

The Practice of Transnational Law

Edited by

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THE PRACTICE OF TRANSNATIONAL LAW

PREFACE

On May 4 and 5, 2000, international practitioners and academics convened in Münster, Germany and discussed the data generated by the first worldwide enquiry on the use of transnational commercial law in international legal practice. The enquiry was conducted by a Research Team of the Center for Transnational Law (CENTRAL), Münster University, Germany. The survey was part of a three-year research project sponsored by the Volkswagen Foundation.

In close cooperation with empirical scientists, the CENTRAL Research Team designed a questionnaire which asked for the addressee's experience with transnational commercial law in contract negotiations, in contract drafting and in international commercial arbitration. Also, the addressees were asked to provide the Research Team with their general evaluation of the concept of transnational commercial law. The questionnaire was sent out to more than 2.700 practitioners from major companies and international law firms in 78 different countries.

While the Enquiry could not and does not claim to be representative, it is the first of its kind which is based on a questionnaire that was drafted with the support of specialists in empirical data collection and that was addressed to practitioners from almost all regions of the world. The Enquiry has generated an excellent return rate, thus providing for the first time a realistic picture of the use of transnational commercial law in international legal practice.

The members of the Research Team hope that the edited empirical data in the Annex of this book as well as the contributions of the speakers and the summary of the discussion of the conference participants contained in these proceedings will provide a new basis for the discussion on the transnationalization of commercial law and will help to lift this discussion on a new level.

Particular thanks are due to the conference speakers and to all those who have contributed to the lively discussion during the conference, in particular to the members of the CENTRAL Board of Trustees.

The Research Team gratefully acknowledges the support of the Center for Survey Research and Methodology (ZUMA) in Mannheim and of Holger Vormann in designing the questionnaire and processing the empirical data generated by the Enquiry.

A very special thank you goes to Sascha Lehmann and Daniel Engelbrecht for their excellent editorial work. Thanks are also extended to Sabine Holtmannspötter for typing the verbatim transcript of the conference discussion.

Preface

Finally, the editor would like to thank the members of the CENTRAL Research Team, Holger Dubberstein, Sascha Lehmann and Viktoria Petzold for their cooperation, enthusiasm and support throughout the project.

Münster, November 2000

Klaus Peter Berger

LIST OF ABBREVIATIONS

ADR	Alternative Dispute Resolution
AGBG	Gesetz zur Regelung des Rechts der allgemeinen Geschäftsbedingungen – German Standard Contract Terms Act
ALR	Australian Law Reports
Am. J. Comp. L.	American Journal of Comparative Law
Am. Rev. Int'l Arb.	The American Review of International Arbitration
Ann. Surv. Int'l & Comp. L.	Annual Survey of International and Comparative Law
Arb. Int'l	Arbitration International
Art.	Article
Artt.	Articles
ASA	Association Suisse de l'Arbitrage
Bankr. W.D. Ark.	US Bankruptcy Court, Western District of Arkansas
BDI	Bundesverband der Deutschen Industrie – Federal Association of the German Industry
BGB	Bürgerliches Gesetzbuch – German Civil Code
BGH	Bundesgerichtshof – German Federal Supreme Court
BGHZ	Entscheidungen des Bundesgerichtshofs in Zivilsachen – Civil Judgements of the German Federal Supreme Court
B. R.	Bankruptcy Reporter
Bull.	Bulletin
Burr.	Burrow's Reports
Bus. Law.	The Business Lawyer
BYIL	British Yearbook of International Law
ca	about
Cal.	California
Cass. civ.	Cour de cassation, chambre civile
Cass. civ. 1re	Cour de cassation, Première chambre civile
C.civ.	Code civil – French Civil Code
CENTRAL	Center for Transnational Law
cf.	compare
ch.	chapter
CISG	United Nations Convention on Contracts for the International Sale of Goods
Col. J. Europ. L.	Columbia Journal of European Law

List of Abbreviations

Col. J. Transnat'l L.	Columbia Journal of Transnational Law
DES	diethylstilbestrol
DZWir	Deutsche Zeitschrift für Wirtschaftsrecht
E.C.R.	Report of Cases Before the Court of Justice of the European Communities
ed.	editor
EDI	Electronic Data Interchange
EDIFACT	Electronic Data Interchange for Administration, Commerce and Transport
edn	edition
eds	editors
e.g.	for example
EGBGB	Einführungsgesetz zum Bürgerlichen Gesetzbuch – Introductory Statute to the German Civil Code
Eng. Rep.	English Reports
EU	European Union
Europ. Rev. Pr. L.	European Review of Private Law
F.2d	Federal Reporter, Second Series
FIDIC	Fédération Internationale des Ingénieurs Conseils – International Federation of Consulting Engineers
Fordham Int'l L.J.	Fordham International Law Journal
F. Supp.	Federal Supplement
F. Supp. 2nd	Federal Supplement, Second Series
GA	United Nations General Assembly
GAOR	United Nations General Assembly Official Record
GYIL	German Yearbook of International Law
Harv. Int'l L.J.	Harvard International Law Journal
Harv. L. Rev.	Harvard Law Review
Hastings Int'l & Comp. L. Rev.	Hastings International & Comparative Law Review
ibid.	ibidem
ICC	International Chamber of Commerce
ICCA	International Council for Commercial Arbitration
ICLQ	International & Comparative Law Quarterly
ICSID Rev. – F.I.L.J.	ICSID Review – Foreign Investment Law Journal
ILA	International Law Association
ILM	International Legal Materials
ILR	International Law Report
Inc.	Incorporated
Int'l Bus. Lawy.	International Business Lawyer
Int'l & Comp. L.Q.	The International & Comparative Law Quarterly
Int'l Constr. L. Rev.	The International Construction Law Review
IPRax	Praxis des Internationalen Privat- und Verfahrensrechts
J. Bus. L.	The Journal of Business Law
J.D.I.	Journal du Droit International
J. Inst. and Theoretical Econ.	Journal of Institutional and Theoretical Economics
J. Int'l Arb.	Journal of International Arbitration

J. Int'l Banking L.	Journal of International Banking Law
J. Int'l Bus. L.	Journal of International Business Law
J. L. & Com.	Journal of Law and Commerce
J. Legal Stud.	Journal of Legal Studies
JWTL	Journal of World Trade Law
JZ	Juristenzeitung
Law & Pol'y Int'l Bus.	Law and Policy in International Business
Law Q. Rev.	Law Quarterly Review
LDIP	Swiss Private International Law Statute
LIBOR	London Inter Bank Offering Rate
Mod. L. Rev.	Modern Law Review
NGOs	Non-Governmental Organizations
NIIT	Neue Institutionenökonomik Internationaler Transaktionen – New International Economics of International Transactions
NJW	Neue Juristische Wochenschrift
No.	number
Nos	numbers
N.Y.L. Sch. J. Int'l & Comp. L.	New York Law School Journal of International and Comparative Law
p.	page
P.2d	Pacific Reporter, Second Series
pp.	pages
Prod. Liab.	Product Liability
Pub.	Publication
RabelsZ	Rabels Zeitschrift für ausländisches und internationales Privatrecht
RDAI	Revue de droit et affaires internationales
Rec.Cours	Recueil des Cours
Res.	Resolution
Rev.	Review/Revue
Rev. Arb.	Revue de l'Arbitrage
Rev. crit. dr. int. priv.	Revue critique de droit international privé
Rev. int. dr. comp.	Revue internationale de droit comparé
RGBL	Reichsgesetzblatt
RID eco.	Revue internationale de droit économique
RIW	Recht der Internationalen Wirtschaft
S.Ct.	Supreme Court Reporter/Supreme Court
SPSS	Statistical Package for the Social Sciences
Supp.	Supplement
TNC	Transnational Corporations
Trav. com. fr. dr. int. pr.	Travaux du comité français de droit international privé
Tul. L. Rev.	Tulane Law Review
TvA	Tijdschrift voor Arbitrage
TvPr.	Tijdschrift voor Privatrecht
UCC	Uniform Commercial Code

List of Abbreviations

U. Chi. L. Rev.	University of Chicago Law Review
UCP	ICC Uniform Customs and Practice for Documentary Credits
UN	United Nations
UNCITRAL	United Nations Commission on International Trade Law
UN Doc.	United Nations Document
UNIDROIT	International Institute for the Unification of Private Law
Uniform L. Rev.	Uniform Law Review
U. Pa. L. Rev.	University of Pennsylvania Law Review
US	United States of America
U.S.	United States Reports
v.	versus
Vand. J. Transnat'l L.	Vanderbilt Journal of Transnational Law
vs	versus
Wayne L. Rev.	Wayne Law Review
WM	Wertpapier-Mitteilungen
Y.B. Com. Arb.	Yearbook Commercial Arbitration
ZEuP	Zeitschrift für Europäisches Privatrecht
ZIP	Zeitschrift für Wirtschaftsrecht
ZPO	Zivilprozeßordnung – German Civil Procedure Code
ZUMA	Zentrum für Umfragen, Methoden und Analysen – Center for Survey Research and Methodology

SPEAKERS AND PARTICIPANTS OF THE CONFERENCE ON THE PRACTICE OF TRANSNATIONAL LAW

The Conference, arranged by the Center for Transnational Law at University of Münster, Germany, was held on May 4 and 5, 2000 in Münster.

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*Klaus Peter Berger**

THE NEW LAW MERCHANT AND THE GLOBAL MARKET PLACE

A 21st Century View of Transnational Commercial Law

INTRODUCTION

'The evolution of an autonomous law of international trade, founded on universally accepted standards of business conduct, would be one of the most important developments of legal science in our time. It would constitute a common platform for commercial lawyers from all countries, those of planned and free market economy, those from civil law and common law, and those of fully developed and developing economy, which would enable them to co-operate in the perfection of the legal mechanism of international trade.'

With these words, *Clive Schmitthoff* introduced the 'London Colloquium on the New Sources of the Law of International Trade' at King's College in September 1962.¹ This colloquium is generally regarded as the first major conference of its kind dealing with the modern *lex mercatoria*. In the preface of the conference proceedings, *Graveson*, then Dean of the Faculty of Law of King's College, emphasized that these proceedings were 'no more than an intermediate chapter in the history of this living phenomenon, the law of international trade'.²

Almost forty years later, the history book of the doctrine of transnational commercial law is far from being finished and the world is still divided between traditionalists and transnationalists.

In some parts of legal doctrine, the *lex mercatoria* is seen with substantial scepticism.³ A worldwide survey among attorneys active in international commercial law conducted in 1995 revealed that most of them would strongly advise against including a provision in the contract of their client referring to the *lex mercatoria* as

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¹ Schmitthoff, in Schmitthoff (ed.), *The Sources of the Law of International Trade*, 1964, pp. 3, 5.

² Graveson, in Schmitthoff (ed.), *The Sources of the Law of International Trade*, 1964, pp. V, VII.

³ See Molineaux, *J. Int'l Arb.* 2000, No. 1, 147: 'The opponents see the *lex mercatoria* as a sort of legal Loch Ness monster – occasionally in the headlines as a result of a purported sighting but ultimately non-existent.'

the *lex contractus*.⁴ In their opinion, transnational law does not have the ‘provable’ and ‘definitive’ quality of domestic laws:

‘By these criteria, *lex mercatoria* simply has not stood up. The problem is both in its “provability”, and in finding a comprehensive set of principles within the *lex mercatoria*. For problems with determining the existence of any purported principle of *lex mercatoria*, just look at its sources: practices followed since time immemorial, or at least since the roman *ius gentium*; ancient cases in dusty tomes; writings of erudite scholars who passed away about the time the steam engine was revolutionizing industry ... As a collection of commercial practices, the content of *lex mercatoria* has not been discoverable in any single place ... Nor has *lex mercatoria* been “definitive” in the sense of supplying a comprehensive set of decision-making rules which can be applied to resolve a dispute.’⁵

This survey was conducted by an American lawyer. Lawyers from Continental Europe seem to be more inclined to accept the idea of transnational law. In fact, it is argued that the debate about the *lex mercatoria* says much about the difference between common law and civil law thinking.⁶

By contrast, the UNIDROIT Principles of International Commercial Contracts have been praised as ‘an authentic expression of what is usually called “*lex mercatoria*”’⁷ and as ‘a kind of *ratio scripta* of an emerging supranational legal order – a modern *lex mercatoria*’.⁸

In 1995, an ICC arbitral tribunal applied the *lex mercatoria* and justified this step with the following words:

‘The application of international principles [of commercial law] offers many advantages. They apply in a uniform manner and independently from the particularities of domestic laws. They take into account the needs of international [commercial] relations and allow a fruitful exchange between legal systems which are frequently linked in an exaggerated manner to conceptual distinctions on one side and those who seek fair and pragmatic solutions for individual cases on the other. It is thus an ideal opportunity to apply [in this arbitration] what is more and more called the *lex mercatoria*.’⁹

In the channel tunnel construction contract, one of the most important infrastructure projects of the last decades in Europe, the parties from France and England agreed to a choice of law clause which called for the application of ‘... the principles

⁴ Selden, *Ann. Surv. Int'l & Comp. L.* 1995, 111, 113 et seq.

⁵ Selden, *ibid.*, 119 et seq.

⁶ Tetley, *Uniform L. Rev.* 1999, 877, 888.

⁷ Bonell, *RabelsZ* 56 (1992), 274, 287.

⁸ Bonell, *RDAl* 1988, 873, 874.

⁹ ICC Award No. 8385, *Clunet* 1997, 1061, 1066 (translation by the author); *cf. also* ICC Award No. 8365, *Clunet* 1997, 1078, where the tribunal developed eight principles which, in its view, form part of the *lex mercatoria*.

common to both English and French law, and in the absence of such common principles [the] general principles of international trade law as have been applied by national and international tribunals ...'.¹⁰ One of the lead counsel involved in the drafting of this contract described the process in the following words:

'To know the rules was not sufficient; we had to remember or learn the basic fundamentals because it was the only way we could make the French and English rules meet. On the face of it, the rules were different, sometimes even contradictory; yet, a common principle had to be found to exist. This daily miracle was made possible largely because all of us ... decided to go beyond the mere wording of the legal provisions and find the basic principle behind them. The principles usually matched ... Obviously we Frenchmen are absolutely certain our system is the best; our English friends had exactly the same view with respect to their own system ... The motto between [the] lawyers became: "CARTESIAN PRAGMATISM".'¹¹

All of these statements reveal that while the economic and political framework has changed dramatically since the early 1960s, the principal questions have remained the same: what is the status quo of the doctrine of a modern *lex mercatoria* and where are we heading? Has Cartesian pragmatism and comparative legal thinking finally won over dogmatism and legal positivism? Have we reached the stage where municipal law merely complements the self-supporting transnational legal order? What is the relationship between domestic law and the law of transnational commercial transactions at the beginning of the new millennium?

I. THE 'MILESTONES' OF THE *LEX MERCATORIA* DOCTRINE

From the emergence of uniform legal structures in the trade relations of the Middle Ages to the present times, we can discern a number of historic 'milestones' in the development of the theory of transnational law. They provide important insights into the nature of this development. These milestones should therefore be recalled and taken into account when discussing the viability and practical usefulness of the modern theory and practice of transnational commercial law.

1. *Malynes and Blackstone: From the Ancient Law Merchant to the Codification Wave*

The ancient law merchant was based on the practices and statutes of powerful trade-guilds, customary law and the case law of the *curiae mercatorum*.¹²

¹⁰ Cf. Jayme, in Nicklisch (ed.), *Rechtsfragen privatfinanzierter Projekte*, 1994, pp. 65, 73; Karrer, *IPRax* 1994, 56 et seq.

¹¹ Cf. Nouel, *Int'l Bus. Lawy.* 1996, 22 et seq. [emphasis added].

¹² See for collections of these principles and rules the 15th century Catalonian compilation edited by the Consulate of Barcelona and known as '*The Consulate of the Sea and the "Little Red Book of Bristol"*' published in the 13th century and containing the '*Roles of Oléron*', a compilation of maritime principles and decisions dating back to the 11th century and the famous text on '*Incipit Lex Mercatoria, Que, Quando, Ubi, Inter Quos Et De Quibus Sit Iglesia Ferreirós*', in Petit (ed.), *Del Ius Mercatorum Al*

‘The men with dusty feet who plied their trades from Champagne to St. Ives, from Wye to Nuremberg, had little concern with legal differences. Their disputes were settled with the same method and dispatch in the pie powder courts of England as in the fair courts of the continent. The voices of the consuls of the sea in Genoa and Barcelona found a ready echo in the maritime tribunals of Bristol and of Ipswich, where the court sat on the beach and dispensed justice to passing mariners between tide and tide.’¹³

Two important milestones should be mentioned in this context. In 1622, *Gerard Malynes* defined the *lex mercatoria* in his famous treatise ‘*Consuetudo Vel Lex Mercatoria, Or the Ancient Law-Merchant*’ as the ‘customary law of merchants ..., more ancient than any written law ... [and] built upon the foundations of Reason and Justice’.¹⁴ In his Commentaries on the Laws of England first published in the 18th century, *Blackstone* wrote that ‘... no municipal laws can be sufficient to order and determine the very extensive and complicated affairs of traffic and merchandise; neither can they have a proper authority for this purpose ... For which reason the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*.’¹⁵ In despite of their similarity, there is an important intrinsic difference between these two views of the *lex mercatoria*. While *Malynes*’ view was still detached from any notion of the sovereignty,¹⁶ *Blackstone*’s approach was no longer truly transnational but was directly linked to the powers of domestic legislatures.¹⁷ With the codification wave of the 19th century, the ancient *lex mercatoria* was

Derecho Mercantil, 1997, pp. 109, 112 et seq.; Coquillette, *ibid.*, pp. 143 et seq.; cf. also Goode, ICLQ 1997, 1, 17.

¹³ Thayer, Brooklyn L. Rev., 1936, 139, 141.

¹⁴ Malynes, *Consuetudo Vel Lex Mercatoria Or The Ancient Law-Merchant*, 1622, p. 3: ‘Every man knoweth, that for Manners and Prescriptions, there is great diversitie amongth all Nations: but for the Customs observed in the course of trafficke and commerce, there is that sympathy, concordance, and agreement, which may bee said to bee of like condition to all people, diffused and spread by right reason, and instinct of nature consisting perpetually. And these Customs are properly those observations which Merchants maintaine betweene themselves’, *ibid.*, p. 8: ‘... and this Law of Merchants hitherto observed in all countries, ought in regard of commerce, to be esteemed and held in reputation as the Law of twelve Tables was amongst the Romanes. For herein you shall find every thing built upon the foundations of Reason and Justice ...’.

¹⁵ Blackstone, *Commentaries on the Laws of England*, Vol. I, 15th edn 1809, p. 273.

¹⁶ See Malynes, *supra* note 14, Introduction: ‘I have intituled the Booke, according to the ancient name of *Lex Mercatoria*, and not *Ius Mercatorum*, because it is a Customary Law approved by the authoritie of all Kingdomes and Commonweales, and not a Law established by the Sovereigntie of any Prince.’ (emphasis added).

¹⁷ See Blackstone, *supra* note 15, p. 75, note 8: ‘The *lex mercatoria*, or the custom of merchants, like the *lex et consuetudo parlamenti*, describes only a great division of the law of England ... But the expression has frequently led merchants to suppose, that all their new fashions and devices immediately become the law of the land; a notion which, perhaps, has been too much encouraged by the courts. Merchants ought to take their law from the courts, and not the courts from the merchants; and when the law is found inconvenient for the purposes of extended commerce, application ought to be made to parliament for redress.’