

Law and Practice of

**TRANSNATIONAL
CONTRACTS**

GEORGES R. DELAUME

LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS

By

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INTRODUCTION

Unlike *Transnational Contracts*, which is a looseleaf treatise intended to serve as a reference work for the specialist, this book is conceived as an introduction to basic issues of conflict avoidance that may be of interest to the general practitioner and to the scholar, who may be more familiar with the rules of conflict solution than with the preventive method of conflict anticipation.

The legal context in which transnational contracts are negotiated and implemented is in the process of rapid evolution. The time is no longer where such contracts fitted into well established categories of transactions between commercialmen, subject to private law, or between subjects of international law conducting business *inter se*. Today, a number of contractual relationships involve both subjects of private and of public international law, and, with increasing frequency, a plurality of parties whose combined efforts are required for the carrying out of a single venture. Neither traditional domestic law rules nor, to the extent that they can be identified with sufficient precision, international law norms necessarily provide adequate answers to problems that they were not designed to meet in the first place.

In order to face the challenges of a new era, the legal profession has been forced to innovate. Imaginative contractual devices have appeared, which have no true antecedent in earlier domestic or international practice. In attempting to ascertain the rules applicable to contemporary transnational contracts, analysis of primary material has become an essential tool for the comparativist. Primary material is not only a living source of law, it may also be the only one available to disclose new trends of legal thinking that go beyond established rules and practices. This is not intended to suggest that modern contractual arrangements may be self-supporting and constitute the "law" of the parties. This simply cannot be since no agreement can exist in a legal vacuum. Quite the contrary, comparative analysis of primary material should be of assistance in the formulation of rules particularly adapted to specific categories of contracts considered in their proper legal environment. The same analysis may also be a useful exercise in identifying means of anticipating the pitfalls of conflicts rules or of transnational litigation that continue to lurk in the path of the parties to transnational contracts.

There is no need to elaborate on the fact that the determination of the law applicable to transnational contracts remains one of the most complex and confused areas of the conflict of laws. So much the more, when it is noted that, in a number of instances, the determination of the applicable law is no longer limited to a choice among domestic laws and may imply a choice between domestic law and international law. Nor is it a secret that existing rules concerning the judicial or arbitral settlement of transnational contract disputes may expose the transnational litigant to serious and unexpected hardship, and be an invitation to forum shopping or a source of considerable frustration at the time of enforcement of a judgment or an award.

Thus, there are ample reasons to reflect on the advantages of anticipating potential problems by means of early comparative analysis of the substantive, conflicts or jurisdictional, rules of possible relevance to individual contractual situations or, in other words, to consider the benefits that can be derived from appropriate techniques of conflict avoidance.

Opinions may differ as to the merits or effectiveness of conflict avoidance. Some lawyers shun the issue. Other lawyers may believe in the sacrosanct virtue of the boiler plate as a solution to their client's problems or be compelled to yield to the client's adherence to tradition. Obviously, this writer is of another opinion, otherwise this book would never have been written.

George R. Delaume

May 31, 1987

ABBREVIATIONS

A. Books Referred to by the Author's Name

Batiffol & Lagarde:	Batiffol and Lagarde, <i>Traité Élémentaire de Droit International Privé</i> Vol. 1 (7th ed. 1981); Vol. 2 (7th ed. 1983)
Cheshire & North:	Cheshire & North, <i>Private International Law</i> (10th ed. 1980)
Dicey & Morris:	Dicey & Morris, <i>Conflict of Laws</i> (10th ed. 1980) and <i>Cumulative Supplement</i>
Scoles & Hay:	Scoles and Hay, <i>Conflict of Laws</i> (1982)
Studies:	Mann, <i>Studies in International Law</i> (1973)
Restatement (Second)	Restatement (Second) of <i>Conflict of Laws</i> (1971)
Schlesinger:	Schlesinger, <i>Comparative Law</i> (4th ed. 1980)
Weintraub:	Weintraub, <i>Commentary on the Conflict of Laws</i> (2d ed. 1980)

B. International Organizations

ADB:	Asian Development Bank
AfDB:	African Development Bank
BIS:	Bank for International Settlements
ECE:	Economic Commission for Europe
EEC:	European Economic Community
ECSC:	European Coal and Steel Community
EIB:	European Investment Bank
EURATOM:	European Atomic Energy Community
FAO:	Food and Agriculture Organization
IADB:	Inter-American Development Bank
IAEA:	International Atomic Energy Agency
IBRD:	International Bank for Reconstruction and Development
IDA:	International Development Association
IFC:	International Finance Corporation
ILO:	International Labour Organization
IRO:	International Refugees Organization

UN:	United Nations
UN Special Fund:	United Nations Development Programme/Special Fund
WHO:	World Health Organization

C. Law Reports, Law Reviews and Other Abbreviations

A.C.:	Appeal Cases, English Law Reports
All E.R.:	All England Law Reports
Am. J. Comp. L.:	American Journal of Comparative Law
AJIL:	American Journal of International Law
Ann. Dig.:	Annual Digest of Public International Law Cases
App. Div. [(2d)]:	Appellate Division Reports, New York Supreme Court [Second Series]
Arb. Int'l	Arbitration International
BGH:	Bundesgerichtshof
BGHZ:	Entscheidungen des Bundesgerichtshofs in Zivilsachen
B.I.J.I.:	Bulletin de l'Institut Juridique International
B.Y.B.I.L.:	British Year Book of International Law
Cass.	Cour de Cassation. When used without qualification, the French Highest Court. References to the Highest Courts of other countries are qualified by initials, e.g. Cass. It. (the Italian Corte di Cassazione)
Ch.:	Chancery Division, English Law Reports
Clunet:	Journal du Droit International
Col. J. Trans. L.:	Columbia Journal of Transnational Law
Court of Appeals:	Decisions of courts of appeals in civil law countries are usually referred only by the name of the city in which the court seats, e.g. Paris, Brussels
Ct. Cl.:	Court of Claims (U.S.A.)
Dalloz:	Recueil Dalloz
D.L.R. [(2d)]:	Dominion Law Reports [Second Series]
D.P.C.I.:	Droit et Pratique du Commerce International
F. [2d]:	Federal Reporter [Second Series]

F. Supp.:	Federal Supplement
Gaz. Pal:	Gazette du Palais
H.L.:	House of Lords
Hoge Raad:	The Dutch Highest Court
I.C.L.Q.:	International and Comparative Law Quarterly
ICSID Review - F.I.L.J.	ICSID Review - Foreign Investment Law Journal
ILM:	International Legal Materials
Int'l Arb. Rep.:	International Arbitration Report
Int'l L. Rep.:	International Law Reports
J.C.P.:	Juris-Classeur Périodique (also called La Semaine Juridique)
J. Bus. L.:	Journal of Business Law
J. Int. Arb.	Journal of International Arbitration
J. Mar. L. & Comm.:	Journal of Maritime Law and Commerce
J.T.:	Journal des Tribunaux (Belgium or Swiss as the case may be)
J. World Trade L.:	Journal of World Trade Law
K.B.:	English Law Reports (King's Bench)
Law & Cont. Prob.:	Law and Contemporary Problems
L.J. (Ch.):	Law Journal Reports, Chancery
L.N.T.S.:	League of Nations Treaty Series
L.Q.R.:	Law Quarterly Review
L.T.R.:	Law Times Reports
McKinney's:	McKinney's Consolidated Laws of New York Annotated
N.E. [(2d)]:	Northeastern Reporter [Second Series]
Neth. Int'l L. Rev.:	Netherlands International Law Review
N.J.:	Nederlandse Jurisprudentie
N.Y. [(2d)]:	New York Court of Appeals Reports [Second Series]
N.Y.C.P.L.R.:	New York Civil Practice Law and Rules
N.Y.S. [(2d)]:	New York Supplement Reports [Second Series]
OLG:	Oberlandesgericht

P.:	Probate Division, English Law Reports
Pasicrisie:	Pasicrisie Belge
P.C.:	Privy Council
Penant:	Recueil Penant (Revue de Droit des Pays d'Afrique)
Q.B.:	Queen's Bench, English Law Reports
Rec. Cours, Hague Acad.:	Recueil des Cours, Hague Academy
Restatement (Second):	American Law Institute, Restatement of the Law (Second), Conflict of Laws 2d (1971)
RG:	Reichsgericht
RZG:	Entscheidungen des Reichgerichts in Zivilsachen
Rev. Belge Dr. Int.:	Revue Belge de Droit International
Rev. Crit. Dr. Int. Pr.:	Revue Critique de Droit International Privé (since 1934; before that date Revue de Droit International Privé; Rev. Dr. Int. Pr.)
Rev. Gen. Dr. Int. Pub.:	Revue Générale de Droit International Public
Riv. Dir. Int.:	Rivista di Diritto Internazionale
Riv. Dir. Int. Priv. e Proc.:	Rivista di Diritto Internazionale Privato e Processuale
Rev. Trim. Dr. Comm.:	Revue Trimestrielle de Droit Commercial
Rev. Trim. Dr. Eur.:	Revue Trimestrielle de Droit Européen
R.O.:	Recueil Officiel des Arrêts du Tribunal Fédéral Suisse
Sirey:	Recueil Sirey
T.F.:	Tribunal Fédéral Suisse
T.G.I.:	Tribunal de Grande Instance (see also, Trib, Civ.)
TIAS:	Treaties and other International Acts Series
Trib. Civ.:	Tribunal Civil
Trib. Comm.:	Tribunal de Commerce
U.N.T.S.:	United Nations Treaty Series
U.S.:	United States Reports See also: S. Ct. Supreme Court Reporter, 1. Ed. [2d] Lawyer's Edition [Second Series]

U.S.C.A.:	United States Code Annotated
W.L.R.:	Weekly Law Reports
ZPO:	Zivilprozessordnung

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