

The Monarch Theory: Historical Transformation of Transnational Business Laws and Merchant Custom Is She a Myth?

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Abstract— Merchant custom was created out of necessity. In the medieval times in the 13th century, merchants were travelling through Europe trading in foreign jurisdictions, so they developed their own rules, borrowed from shipping contracts, to deal with business disputes in a swift and practical fashion. Merchants were a sophisticated class of people who developed and enforced a set of rules by the merchants themselves initially on fair tables in the middle of the square and not in the King's court. Included amongst the rules was the ability of the merchants to banish a merchant from the fair, including peer pressure as his friends were also expelled from the market, until the fair letter was paid in full. During the rise of Sovereignty and the *laissez-faire* movement, Lord Mansfield and Lord Holt's recognition of this ancient custom became incorporated into the common law, and merchant custom began to mutate. The rise in International arbitration solidified a new merchant custom, growing alongside, and to some extent a part of general principles of transnational laws. The metamorphosis of merchant custom is of such an extent that some commentators can no longer recognize her. The historical transformations of merchant custom retain one common characteristic: the support of party autonomy, treasured by business parties negotiating cross-border transactions. This support requires continuous expansion and protection by law and can be done in future through the development of enhanced juridical tools that aid the parties to communicate with one another throughout all the processes of negotiations.

Keywords— merchant custom, *lex mercatoria*, international arbitration, general transnational principles of law, business negotiations.

I. INTRODUCTION

Merchant custom, also referred to as *lex mercatoria*, is a body of rules derived from customary use that has been generally recognized by traders over time to regulate their commercial transactions and a set a manner to settle disputes. This body of rules was meant as an application to maintain fairness¹ and communicate trust.

International commercial law has developed into "a transnational community which has had a more or less continuous history, despite countless vicissitudes, for some nine centuries. It is the mercantile community that, in the first instance, generated mercantile law." Merchants have exercised their trade under the umbrella of party autonomy. Customs arose out of necessity; a body of transnational customs governing "a special class of people (merchants) in special places (fairs, markets, and seaports)," while regulating the business of exchange and transport of goods. These customs through the medieval era were referred to as the merchant law or *lex mercatoria*: a body of informal rules that spread from the

Mediterranean and through the continent to England in medieval times. Many customs were gradually integrated into the English common law, particularly through the works of Lord Mansfield and Lord Holt. These customs allowed parties to transcend borders by recognizing a certain set of standards and methods that all merchants practiced. Trust had to be created through some vehicle as distance prevented parties to be privy of one another's personal and cultural values. These customs were practiced through semiotics, signals that were recognized and applied by the merchants themselves².

The romantic view of merchants is often portrayed as dusty fair streets filled with the hustle and bustle of peasants haggling over their wares. However, in fact, merchants of the 13th century did not fall into typical categories; rather they were a class of their own and often maintained control over municipal council. Merchants preferred to settle their disputes in their own private courts to cater to a speedy resolution and allow commerce to continue. This socio-economic evolution was recognized as "customary merchant law" by the 18th century, and the recognition of a statistical pattern of factors was documented. The rise of 19th century Sovereign State domination of creation of law through political means offered few tools for the recognition of *lex mercatoria*. In modern times she is sometimes referred to as an economic creation rather than a political one that is not recognized in sovereign legal doctrines; labeled "uncertain" by the juridical positivist movement. The revival of merchant law and recognition of party autonomy has grown out of recognition by international arbitration during the 20th century, commonly referred to as the "New" *lex mercatoria*. In fact, she held an implicit influence even during the development of the doctrines of contracts and torts, but pluralistic tools will reveal her as "the law beyond the state"³.

To comprehend merchant custom, we must follow the transformation of merchant trade through three basic phases in the history of *lex mercatoria*: **ancient *lex mercatoria*** through the Middle Ages; **the new *lex mercatoria*** which developed in the 20th century through the practice of arbitration; and **the new, new *lex mercatoria***, as a codification of legal rules recognized by international arbitrators' application of *lex mercatoria*, some of which has been documented both in UNIDROIT *Principles* and Berger's *creeping lex mercatoria*⁴.

II. ANCIENT *LEX MERCATORIA*

Returning to the economic expansion of the 13th century, markets relaxed the rigid rules to allow persons to negotiate without a native broker, opening the scope of marketing. One of the primary financial infrastructures for the merchants was

the ‘fair letter’, suited specifically for merchant needs, which was land marked to constitute the core of merchant law, whereby a merchant could barter his wares during the market season and settle up at the end of the market season. The fair letter served to recognize a merchant’s debt to another. Regulation was mostly contained within the merchants themselves clothed in ‘non-legal sanctions.’ For example, the enforcement of merchant law on a debtor who did not honor payment was said to be based on reputation alone. The system worked effectively because it targeted not only the person owing the debt, but friends and acquaintances were also forbidden to trade at the market until the debt was paid. These informal rules based on reputation could not be recognized as legal norms until trade “usage” could be identified⁵.

There are many theories describing the origins of ancient *lex mercatoria* but to get to the crux of the matter involves following the historical transformation of merchant custom until its attainment of a normative legal order. There are two fundamental requirements to evaluate when merchant custom can be recognized to compose legal norms as opposed to social norms:

- 1- That the actions reflect repeated and structured application; and
- 2- That there is a minimum formulation of law⁶.

The first condition is dependent on a pattern of human behavior that confers a legal duty. Repeat human behavior of a certain standard of behaviour is considered a normative merchant usage.

The second condition is whether a minimum formulation of law exists. Law is not based solely on what is tangible; rather it recognizes verbal agreements and tacit actions which may form binding obligations from one party to another. Whether merchant law can be considered law depends on what is considered “law”. A pattern of compulsory human behavior leading to normative legal status is legitimized by sourcing precedence of adjudicators⁷.

There are proponents who contend that *lex mercatoria* did not have its “origin” in the Middle Ages and that merchant law was classified as such at a later date. In reality, *lex mercatoria* underwent a dynamic transformation following the Middle Ages towards a normative legal order, only to become overshadowed through the blossoming concepts of legal positivism which could not recognize *lex mercatoria* since it was not considered promulgated from legislative sources until her recognition by Lords Mansfield and Holt that generated legal normativity as a body of merchant laws⁸.

III. THE NEW *LEX MERCATORIA*

While *lex mercatoria* may have faced a dubious legal creation during the middle ages, overshadowed by emerging legal positivist theories disputing its existence as a juridical order, the metamorphosis of *lex mercatoria* nevertheless was later recognized by international arbitration. Carbonneau clarifies: “These questions point to uncertainty in the evolution of the process. The private, ad hoc character of arbitration makes it difficult to formulate an informed and comprehensive evaluation. This uncertainty is nonetheless critical to the law of

arbitration. It implicates the basic character of the arbitral process and will affect arbitrations’ destiny as a dispute resolution mechanism. The unresolved questions as to arbitral procedure and the scope of arbitrator authority can disturb the necessary equipoise between arbitral autonomy and vital juridical interests”⁹. Merchant law in 13th century England is analogous to a caterpillar which was obliged to cocoon during the rise of Sovereignty only to later metamorphosis through recognition of procedural party autonomy through arbitral mechanisms in the 20th century. Furthermore, merchant law is an economic creation and not a political one and therefore, on substantive terms, stands alone. The difficulty in researching arbitral awards is that many are published in a skeletal manner, specifically to protect the very principle that drives commercial parties towards arbitration: privacy and confidentiality of the parties.

The growth of commercial globalization that took place during the 20th century resulted in a need to create further juridical security and uniform regulation of commercial relations. Working groups researched to create soft laws such as UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract prepared by the Commission on European Contract Law, UNIDROIT principles were originally created to offer uniformity in transnational transactions¹⁰.

There is no hierarchy in International law, rather a horizontal pluralism between party autonomy, *lex mercatoria* and thirdly, treaties and domestic laws, thus local arbitrators that are forced to resolve disputes without the proper juridical tools to aid the making of fair and equitable decisions.

IV. THE NEW, NEW *LEX MERCATORIA*

At the end of the 19th century, *lex mercatoria* launched into a new economic meaning that “no single national law governs the contract.” Arbitrators supported the “selective and creative process...called *lex mercatoria*” when parties have expressly referred to general principles of law¹¹. Merchant customs today are dynamic, so commentators question how “actions reflect repeated and structured application” can offer any security in these customs. In other words, how can a dynamic quality maintain a consistent and coherent manner which reflects the legitimacy of law?

“The law merchant is still a diffuse and fragmented body of law. It will grow with the growth of uniform law, international trade customs and usages, and with the increasing number of reported awards...”¹².

Normativity is established by two primary factors: the pattern of human behavior and the predictability of regulating it. The pattern of human behavior can be tracked over time. The predictability of regulating remains the object for discussion. Law does not live in a vacuum and must encompass the reality and the perception of business parties when assessing whether the new *lex mercatoria* caters to the rising needs of predictability¹³. A bridge exists between party autonomy and customary merchant law and that the same coherence is expected of party autonomy as any other juridical order. It is

the roots of *lex mercatoria* that provide us with clues of normativity that will serve to support party autonomy as its' own juridical order in TBN. Commentators have acknowledged that international arbitration has catered to party autonomy and supports *pacta sunt servanda* (the sanctity of contract) if the parties have expressly stipulated their agreements.

In sum, merchant law was created to form bridges to join merchants together in an organized and trustworthy fashion. We have observed, during an interdisciplinary voyage, that semiotics can be tangible or intangible. Leeson depicts the semiotics:

"Signaling through this shared practice allows heterogeneous traders to overcome the problems of uncertainty and informational asymmetries posed by their social distance."¹⁴

This practice of semiotics transfers communications from one party to the other to synchronize their mutual interests. These communications are heterogeneous custom-based, often turning to private arbitration methods to resolve disputes that parties are unable to resolve between themselves. Modern commercial transactional parties continue to utilize international arbitration to settle their unresolved disputes. For example, memberships in an international organization such as the International Chamber of Commerce ("ICC"), signals trust and credibility between transnational business partners¹⁵.

We have followed the historical transformation of *lex mercatoria* to conclude that she is not a myth; rather we argue that there is no point in searching for the ancient *lex mercatoria* since she has historically transformed¹⁶.

V. CURRENT COMPLIANCE TO TRANSNATIONAL LAWS

Transnational General Principles of Law [TGPL] have been recognized by international arbitrators, when parties have failed to express themselves adequately in their agreement with regard to choice of law¹⁷.

Although there is no consensus on the composition of transnational laws, we have divided the sphere of transnational laws, conducive to the discussion of the regulation of negotiations in international sale of goods, into two categories:

- ❖ Voluntary compliance to TGPL; and
- ❖ Mandatory principles of transnational laws.

We will distinguish between TGPL that are adhered to on a voluntary basis and those transnational principles that are trending towards a mandatory recognition through decisions of international arbitrators and state recognition¹⁸.

VI. VOLUNTARY COMPLIANCE TO TRANSNATIONAL LAWS

There is no sovereign pyramid as developed by Hans Kelsen during the rise of the positivist movement, to regulate human activities internationally. Thus, voluntary compliance is a necessary and encouraged component of the pluralistic environment of transnational laws. TBN are generally long-term relationships composed of many interconnected agreements established between the parties during the progression of the negotiating processes, requiring fairness and

trust. Trust is built over time in a business relationship or developed through reputation. Socially, fairness guides agreements during TBN due to normative values developed in TBN which we have examined, based on efficiency, autonomy and certainty. To attain this certainty, the legal community has strived to harmonize laws relating to the international sale of goods in a threefold manner:

- by supporting party autonomy, an organizing TGPL, to promote *pacta sunt servanda*;
- by persuading States to embrace a unity in the ratification of a treaty that embraces "transnational laws"; and
- by tracking and documenting the elusive nature of merchant customs to entice voluntary adhesion to TGPL.

Pacta sunt servanda

Pacta sunt servanda was said to originate out of custom, firstly on a religious basis. Under Ulpian rules of law, custom was considered the tacit consent of the populous who abided by such custom as a long-term habit or practice. Hyland identified that the Ulpian comment '*Huius edicti aequitas naturalis est. quid enim tam congruum fidei humanae, quam ea quae inter eos placuerunt seruari*' means: "it is equitable and right for agreements to be observed." Therefore, the maxim is a general rule inherent to all nations, standing as one of the most important TGPL. It upholds the sanctity of contract; that promises must be kept, indicative of the binding force of law that exists between contracting parties, without which there would be no international law. *Pacta sunt servanda* is supported by international treaties, by domestic laws and by the parties themselves. Wehberg argues that *pacta sunt servanda* not only binds the parties themselves, but also the "international community as a whole"¹⁹.

But, what is the scope of the application of this maxim? Is it meant only for contracting parties or can it apply to parties during negotiations? Hyland sheds some light on the debate:

"The dispute about whether to apply the pacta maxim to all promises or only to those that produce agreements is only one of the interesting translation questions. For all practical purposes, in other words, it is a phenomenon peculiar to the Latin language...Since the simple present indicative is already of great power and dignity when used in the law, the pacta maxim cannot be translated satisfactorily without taking into account the special force of the gerundive."

Translated the concept under Ulpian reports on Praetor's religious rules:

"I will enforce agreements in the form of a pact which has been made neither maliciously nor in contravention of a statute, plebiscite, decree of the senate or edict of the emperor, nor as a fraud on any of these."

Semantics can be argued endlessly, but what did the rule really mean?

"Pactum is one of the oldest words in the Latin dictionary. In the nonlegal literature, the term seems to have signified any kind of agreement. It seems that some pacta were enforced

while others were available merely as an exception: as Ulpian wrote, *Sed cum nulla subest causa, propter conventionem hic constat nonposse constitui obligationem: igitur nuda pactio obligationem non parit, sed parit exceptionem* (But when no causa exists, it is settled that no obligation arises from the agreement; therefore, a naked agreement gives rise not to an obligation but to a defense). (Digest 2.14.7.4.)”

This analogy seems strikingly familiar to the will theory and the concept of consent. What are the considerations of an agreement that would make it recognizable to law? Historically, there were two sub-categories of contracts in domestic laws, being *conventio* and *consensus*. Initially, there was no general acceptance that the consensus, or mere pact, could form legal obligations, particularly in common law jurisdictions. The relaxation of this resistance, as law reconsidered the rigidity of this position, has not entirely solved the dilemma. If we turn to Anson's original classification of obligations, there was an assortment of agreements, some that have binding force between the parties, even though the obligation itself may seem “remote”. Naturally, there are also agreements that do not have binding force between the parties, being merely social obligations. Even more precarious is that some agreements may contain aspects of both legally binding commitments and nonlegal commitments. The trick is to distinguish between the two. We do not deny that negotiators in transnational settings may be window shopping, but in general terms, when these negotiations continue for many months or longer, it is implausible not to narrow the divide between consensus and convention during TBN.

Persuasion to ratify the CISG

There are conventions and treaties, such as the United Nations Convention on Contracts for the International Sale of Goods (“CISG”), which has been widely accepted as “the backbone of international trade in all countries, irrespective of their tradition or level of economic development”²⁰. There are four ways in which the CISG can impact the regulation of TBN in the context of international sale of goods when parties enter into an agreement.

The first influence is ratification by domestic states of the CISG, so that their residents are subject to a set of harmonized rules unless they specifically opt out. The second manner of persuasion is when a domestic legislation imports CISG rules into their own sovereign laws; albeit legislative or through judicial recognition. Thirdly, the parties themselves may adopt the CISG rules by referring to them in an agreement. The last manner is affected through the application of the CISG rules by international arbitrators.

Prior to discussing matters of persuasion, we will review what the CISG is and its purpose as an equalizer in international trade. The CISG is considered an autonomous set of international rules resulting from commercial practice, in support of party autonomy. The scope of the CISG was meant to deal with substantive rights and obligations of contracting parties; it deals with matters of formation and interpretation of contracts of sale to the exclusion of some categories of sale, including “the use of electronic communications in connection with the formation and performance of international sales

contracts,” but remains open-ended. Some of the decisions implementing the CISG have not offered sufficiently detailed reasons of why an issue falls within or outside the scope of application of the CISG. However, the CISG “governs matters other than the formation of sales contracts and the rights and obligations of the seller and the buyer arising from such contracts”²¹. Caselaw remains scattered, and subject to interpretation. There is no consensus as to whether TBN could conceivably fall into and be subject to CISG rules in terms of relationships unless the parties specifically refer to it in an agreement.

Ratification by domestic states: The CISG features growing ratification, adding twenty states since 2007. This fact is vitally important to demonstrate the persuasive movement of the CISG's uniform system of rules governing cross-border contracts for the sale of goods and encourages ratification by states towards international cooperation and uniformity in this area of law. The more states that join, the more likely the contagion will spread.

The impact of ratification of CISG by domestic states operates by binding its residents to an international, harmonized set of rules. The CISG supports party autonomy but unless the parties expressly opt out of the CISG they are subject a certain minimum standard of conduct: good faith. The CISG was purposely left open-ended to accommodate situations that drafters had not foreseen at the time of its fruition, and for international arbitrations to fill in the gaps.

“Internalization” by domestic states: Cordero-Moss investigated the historical aspects of the CISG, based on what she refers to as “two previous attempts” that were not widely successful. While there are countries who have not ratified the CISG, the second element of persuasion is that some countries have “down loaded” the CISG rules into their domestic policies. Koh describes this “legal internalization” as an occurrence of when an international norm becomes “incorporated into the domestic legal system”²².

This occurrence can take place legislatively or judicially. An example of judicial importation of CISG rules has been identified by commentators under Dutch law. According to Janssen, the Dutch courts have been integrating CISG rules.

Ratified by party autonomy: The support of party autonomy is evidenced in Article 6 of the CISG and a principle of TGPL: *pacta sunt servanda*. However, parties must also, when exercising this freedom, respect the underlying principle of the duty of good faith standards of conduct during the formation and performance of contracts. Parties are free, nevertheless to opt out of being subject to the rules of CISG if this option has been stipulated expressly.

Good faith is incorporated in a general fashion in Article 7(1), therefore it appears to have a “restrictive application of this principle”. “[T]he CISG does not contain any rule that might be used as a guideline...for a progressive doctrine of good faith within international trade law.” There is no consensus on the interpretation of the CISG obligation of good faith but there is a suggestion that good faith is a norm of conduct based on cooperation.

It was anticipated that the CISG was to contribute to harmonization of legal traditions. How far can the CISG be stretched before it no longer fits the growing needs of the global market? This is yet to be seen in the e-communications and technological world which may paralyze its effect and require a fresh investigation of how transnational transactions function and how they could be better regulated.

Applied by international arbitrators: Although the convention was left in uncertain terms to be interpreted by adjudicators to provide an openness towards future application of the convention, Gaillard delineates the role of an international arbitrator. Firstly, arbitrators honour party autonomy and the expressed stipulations of the parties. Parties may choose to submit to TGPL and, in absence of choice, an arbitrator may apply them. If the parties have chosen a domestic law, the arbitrator is bound to consider whether the domestic law has recognized the parties' choice.

Contract interpretation under the CISG refers back to the ratification of domestic laws in absence of expressed party intention. For example, in the international arbitration award of *Russian Co. (RUS) v Moldavian Co. (MOL)* RUS negotiated an agreement to supply natural gas to MOL who was to deliver to a third-party recipient under the contract. However, RUS delivered the goods directly to the recipient thereby risking non-payment to MOL, since the recipient was not part of the negotiation process. Since both parties were from CISG member states, the arbitrator applied UNIDROIT Principles to interpret the matter and decided that RUS failed to act in the implied good faith under Art. 1.7 UNIDROIT Principles and Arts. 7 and 8 of the CISG. "International practice considers good faith and fair dealing as implied obligations (Article 5.1.2 of the UNIDROIT Principles)." The application of the CISG rules by international arbitrators, interpreted through UNIDROIT Principles, is a persuasive factor that supports the harmonization intended by the CISG.

UNIDROIT Principles

Documentation of TGPL has been commented upon extensively. While commentators continue to debate whether TGPL equate *lex mercatoria* or customary usage, a special working group was appointed under the United Nations, representing many nations to ponder international trade.

UNIDROIT Principles are considered to be a non-binding set of principles whereby enforcement depends on persuasion rather than an imposed standard. The scope of the UNIDROIT Principles is intended to "provide an increasingly "global" legal environment for cross-border commercial transactions, including negotiations as well as contracts. Since they are non-binding, parties are not meant to be affected by the UNIDROIT Principles unless they "opt in". However, where parties are silent, the UNIDROIT Principles have been used as gap-fillers in international arbitration, representing international standards that are considered accepted generally. In other words, where TGPL are referred to in the parties' agreement, adjudicators have applied the UNIDROIT Principles.

Merchant law has developed to maintain community practices within its own regulatory system maintained as their own institutions. There are commentators who refer to

UNIDROIT Principles as the "New *Lex Mercatoria*". Other commentators distinguish between these three sources of transnational law.

TGPL are dynamic and flexible in their nature, established by compliance to certain norms of practice that have developed over time. Most commentators consider these general principles to be part of the development and transformation of *lex mercatoria*, a guide for global trade.

Party autonomy is protected under Article 1.1 "Article 1.1 (Freedom of contract) The parties are free to enter into a contract and to determine its content." UNIDROIT comments explain the philosophy behind supporting party autonomy:

"The principle of freedom of contract is of paramount importance in the context of international trade. The right of business people to decide freely to offer their goods or services and to whom they wish to supply, as well as the possibility for them freely to agree on the terms of individual transactions, are the cornerstones of an open, market-oriented and competitive international economic order."

Negotiations are considered under party autonomy in the UNIDROIT 2010 comment:

"As a rule, parties are not only free to decide when and with whom to enter into negotiations with a view to concluding a contract, but also if, how and for how long to proceed with their efforts to reach an agreement. This follows from the basic principle of freedom of contract enunciated in Article 1.1 and is essential to guarantee healthy competition among business people engaged in international trade."

We must not forget the reason that UNIDROIT was set up in the first place: to unify private law and to support party autonomy. At the same time, public order and good faith come into play to accompany party autonomy. The relationship between the two is rather intriguing. Rather than addressing negotiations under a duty of good faith, planners clothed expectations in negotiating conduct in a negative sense; that parties cannot negotiate in "bad faith" under Article 2.1.15. The most likely reason for this was to appease common law jurisdictions who did not embrace the principle of good faith. With a growing acceptance of a duty of good faith in common law contracts with precedence like *Yam Seng* and *Bhasin*²³, it may be time to reconsider a review of the drafting of 2.1.15 and its application to negotiations. There is really no legal principle as "bad faith" since the intention is to sanction the breach of good faith. Further attention to what constitutes a duty of good faith and when it should be recognized by law deserves expansion, taking care not to impede on party autonomy.

The matter of a standard of conduct, such as good faith and fairness, is reaching mandatory heights in TGPL. Can transnational laws supersede party autonomy? Hypothetically speaking the answer is no. In practice, due to the poverty of juridical tools, it has been accomplished through legal fiction.

VII. MANDATORY PRINCIPLES OF TRANSNATIONAL LAW

Transnational mandatory rules are projected but not set in stone and there are doctrinal disagreements as well as conflicts between doctrine and law in action to determine what is

considered mandatory and whether international mandatory rules can supersede party autonomy²⁴.

A debate in the international arbitration quarters revolves around which laws should apply to parties of a dispute. Preponderants of party autonomy argue that if the parties have clearly expressed themselves on a choice of law, arbitrators should apply the parties' choice for the sake of certainty and stability. Other commentators posit that the closest connection to the context of the case is a fairer way to resolve disputes. Yet, a third angle posits that arbitrators must apply what they "consider fair and reasonable" in accordance with international trade usages "which are so sufficiently established that parties consider themselves to be bound by them"²⁵.

While certain TGPL may be approaching mandatory recognition (rules that supersede party autonomy), there is resistance from preponderants who uphold party autonomy. We must strive to reconcile this strain that sponsors uncertainty and instability in transnational private transactions. TBN remain intangible to law, as we are unable to follow the negotiation processes in absence of juridical tools. Negotiations remain chameleonic; like "ghosts that are seen in the law but that are elusive to the grasp"²⁶. Yet, on a normative basis TBN parties in the processes of negotiation exercise their autonomy within a circle of responsibility regarding conduct to protect trust and cooperation.

One example of an evolving mandatory rule is the presumption that parties are expected to negotiate in good faith, but the scope and intensity of such a presumption has not been determined. What is customary between TBN parties during the functioning of negotiations?

Custom is not easily identified, but in practice legal obligations have been recognized and applied by adjudicators. Customary standards of conduct reflect what is expected within a certain trade. Although skeptical commentators remain unconvinced of the juridical power of custom, Carbonneau deflects the negative attacks on transnational order and refocuses the lens on the essential mitigating factor: Who do business parties trust when they are unable to resolve their disputes²⁷?

Although the answer is steeped in history and has suffered the battle of controversy, it has not been defeated thanks to Lord Holt and Lord Mansfield, and to the rise of international arbitration whose transformation offers support of both party autonomy and TGPL. These principles have mutated through the historical transformations to support party autonomy. In other words, party autonomy is the front line and only when party autonomy fails to operate will third party adjudication serve as a safety net. Even during a dispute, parties are free to choose alternative adjudication from domestic courts, such as binding arbitration or mediation to aid the parties back into party autonomy so that they can design the remedy themselves. Therefore, if the parties do not overstep the boundaries of what is considered minimally fair, the parties have always been supported in the exercise of their autonomy. What is minimally fair is yet to be determined and defined.

How does a transnational general principle of law become mandatory? A mandatory principle of transnational law, per say, does not exist. Gaillard refers to transnational public laws that include, "les principes fondamentaux du droit qui s'imposent sans égard aux liens du litige avec un pays déterminé". In other words, these fundamental rules of law

imposed without heed to domestic determination exists when universal values are recognized by domestic laws as public order²⁸. Gaillard has provided strong arguments that certain TGPL are moving forward towards recognition as mandatory principles through state recognition; meaning that the parties cannot contract out of them. This occurs through state recognition of TGPL or by ratification of the parties themselves, either because they have specifically referred to them or because they have remained silent. The question is what does this standard of conduct comprise? Does it include honesty, loyalty or/and cooperation? Is it applicable during negotiations?

Domestic ratification: Some commentators have claimed that transnational laws are "beyond" or even "without" the nation-state" (everything but domestic laws). Others consider transnational laws hybrid between international and domestic laws. Domestic laws provide enforcement measures of transnational laws. This may take place because of an internalization process, by integration into the domestic system or ratification of a treaty by the State.

Domestic laws remain an important part of transnational laws. While juridical positivists avowal the sovereign legislative authority, prior to the rise of sovereignty law was pluralistically *relational*:

"Historically, [prior to the rise of sovereignty] the English notion of common law was...*relational* law, law which defined itself and its application in terms of its constant and ongoing relations with other laws applicable within the same territory. The notions of binding law and *stare decisis* were creations of the mid-nineteenth century."²⁹

There may be a change in the air, and a growing need to take an alternative view. We posit that harmonization of transnational laws is not a fantasy if we take an alternative view based on *cooperation* rather than unification. Unification is improbable due to the divergent nations, languages and cultures. To attain cooperation, domestic courts and international arbitration must learn from each other and respect one another. Domestic laws are not alone in this inter-connection with transnational sources of law since transnational laws include a plurality of private actors, and party autonomy is greatly appreciated in international arbitration. Mandatory transnational laws are considered dependent on domestic ratification. But they are also susceptible to ratification through party autonomy³⁰.

Ratification through party autonomy *pacta sunt servanda*: The enigma of transnational law has attracted commentators from all over the world. "What do we mean by transnational commercial law? Is it the same as the *lex mercatoria* or something broader"³¹?

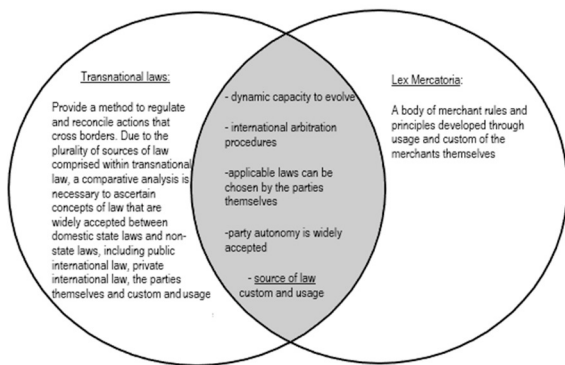
"After some 35 years of legal debate and countless applications of transnational rules by international arbitrators...it may seem surprising that general principles of law – also frequently referred to as transnational rules or *lex mercatoria* – remains such a divisive issue"³².

Transnational law's spherical characteristics are due to its capacity to embody a plurality of legal systems. This collection has often been seen as producing a set of general principles of law "which transcend the law of any nation-state or regional or international organization"³³.

We maintain that TGPL are broader than *lex mercatoria*. TBPL are an umbrella that shelters customs that have been

generally accepted and documented to which parties are expected to voluntarily adhere to, not all of which has been recorded, as well as state and non-state laws. If party autonomy fails, then international arbitrators may turn to TGPL to fill in the gaps of the parties' agreements. When transnational principles that have become mandatory through state recognition they can supersede party autonomy if not expressly opted out.

Commonalities between Transnational Laws and Lex mercatoria



While there are commonalities between transnational laws and lex mercatoria, the legal concepts differ. Whereas transnational laws are composed of a plurality of sources of law, state and non-state laws including lex mercatoria, *lex mercatoria* is a specialized body of principles developed through custom over time and accepted widely by the merchants themselves. However, the dynamic capacity for law to evolve and the extent of support of party autonomy is what joins these two concepts of law together.

Party autonomy has played a significant role in transnational law. In fact, it is the cornerstone to the foundation and future development of transnational law. Where it is necessary to further distinguish its role, is to identify the relationship between party autonomy and standards of good faith.

TGPL includes *pacta sunt servanda* as well as a concept of good faith and cooperation. Both UNIDROIT Principles and the CISG have embraced the concept of good faith to standardize transnational commercial trade and promote trust. At first glance, transnational laws appear to limit the principle of good faith to contracts. We argue that TGPL include good faith in negotiations. Although general UNIDROIT Principles support the concept of good faith, when dealing specifically with

negotiations Article 2.1.15 of the UNIDROIT Principles emphasizes bad faith. The CISG is the larger challenge as many commentators refute any application to negotiations. Thus, the boundaries of party autonomy must be explored in terms of what can supersede party autonomy and, if good faith is a factor, whether it overrides or enhances party autonomy.

VIII. CONCLUSION

Transnational settings recognize that contracting parties should regulate their own affairs. TBN parties require support and proper juridical tools to encourage them to document agreements during negotiations. It is understood that the shared understandings of merchants are better served within their own arenas to remain autonomous. Agreements under transnational legal regulation do not fall into the same depth of uncertainty as domestic laws³⁴.

Party autonomy has been significantly supported by transnational laws, particularly when disputes are regulated by international arbitration. In fact, one of the TGPL is *pacta sunt servanda*; that promises exchanged between parties must be kept, recognizing the binding force of law that exists between contracting parties. Although *pacta sunt servanda* grants to TBN parties' freedoms of contract, they are accompanied by a standard of good faith expected between negotiating parties, the need to reconcile the relationship between party autonomy and expectations of standard of conduct, such as good faith, remains to be more fully elaborated.

A growing uneasiness regarding the regulation of international sale of goods, presumed to be harmonized through standard form contracts, is suffering from a poverty of legal tools. In a sophisticated, e-commerce environment, updating antiquated treaties to provide for growing technological concerns and a manner to view the transformation of TBN from ancient merchant customs to its own juridical order should be reconsidered.

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¹ Woo Pei Yee, Woo Pei, "Protecting Parties' Reasonable Expectations: A General Principle of Good Faith", 1 Oxford U. Commw. L.J. 195, 2001. Yee refers historically to: "The high watermark of good faith came when Lord Mansfield made a famous reference in *Carter v. Boehm* to good faith as '[t]he governing principle...applicable to all contracts and dealing.' at 195.

² Berman, Harold J., and Colin Kaufman, "The Law of International Commercial Transactions (Lex Mercatoria)", Harv. Int'l. L. J. Vol. 19 (1), Winter, 1978 at 222. For signaling, see Peter T. Leeson, "Cooperation and Conflict: Evidence on Self-Enforcing Arrangements and Heterogeneous Groups", Am. J. of Economics and Sociology, Vol. 65, No. 4 (October, 2006). Leeson explains: "Through these signals [practices, customs, and traditions] heterogeneous individuals are able to convey trustworthiness, enabling peaceful exchange despite the absence of a formal institutional structure." at 893.

³ Michaels, Ralf, *The True Lex Mercatoria: Law Beyond the State*, (2007) 14 Ind. J. Global Legal Stud. at 449; Justice Atkin, Foreword to Wyndham Anstis Bewes, *The Romance of the Law Merchant*, Sweet & Maxwell, 1923, reprint Rothman 1986 at iii.

⁴ *Supra* note 3. Michaels at 449. Bristol's Little Red Book written in the 13th century, later referred to through the writings of Holt and Lord Mansfield of the King's Bench, is the first proven 'formulation' of the origin of lex mercatoria as a legal order. www.trans.lex.org/100600. Berger's internet based documentation reflects the ever-changing values of the global market.

⁵ Aurell, Martin, "Society", in Daniel Power, (Ed.), *The Central Middle Ages, Europe 950-1320*, New York, Oxford University Press, 2006 at 69 and 79; see also Barrow, Julia, "Religion", in Daniel Power, (Ed.), *The Central Middle Ages, Europe 950-1320*, New York, Oxford University Press, 2006 at 130; See also law as an art of poetry: Glenn, Patrick, "Transnational Common Laws", 29 Fordham Int'l L. J. 457, 2005-2006.

⁶ Jean-Marie Fecteau, Jean-Marie, « Savoir historique et mutations normatives. Les défis d'une nécessaire convergence entre droits et histoire » dans Pierre Noreau (dir.), *Dans le regard de l'autre*, Editions Thémis, 2007 at 52.

⁷ *North Sea Continental Shelf (Federal Republic of Germany v. Denmark; Federal Republic of Germany v. Netherlands)*, Judgment of 20 February 1969, ICJ Reports (1969) 3. The International Court of Justice (ICJ) "...Although the

passage of only a short period of time is not necessarily, or of itself, a bar to the formation of a new rule of customary international law ...” at 44 (para 74). *See also* Bonell, Michael Joachim, “The Unidroit Initiative for the Progressive Codification of International Trade”, 27 ICLQ, Vol. 27, No. 2, April 1978, 413-441 at 430.

⁸ Berman, Harold J., and Colin Kaufman, “The Law of International Commercial Transactions (Lex Mercatoria)”, Harv. Int’l. L. J. Vol. 19 (1), Winter, 1978 at 222.

⁹ Carbonneau, Thomas E., “The Remaking of Arbitration: Design and Destiny” in Thomas E. Carbonneau, (Ed.), *Lex Mercatoria and Arbitration*, New York, Transnational Juris Publications, 1990 at 5.

¹⁰ Rome, International Institute for the Unification of Private Law (Unidroit), 2010. ISBN: 88-86449-9-4.

¹¹ Lando, Ole, “Lex Mercatoria in International Commercial Arbitration”, (1985) 34 Int’l & Comp. L.Q. 747 at 748.

¹² Berger maintains a flexible and continuous set of rules called “the creeping codification of the new *lex mercatoria*” can be catalogued and consulted to under his web site. www.trans-lex.org/100600. *Ibid.* Ole Lando at 752.

¹³ Fyson, Donald, “De la common law à la Coutume de Paris: les nouveaux habitants britanniques du Québec et le droit civil français, 1764-1775 dans Florent Garnier et Jacqueline Vendrand-Voyer (dir.), *La coutume dans tous ses états* (Paris, La Mémoire du Droit, à paraître).

¹⁴ *Supra* note 2 at 898. Leeson further offers: “Sharing these “manners” created a “reputation” for trustworthiness that enabled intergroup exchange...” at 898.

¹⁵ Druzin, Bryan H., “Eating Peas with One’s Fingers: A semiotic Approach to Law and Social Norms”, Int J. Semiot Law (2013) 26: 257-274. *See also supra* note 2. Leeson at 901. In law, *see* Carbonneau, Thomas E., *Cases and Materials on Arbitration Law and Practice*, Fifth Edition, MN, Thomson/West, 2007. Carbonneau demonstrates business attraction to international arbitration: “Party negotiations, obviously, should prevail if possible. Third-parties could assist the disagreeing parties in reaching and accommodation. In situations in which the disputes were unresponsive to these efforts and involves large sums of money or were otherwise critical, final and binding adjudication was the only means of unraveling the impasse. Arbitration had always been attractive to the business community.” at 105.

¹⁶ Goldman, Berthold, *Lex Mercatoria*, 3 Forum Internationale 3, 3 (Nov. 1983): “Lex mercatoria is a venerable old lady who has twice disappeared from the fact of the earth and twice been resuscitated.” at 3 to 6.

¹⁷ Gaillard, Emmanuel, « La Distinction des Principes Généraux du Droit et des Usages du Commerce International », dans *Études offertes à Bellet*, Paris, Litec, 1991, 203. <http://www.shearman.com/~media/Files/NewsInsights/Publications1991/01/La-distinction-des-principes-g%C3%A9n%C3%A9raux-du-droit-e-Files>.

¹⁸ Arbitration award 00-04-1997 (8264) Court: ICC International Court of Arbitration, Paris. USA v. Algerian Co. (ALG) <http://www.unilex.infor/case.cfm?id=658>. An agreement between a US manufacturer and ALG for the supply and knowledge of operating industrial equipment was to provide information regarding any improvements. The choice of law between the parties was domestic Algerian law with authorization to use general principles of law and trade usage. ALG lost opportunities as a result of non-disclosure of information and tribunal ordered compensation under 7.4.3(2) UNIDROIT Principles. The tribunal noted: “...manque de transparence et de sincérité quant à la mise en oeuvre concrète de ses obligations...dans les contrats synallagmatiques, les prestations promises par chaque partie doivent être exécutées simultanément...Le contrat de licence l’obligeait à un comportement actif...Ce manque de transparence est contraire, lui aussi, au principe général selon lequel les obligations contractuelles doivent être exécutées de bonne foi, principe particulièrement exigeant dans un contrat international de coopération industrielle ayant pour objet la réalisation effective d’un transfert de technologie sui-une longue durée... » [our underline] *See also* Charpentier, Élise, “Un paradoxe de la théorie du contrat: l’opposition formalisme/consensualisme”, 43 C. de D. 275, 2002.

¹⁹ Wehberg, Hans, “Pacta Sunt Servanda”, AJIL 1959, 775 at 782 and 783; Hyland, Richard, “Pacta Sunt Servanda: A Mediation”, 34 VJIL 1994, 405 to 413.

²⁰ Connerty, Anthony, “Lex Mercatoria: Reflections from an English Lawyer”, Arbit. Int. Vol. 30, No. 4, 2014 at 715.

²¹ Schroeter, Ulrich G., “Defining the Borders of Uniform International Contract Law: The CISG and Remedies for Innocent, Negligent, or Fraudulent Misrepresentation.” 58 Vill. L. Rev. 553, 2013 at 556; *See also* Audit, Bernard, “The Vienna Sales Convention and the Lex Mercatoria” in Thomas E. Carbonneau, (Ed.), *Lex Mercatoria and Arbitration*, New York, Transnational

Juris Publications, 1990; *See* Cordero Moss, Guiditta, “International contracts between common law and civil law: is non-state law to be preferred? The difficulty of interpreting legal standards such as good faith”, Global Jurist 7.1 (Mar. 6, 2007) <http://go-galegroup.com/ps/retrieve.do?sgHitCountType=None&sort.at.3.1.3>.

²² *Ibid.* Cordero Moss at 3.1.3.

²³ *Yam Seng Pte Limited v. International Trade Corporation Limited*, [2013] EWHC 111 (QB); *Bhasin v. Hrynew*, 2014 SCC 71; [2014] S.C.R. 494.

²⁴ Gaillard, Emmanuel, *Aspects philosophiques du droit de l’arbitrage international*, 329 Recueil des cours 49, 2007 at 67 and 68 ; Stephan, Paul B., “Privatizing International Law”, 97 Va. L. Rev. 1573, 2011 at 1574 and 1575; Dibadj, Reza, “Panglossian Transnationalism”, 44 Stan. J. Int’l L. 253, 2008 at 254.

²⁵ *Supra* note 20. Connerty. *See also supra* note 9. Carbonneau explains: “The process [of international arbitration] provides for commercially adapted results. It is a by-product of transnationalization and an anticipated feature of informal and expedient commercial justice. Arbitration has none of the fine trappings of the masked ball, nor is it the ribald antics of the carnival. Formalistic facades are not necessary to achieve the sensible results dictated by a commercial ethic.” at 13.

²⁶ Brower II, Charles H., “Arbitration and Antitrust: Navigating the Contours of Mandatory Law”, 59 Buff. L. Rev. 1127, 2011 at 1134.

²⁷ Carbonneau, Thomas E., *Carbonneau on International Arbitration: Collected Essays*, New York, JurisNet, 2011 at 389. *Supra* note 15. Carbonneau defends why international arbitration is of importance: “In transborder commercial matters, choosing to arbitrate goes almost without saying, because international arbitration is instrumental to neutrality, the provision of the necessary expertise, effective dispute resolution, and the enforcement of awards. Finality and enforceability are central to any dispute resolution process. Functionality—in terms of economy, efficiency, and effectiveness—is another highly prized objective. Additionally, parties may want to provide for greater rights protection or may seek to preserve their business relationship no matter how difficult a particular transaction may become. Different or adapted remedies can achieve these ends.” at 435.

²⁸ *Supra* note 17. Gaillard at 116. Hochstrasser, Daniel, “Public and Mandatory Law in International Arbitration” in Emmanuel Gaillard, Ed., *Towards a Uniform International Arbitration Law?*, New York, JurisNet, 2005. Hochstrasser explains: “Mandatory rules of law...are defined as imperative provisions of law which must be applied to an international relationship irrespective of the law that governs that relationship; they are a matter of public policy...and moreover reflect a public policy so commanding that they must be applied even if the general body of law to which they belong is not relevant by application of the conflicts of law rule” at 17.

²⁹ *Supra* note 5. Glenn at 462 and 463. *See also* Calliess, Galf-Peter, “The Making of Transnational Contract Law”, Indiana Journal of Global Legal Studies, July 2007, Vol 14(2), 469-483; Calliess, Galf-Peter, and M. Renner, (2009), “Between Law and Social Norms: The Evolution of Global Governance”, Ratio Juris, 22: 260–280. doi: 10.1111/j.1467-9337.2009.00424.x at 262. *See contra see* Duval, Antoine, “Lex Sportiva : A Playground for Transnational Law”, European Law Journal, Vol 19., No. 6, November 2013, 822-842 at 823.

³⁰ *Ibid.* Duval at 824. *See also* Joshua D. H. Karton, Joshua D.H., “Party Autonomy and Choice of Law: Is International Arbitration Leading the Way or Marching to the Beat of its own Drummer?”, UNB L. J. 2009, Vol. 60, 32 at 53.

³¹ *Supra* note 5. Goode at 1.

³² *Supra* note 24. Gaillard at 59.

³³ *Supra* note 5. Glenn at 458.

³⁴ *Supra* note 15. Carbonneau defends party autonomy: “What contracting parties provide in their agreement generally becomes the law controlling law. Courts can interpose their authority in arbitrations. They could assert their power by policing the formation and the content of arbitration agreements. But, from a practical standpoint, if courts were to become more active in the supervision of arbitration, they would more than likely focus their attention upon awards rather than agreements. Agreements have a symbolic standing: they represent a gateway to private adjudication and they codify the parties’ intent regarding dispute resolution. Blocking their enforcement would signify opposition to the fundamental consensus surrounding arbitration rather than the implementation of a narrower strategy for the periodic defense of national interests through the vacatur of awards.” at 421.