2 and various additional costs that it had been caused to incur. Respondent 2 made a counterclaim in order to obtain payment of the penalties for late performance and to be covered for certain additional costs it had been caused to incur.

The arbitration clause was read:

Arbitration and choice of law. This contract shall be entirely governed by Spanish Law, excluding any other legal system. Any dispute arising in connection with the interpretation, validity or any effect of the contract, shall be settled by arbitration which shall take place in Madrid (Spain) under the Rule of conciliation and arbitration

of the International Chamber of Commerce by one or more arbitrators appointed in accordance with said rules.⁸⁸

The arbitral tribunal, sitting in Madrid, determined the applicable law to the merits as being Spanish Law. However, according to the claimant, the dispute was not to be decided only on the basis of Spanish law, but taking into proper account international trade usages. This reasoning would lead to apply general principles of law and, in particular, usages in the field of public procurements (*usages existants dans les contrats internationaux de génie civil*).⁸⁹

The defendant pleaded against this approach showing that, under Spanish law, the *contrato de obras* is disciplined by the civil code. Therefore, usages and customs would have been effective *secundum legem*, that is, within the limits set forth by Spanish civil law rules, regardless of all other commercial considerations. In order to resolve this issue, arbitrators recalled Article 13 of the ICC Regulations and Article VII of the 1961 Geneva Convention, observing that they were not bound to follow strictly any national law when determining the effects of trade usages for the transaction.⁹⁰ They added that, when there is a question of determining the role of trade usages, the Geneva Convention, via the rules of its Article VII, allows the arbitrators a very broad discretionary margin. This discretionary power results in attributing international trade usages a legal force which can be limited only in the presence of mandatory rules of the *lex contractus*. From this perspective, a rule can be ascribed to trade usages only if it is widely known and regularly observed in a given trade.⁹¹

According to the claimant, hardship rules may be found in the UNIDROIT Principles⁹² and constitute a common clause in international standard contracts. In particular, hardship clauses are

88. ICC Award No. 8873, *discussed in Marrella & Gélina, supra note 2.*

89. *Id.*

90. See ICC Award No. 8873 (author's translation). The original text of the award states, "[Les arbitres] ne sont pas liés aux règles strictes d'un droit national lorsqu'il s'agit de déterminer si, et dans quelle mesure, les usages du commerce peuvent s'appliquer, éventuellement en substitution de normes dispositives de la loi applicable."

91. Therefore, according to arbitrators:

il faut par conséquent établir qu'il s'agit de règles que les personnes engagées dans le commerce international (et en particulier dans la branche en question) considèrent applicables sans aucun besoin d'une référence expresse, parce qu'elles sont devenues obligatoires comme conséquence d'un usage répandu et continu. Il est évident que cette appréciation doit être faite avec prudence, afin d'éviter que les parties se trouvent soumises à des règles dont elles ne pouvaient pas attendre raisonnablement qu'elles soient applicables.

ICC Award No. 8873.

92. See UNIDROIT Principles, *supra note 2*, arts. 6.2.1, 6.2.2, 6.2.3.

contained both in FIDIC (edition IV) and in ENAA conditions (ENAA Model form International Contract for Process Plant Construction).

With regard to the legal nature of the UNIDROIT Principles, the arbitral tribunal noted that those Principles could find an application when the parties have agreed that their contract should be governed by them. In the specific case at issue, parties had not made any reference to the Principles. Therefore, it followed that the UNIDROIT Principles were not applicable. Moreover, arbitrators added that:

The only means to justify their application would be of saying that they [the UNIDROIT Principles] are a codification of existing usages. In order to reach this conclusion it would be necessary to prove that the rules called upon by Claimant (and in particular those on Hardship, contained in articles 6.2.1 and following) correspond to a generally established international practice, which people engaged in international trade consider as binding regardless its written stipulation.⁹³

However, the arbitral tribunal considered that although there is a tendency to stipulate hardship clauses in certain sectors of international trade in a repetitive way, in business practice an obligation of renegotiation of the contract constitutes a principle of exceptional matters notwithstanding rules of the UNIDROIT Principles. Furthermore, one has to consider the degree of detail with which the hardship clauses are stipulated. If hardship clauses must be stipulated in the contract and detailed, it follows that they cannot be considered trade usages since their content varies from time to time.

The conclusion of the tribunal was the following:

It is thus excluded that provisions on Hardship contained in the UNIDROIT Principles are trade usages. On the contrary, they do not correspond, at least at present times, to current practice of business in international trade and therefore their applicability depends on an express contractual reference from the parties, which is not the case at issue.⁹⁴

93. ICC Award No. 8873 (author's translation). The original text is as follows:

Le seul moyen pour justifier leur application serait de dire qu'il s'agit d'une "codification" des usages existants et que le Principes d'UNIDROIT devraient être appliqués dans cette qualité d'usages codifiés par l'UNIDROIT. Pour arriver à cette conclusion il faudrait prouver que les règles invoquées par la demanderesse (et en particulier celles sur la Hardship, contenus dans les articles 6.2.1 et suivants) correspondent à un usage international généralement établi, auquel les personnes engagées dans le commerce international se considèrent liées sans besoin d'une stipulation expresse dans ce sens.

94. ICC Award No. 8873 (author's translation). The original text is as follows:

Il est donc exclu que l'on puisse considérer les dispositions en matière de Hardship contenues dans les Principes d'UNIDROIT comme des usages du commerce. Il s'agit, au contraire, de règles qui ne correspondent pas, au moins

Once decided against the application of the UNIDROIT Principles to the case at stake, arbitrators considered the issue of applicability of FIDIC and ENAA Conditions.

FIDIC and ENAA general conditions of contract were characterized as standard contracts. In such a situation, these rules would have been applicable only if the parties had expressly or implicitly made reference to them. Nonetheless, arbitrators observed that principles contained in standard contracts, typical of certain economic sectors of trade, can become usages. Therefore, standard contracts may become trade usages whenever it is proven that they are applied, without need of agreement, in transactions among companies of a given economic sector.

In other words, according to the arbitral tribunal, two conditions must be matched:

Rules must be established in practice of business with a sufficient degree of uniformity in order to be applied directly (like standard formulas) without need to negotiate further elements . . . [and secondly] that the same rules or principles are applied by economic operators of the branch in question even in absence of an express clause in the contract.⁹⁵

As the claimant's invoked hardship and *force majeure* principles were based on FIDIC and ENAA clauses, it followed, once again, that arbitrators faced rules of an exceptional nature which, in their opinion, did not seem yet sufficiently "ripe" to be transformed into uniform and autonomous rules on that specific issue. From this perspective, arbitrators finally concluded that those principles represented mere "contractual formulas." As such, those rules had no legal value beyond the context of the standard contract containing them. As the tribunal correctly noted, the claimant had not shown that both the UNIDROIT Principles and the FIDIC or ENAA conditions formed a usage that parties knew or ought to have known, and which in international trade is widely known by parties to contracts of the particular trade concerned. For all these reasons, the application of hardship rules contained in UNIDROIT principles as well as in FIDIC and ENAA conditions were rejected.

à l'état actuel, à la pratique courante des affaires dans le commerce international et qui ne seront par conséquent applicables que lorsque les parties y ont fait une référence expresse, ce qui n'est pas le cas ici.

95. ICC Award No. 8873 (author's translation). The original text is as follows :

[Q]u'il s'agisse de solutions établies dans la pratique des affaires avec un degré suffisant d'uniformité pour pouvoir être appliquées directement (comme formule standard) sans besoin de négocier des éléments ultérieurs; qu'il soit prouvé que les principes que l'on veut considérer comme des usages sont appliqués par les entreprises de la branche en question même dans l'absence d'une prévision expresse dans le contrat.

V. UNIDROIT PRINCIPLES DO NOT CLASH WITH STATE CONTROL MECHANISMS

The last (but not at all the least) question raised by transnational rules like the UNIDROIT Principles and *lex mercatoria* are their possible interaction or conflict with control mechanisms. On this issue there are many important scholarly writings on *lex mercatoria* which may be recalled, and may it suffice to present only a few remarks concerning mandatory rules and public policy.⁹⁶

First of all, the UNIDROIT Principles are not intended to be applied against mandatory rules. Article 1.4 of the UNIDROIT Principles states that: “[n]othing in these Principles shall restrict the application of mandatory rules, whether of national, international, or supranational origin, which are applicable in accordance with the relevant rules of private international law.”⁹⁷

96. See generally Norbert Horn, *Codes of Conduct for MNEs and Transnational Lex Mercatoria: An International Process of Learning and Law Making*, in LEGAL PROBLEMS OF CODES OF CONDUCT FOR MULTINATIONAL ENTERPRISES 45-81 (1980); Hubert Moitry, *Arbitrage international et droit de la concurrence: vers un ordre public de la lex mercatoria?*, 1989 REV. ARB. 3 (1989); FILALI OSMAN, LES PRINCIPES GÉNÉRAUX DE LA LEX MERCATORIA 381 (1992); William W. Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in LEX MERCATORIA AND ARBITRATION 109 (Thomas E. Carbonneau ed., 2d ed. 1998) (observing that “[t]he healthy elaboration of transnational economic norms requires judicial control mechanisms to insure that arbitral awards purporting to be based on *lex mercatoria* represent more than the arbitrator’s personal notions of justice”); Fabrizio Marrella, *Arbitrato e strumenti di lotta alla criminalità transnazionale riconducibili all’autonormazione ed alla lex mercatoria*, in LA SFIDA ALL’ECONOMIA CRIMINALE NELL’ESPERIENZA GIURIDICA ITALIANA 41-100 (2002) (discussing forms of limitation of party autonomy coming from self limitation of the international business community).

97. UNIDROIT Principles, *supra* note 2, art. 1.4:

1. Mandatory rules prevail. Given the particular nature of the Principles, they cannot be expected to prevail over applicable mandatory rules, whether of national, international or supranational origin. In other words, mandatory provisions, whether enacted by States autonomously or to implement international conventions, or adopted by supranational organisations, cannot be overruled by the Principle.

2. Mandatory rules applicable in the event of mere incorporation of the Principles in the contract. In cases where the parties’ reference to the Principles is considered to be only an agreement to incorporate them in the contract, the Principles will first of all encounter the limit of the mandatory rules of the law governing the contract, *i.e.* they will bind the parties only to the extent that they do not affect the rules of the applicable law from which parties may not contractually derogate. In addition, the mandatory rules of the forum, and possibly also those of third States, will likewise prevail, provided that they claim application whatever the law governing the contract and, in the case of the rules of third States, there is a close connection between those States and the contract in question.

3. Mandatory rules applicable if the Principles are the law governing the contract. Yet, even where, as may be the case if the dispute is brought before an

Second, there is a certain uniformity of views (at least in continental Europe) that mandatory rules (*lois de police* in French literature, *norme di applicazione necessaria* in Italian writings; *international zwingende Rechtssätze* or *Zweckgesetze* in German works) are intended to protect essential interests touching the political, economic, and social organization of the forum law.⁹⁸ Thus,

arbitral tribunal, the Principles are applied as the law governing the contract, they cannot prejudice the application of those mandatory rules which claim application irrespective of which law is applicable to the contract (*lois d'application nécessaire*). Examples of such mandatory rules, the application of which cannot be excluded simply by choosing another law, are to be found in the field of foreign exchange regulations (see Articles of the Agreement of the International Monetary Fund, (Bretton Woods Agreement)), import-export licences (see Articles of these Principles on public permission requirements), regulations pertaining to restrictive trade practices, etc.

4. Recourse to the rules of private international law relevant in each individual case. Both courts and arbitral tribunals differ considerably in the way in which they determine the mandatory rules applicable to international commercial contracts. For this reason the present article deliberately refrains from entering into the merit of the various questions involved, in particular whether in addition to the mandatory rules of the forum and of the *lex contractus* those of third States are also to be taken into account and if so, to what extent and on the basis of which criteria. These questions are to be settled in accordance with the rules of private international law which are relevant in each particular case.

See, e.g., 1980 Rome Convention on the Law Applicable to Contractual Obligations, art. 7, discussed *supra* note 38.

98. Cf. Law 31, art. 17, May 1995, n.218. According to the famous definition offered by Philippe Francescakis mandatory rules are those "*lois dont l'observation est nécessaire pour la sauvegarde de l'organisation politique, sociale et économique du pays.*" Philippe Francescakis, *Quelques précisions sur les lois d'application immédiate et leurs rapport avec les règles de conflit des lois*, 55 REV. CRIT. DR. INT'L PRIV. 1 (1966); See generally R. AGO, LEZIONI DI DIRITTO INTERNAZIONALE PRIVATO 303 (1939); ERNST RABEL, THE CONFLICT OF LAWS: A COMPARATIVE STUDY 558 (1945); Karl H. Neumayer, *Autonomie de la volonté et dispositions impératives en droit international privé des obligations*, 46 REV. CRIT. DR. INT'L PRIV. 579 (1957); T. Ballarino, *Norme di applicazione necessaria e forma degli atti*, R.D.I.P.P. 707 (1967); DE NOVA, I CONFLITTI DI LEGGI E LE NORME SOSTANZIALI FUNZIONALMENTE LIMITATE 699 (1967); G. SPERDUTI, NORME DI APPLICAZIONE NECESSARIA E ORDINE PUBBLICO 473 (1976); P. Mengozzi, *Norme di applicazione necessaria e progetto di Convenzione CEE sulla legge applicabile alle obbligazioni contrattuali (la Conflict of Laws Revolution attraverso l'oceano)*, in ARCH. GIUR. SERAFINI 3 (1979); G. Pau, *Le norme imperative nella Convenzione CEE sulla legge applicabile alle obbligazioni contrattuali*, RIV. DIR. INT. 868 (1982); T. Treves, *Norme imperative e di applicazione necessaria nella convenzione di Roma del 19 giugno 1980*, R.D.I.P.P. 25 (1983); P. Mengozzi, *La convenzione Cee sulla legge applicabile alle obbligazioni contrattuali, il notaio e le norme di applicazione necessaria*, RIV. TRIM. DIR. PROC. CIV. 165 (1984); G. Cassoni, *Spunti in tema di norme di applicazione necessaria*, ARCH. G. 354 (1986); F. Mosconi, *Exceptions to the Operation of Choice of Law Rules*, 217 R.C.A.D.I. 9, 9-214 (1989); A. Bucher, *L'ordre public et le but social des lois en droit international privé*, R.C.A.D.I. 9, 9-116 (1993); H. BATIFFOL & P. LAGARDE, TRAITÉ DE DROIT INTERNATIONAL PRIVÉ 425 (1993); A. Lowenfeld, *International Litigation and the Quest for Reasonableness*, 245 R.C.A.D.I. 9, 9-320 (1994); M. Frigo, *La determinazione della legge applicabile in mancanza di scelta*

mandatory rules operate unilaterally imposing substantive rules and neutralizing the effects of conflict of laws rules.⁹⁹

Third, if one tries to find examples of mandatory provisions of national arbitration law, one will arrive at different lists according to the countries examined, since that characterization depends on the national legislature and the interpretation of national law by the national courts. One may say generally that certain fundamental principles of justice and of arbitration procedure appear to be mandatory in all national laws.

Finally, arbitral case law evidences a growing consideration of such rules as it is shown, *inter alia*, in Award Numbers 4237, 5314, 6500, 6320, and 9333.¹⁰⁰ In Award Number 4237, deciding a dispute between Syrian and Ghanian parties, the sole arbitrator, Loek Malberg, after having excluded application of *lex mercatoria* in favour of the application of English Law, pointed out that: “[i]t goes without saying that the Arbitrator shall have regard to these bases to the extent that they do not deviate from the mandatory rules of the

dei contraenti e le norme imperative della Convenzione di Roma, in LA CONVENZIONE DI ROMA SUL DIRITTO APPLICABILE AI CONTRATTI INTERNAZIONALI 21 (2nd ed. 1994); T. Treves, *Art. 17 (Norme di applicazione necessaria)*, R.D.I.P.D. 1 (1995); N. BOSCHIERO, *Art. 14-17*, in BARIATTI (1995); *Legge 31 maggio 1995*, N.L.C.C. 1035, 1035 n.218 (1996); T. Hartley, *Mandatory Rules in International Contracts: The Common Law Approach*, 266 R.C.A.D.I. 337, 337-426 (1997); SERGIO M. CARBONE & R. LUZZATTO, *IL CONTRATTO INTERNAZIONALE* 103 (3d ed. 1998); T. Ballarino, *Diritto internazionale privato*, *supra* at 187 (observing that the common feature of these rules is “volere essere applicate anche quando il rapporto giuridico sul quale incidono è sottoposto ad un ordinamento straniero, in deroga a quanto previsto dalle norme di conflitto bilaterali”); BERNARD AUDIT, *DROIT INTERNATIONAL PRIVÉ* 97 (1997); A. BONOMI, *LE NORME IMPERATIVE NEL DIRITTO INTERNAZIONALE PRIVATO* 1 (1998); L. Migliorino, *Norme di applicazione necessaria del foro e convenzioni di diritto internazionale privato*, in *STUDIUM IURIS* 109 (1998); *Pierre Mayer, Lois de police*, *RÉP. DR. INT.* 3 (1998); YVON LOUSSOUARN & PIERRE BOUREL, *DROIT INTERNATIONAL PRIVÉ* 128 (1999); F. TROMBETTA PANIGADI, *LE NORME DI APPLICAZIONE NECESSARIA NEL NUOVO SISTEMA ITALIANO DI DIRITTO INTERNAZIONALE PRIVATO* 750 (1999); Yvon Loussouarn & Pierre Bourel, *Legge regolatrice del contratto e rilevanza di norme di altri ordinamenti: ordine pubblico e norme di applicazione necessaria*, in *IL DIRITTO PRIVATO NELLA GIURISPRUDENZA* 240-49 (2000); F. MOSCONI, *DIRITTO INTERNAZIONALE PRIVATO* 174, 244 (2d ed. 2001)

99. “*On parle de lois de police pour désigner le mécanisme d’application d’une règle interne à une situation internationale en fonction de sa volonté d’application et indépendamment de sa désignation par une règle de conflit.*” BERNARD AUDIT, *DROIT INTERNATIONAL PRIVÉ* 97 (1997).

100. See ICC Award No. 8938 (1996):

In virtue of the independent rule of international arbitration law, embodied in Art. 8(4) of the [ICC, *n.d.r.*] Rules, the arbitral clause is autonomous and juridically independent from the main contract in which it is contained either directly or by reference, and its existence and validity are to be ascertained, taking into account the mandatory rules of national law and international public policy, in the light of the common intention of the parties, without necessarily referring to a state law.

24 Y.B. COM. ARB. 174-81 (1999).

applicable law.” Thus, for Malberg, it is clear that the interference of mandatory rules is limited to those rules pertaining to the same *lex contractus*, avoiding any other consideration on mandatory rules from the *lex situs arbitri* or the *lex loci executionis*.

ICC Award Number 5314, on the other hand, shows that even though the applicable law to substance of the dispute is the *lex mercatoria* (and thus a fortiori, the UNIDROIT Principles) the interference of mandatory rules remains unchanged.¹⁰¹ A line of cases which is followed by ICC Award Number 6500 where arbitrators decide that “even when *lex mercatoria* is applicable as any proper law of the contract—the court or the arbitrator—should take into account mandatory rules and public policy of another legal system if there are good and just reasons to do so (see Article 7 of the Rome Convention on the applicable law to contractual obligations).”¹⁰²

101. ICC Award No. 5314, 13 Y.B. COMM. ARB. 35-40 (1988). According to the arbitrators:

Whereas under Swiss Rules of Conflict, the Tribunal fédéral, although the question is a controversial one, has applied to a licence Agreement the law of the domicile of the licensor, as this party is considered to perform the characteristic obligation (ATF 101 II 293). Whereas this solution has also been adopted by the new Federal law on private international law (Art. 122(1)) . . . Whereas however, such solution has been criticized, in particular on the basis that the law of the domicile of the licensee may contain mandatory rules which in any case, have to be observed.

102. See excerpts in 119 J. DU DROIT INT'L (1992) (citing Arnaldez, *Recueil*, III CCI), at 452-54.

[L]orsque la est applicable comme toute autre “proper law” du contrat—le juge ou l'arbitre—devrait tenir compte d'une norme d'application immédiate où d'ordre public appartenant à un autre système loefrsqu'il y a de bonnes et justes raisons de le faire (V.art. 7 de la Convention de Rome entre les Etats membres de la CEE sur la loi applicable aux obligations contractuelles). C'est précisément le cas dans ce litige. Dans la mesure où la loi libanaise est impérative et a pour but de protéger le représentant, cette loi est d'ordre public. De ce fait, même si le tribunal décidait d'appliquer la *lex mercatoria*, il ne devrait pas ignorer de telles dispositions. Enfin, *même si la loi libanaise est applicable, la lex mercatoria peut encore être utilisée dans l'application de la loi libanaise, ou dans la mesure où la loi libanaise est silencieuse.*

For a decision in which RICO was considered mandatory law excluding sanctions of treble damages, see ICC Award No. 6320 (1992), 20 Y.B. COM. ARB. 62-109 (1995). Arbitrators have observed:

While the United States is certainly free to mandate application of its law to its nationals and to others within its jurisdiction, the Tribunal cannot find that such a mandatory application is in this Case warranted with regard to a foreign national outside the United States' jurisdiction. The fact that the foreign national itself 'seeks' the protection of RICO cannot affect the above finding, since it seeks a 'mandatory' protection that would be contrary to the choice of law it agreed to with the other party.

The conclusion might be different if the national mandatory law would have to be considered as reflecting a principle of international public policy.

Finally, ICC Award Number 9333 confirms further that the question of applicability of mandatory rules to international arbitration does not really change according to the national or anational nature of the applicable law. On the public policy exception as a form of control device the same conclusions apply. Respect of public policy of the *lex situs arbitri* and/or (after *Hilmarton* and *Chromalloy* cases) of the *lex loci executionis* is imposed by domestic courts regardless of the specific national or anational origin of the rules applied by arbitrators. What counts at *exequatur* stage is only the legal result of the arbitral decision and not the rules of law employed to reach it.

This insight finds confirmation in *Ministry of Defense and Support for the Armed Forces of The Islamic Republic of Iran v. Cubic Defense Systems, Inc.*:

Cubic also disputes the Tribunal's reference to the Principles of International Commercial Contracts published in 1994 by the UNIDROIT Institute (UNIDROIT Principles) and the Tribunal's references to principles of fairness such as good faith and fair dealing. Cubic claims that references to such international and equitable principles also violates Art. V(1)(c) because this law exceeds the scope of the Terms of Reference. The reference to the UNIDROIT Principles does not exceed the scope of the Terms of Reference. One of the issues presented to the Tribunal was whether general principles of international law apply to this dispute. That Cubic disagrees with the Tribunal's response to the question posed by the parties is not a reason to find that the Tribunal addressed issues beyond the scope of the Terms of Reference. The same is true for Cubic's assertions with regard to the Tribunal's references to equitable principles of contract law.¹⁰³

However, such a qualification cannot be made for the treble damages rule of the RICO statute, whose application is at stake here. In fact, as mentioned above, this rule is specific to the United States and is not found either in other major national legal systems or in international conventions. While it is, of course, in the interest of the international community and international commerce to prevent, also at the international level, practices such as those at which RICO aims, it cannot be judged that the specific legal consequences of a treble damages claim of an 'injured' party, which is the only issue at stake in this arbitration, are a common feature of many national laws or of international law. The Tribunal, therefore, concludes that the application of RICO is not mandatory in the present Case.

Even if, as found above, the application of RICO is not mandatory in the present Case, at least in theory that would not exclude that the treble damages provision of RICO is applicable due to a choice expressed by the parties in the Contract. For the sake of completeness, and as the parties have addressed that issue in detail, the Tribunal therefore hereafter will examine that issue as well. However, as will be seen, the Tribunal finds that RICO is also not applicable on this basis of the Contract.

Id. See also discussion *supra* note 38 and accompanying text (discussing Rome Convention).

103. *Ministry of Defense & Support for the Armed Forces of the Islamic Republic of Iran v. Cubic Defense Systems, Inc.*, 29 F. Supp. 2d 1168, 1173 (S.D. Cal. 1998).

Hence, the court, joining the streamline of *lex mercatoria* decisions of European courts, has stated that:

[T]his court's discretion in reviewing a foreign arbitration award is quite circumscribed. See Ministry of Defense, 969 F.2d at 770. The Tribunal's reference to and application of the UNIDROIT Principles and principles such as good faith and fair dealing do not violate Art. V(1)(c). The Tribunal applied these principles to differences contemplated by and falling within the terms of the submission to arbitration and therefore the Award does not violate Art. V(1)(c).¹⁰⁴

VI. CONCLUSION

In conclusion, there is little doubt that third-millennium international arbitrators will face the flowering of a transnational rule such as the UNIDROIT Principles for international commercial contracts. They will be used to solve problems of characterization, preliminary questions, and choice of law to the merits of the dispute. In this sense, it appears clearly that these rules are to be construed under a triangular scheme. Thus, *lex mercatoria* and transnational rules like the UNIDROIT Principles will intervene more and more in the arbitral choice-of-law process in three competing contexts: (1) as a *lex contractus*; (2) as a means to interpret, supplement, or adapt national law; and (3) as a means to resolve matters of interpretation or gap-filling in international conventions. Criticism by conservative private international law scholars towards the choice of *lex mercatoria* and transnational rules seems therefore to have been overcome by arbitral practice.

The second group of cases has shown that the antagonism between *lex mercatoria* or transnational rules and domestic law is less a matter of conflicting rules and more a problem of harmonization of principles. Thus, the *transnational test* (I have called it the *TNT test*) becomes a technique of adaptation of domestic law in a transnational arbitration context. In this way it becomes evident that many rules drawn from domestic legal systems come in line with needs of international trade. Criticism by the *lex mercatoria* orthodoxy on the parochialism offered by the application of state conflict-of-law rules may, thus, be overcome.

Finally, awards excluding the application of the UNIDROIT Principles show the progressive sophistication of international trade law rules: a differentiation, within *lex mercatoria*, between generally accepted principles of contract law and international trade usages seems to be ongoing. New challenges shall be faced. Paradoxically, the need for progressive codification of transnational law is leading

104. *Id.*

the world community to a sort of non-binding over-codification of this branch of law.

There are numerous commissions in charge of codification of international contract law in many parts of the world, the most famous being the Lando Commission whose aim is to design the future European Civil Code. Many sets of principles presently claim to be applied whenever *lex mercatoria* is at stake.¹⁰⁵ Yet in most *post-UNIDROIT* sets of principles there is no reference to rules on conflict of principles. The danger of over-codification becomes reality when we consider the case of an arbitrator having to apply *lex mercatoria* or transnational rules and facing two or more collections of nonbinding principles all of which are self-declared codifications of the new law merchant (i.e. the UNIDROIT and the European Contract Law Principles). Which set shall prevail and why?

One global set of principles like the UNIDROIT Principles should prevail. This would allow the rules of transnational commerce to be more consistent and predictable in the third millennium. If this does not happen, we will have substituted the complexity of conflicting sets of principles for "classical problems" of conflict of laws.

Five centuries after it was made, Lanfranco da Oriano's prophecy might still govern international arbitration from his grave, leaving a great sense of anxiety for legal scholars willing to explain the mysteries of transnational trade. The purpose of the present symposium is to shed some light in the darkness of legal prejudice and academic conservatism. I hope with the present paper to have provided some comfort to the curious reader.

105. See PRINCIPLES OF EUROPEAN CONTRACT LAW: PART I & II 95 (Ole Lando & Hugh Beale eds., 1998).

Art. 1:101: Application of the Principles: (1) These Principles are intended to be applied as general rules of contract law in the European Communities.

(2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them.

(3) These Principles may be applied when the parties: (a) have agreed that their contract is to be governed by "general principles of law," the "*lex mercatoria*" or the like; or (b) have not chosen any system or rules of law to govern their contract.

(4) These Principles may provide a solution to the issue raised where the system or rules of law applicable do not do so.

Id.