LEX MERCATORIA - A FLEXIBLE TOOL TO MEET TRANSNATIONAL TRADE LAW NEEDS TODAY

Report Submitted by
Jorge JARAMILLO-VARGAS *

ON THE RESEARCH PERIOD AT UNIDROIT, 10 OCT – 10 DEC 1999, ON

Contents

Acknowledgements ____ *1*

1. *Introduction* ____ *2*
2. *The Lex Mercatoria* ____ *2*
3. *The New Lex Mercatoria* ____ *3*
4. *From the Middle Age to the Information Age* ____ *4*
5. *Positivism and Lex Mercatoria* ____ *5*
    1. *What is National?* ____ *6*
    2. *What is Private?* ____ *7*
6. *Transnational Arbitration and the Unidroit Principles* ____ *8*
7. *Conflicts of Laws v Lex Mercatoria* ____ *10*
8. *Final Remarks* ____ *10*

Bibliography ____ *12*

1. *Lex Mercatoria* ____ *12*
2. *International Private Law* ____ *16*
3. *Geo-Law* ____ *17*

Acknowledgements

First of all, I should like to express my gratitude to UNIDROIT and the Government of Finland for the opportunity they have given me. I am looking forward to share with Colombian students and scholars the invaluable academic experience afforded by my stay at UNIDROIT. I will be forever grateful.

As I described in my Application Form, the Colombian economy has been opened up to the international market in goods and services since the early 1990s. This, as in most of the world, has brought interesting challenges for lawyers, lawmakers and the commercial community world-wide.

Our work at the Departamento de Derecho Comercial in the Universidad Externado de Colombia has been to promote understanding of these new phenomena through our lectures on and research into the relevant transnational legal processes of trade and globalisation and by interpreting our needs and roles within them.

When I first came to UNIDROIT, I identified two principal goals. First, to complete a working bibliography in order to continue our work on a international trade law publication to help students and researchers find relevant sources and to address the

* Lecturer in International Trade law, Universidad Externado de Colombia, Santafé de Bogota (Colombia)

state-of-the-art of transnational phenomena relating to trade law. Secondly, to address the main measures needed in order to change and adapt our legislative policies regarding national, international and transnational legal instruments to promote trade. Both objectives are being met as part of an ongoing process.

The information gathered at UNIDROIT will enable me to write my book on Transnational Trade Law and our students will have the opportunity to tap new sources in their research work. The lack of a bibliography had been a serious obstacle to developing further studies in Colombia. I have to affirm that without opportunities of the kind offered by the UNIDROIT scholarship programme, we should be hard pressed to progress in the studies that are needed in developing countries. We have been working hard to meet the expectations of our donors and those of our native countries.

Contact with the other scholars at UNIDROIT and the opportunity it offered to learn from them about their own experiences at first hand was outstanding. It was particularly interesting to observe how scholars from places as far apart as Brazil, Indonesia and Nigeria, to mention but a few, thought alike in appreciating both the current framework and the challenges ahead in fostering more comprehensive legal integration tailored to the demands of the transnational political economies.

The credit for my having achieved the goals I had set myself before coming to UNIDROIT must go to the members of its staff. I should like to mention every single one of them, but am afraid inadvertently to leave someone out, as all without exception were extremely kind and helpful in ensuring the success of my work. Their generosity, experience and knowledge fully explain UNIDROIT's first-rate record and its contribution to the development of instruments in the field of private international law world-wide. Thank you all for all you have done.

I should now like to write some comments on a particular subject of international trade law: the *Lex Mercatoria*, in an attempt to make a small contribution of my own.

1. Introduction

The mere idea of the return, at the onset of the information age, to the medieval *law merchant* has fascinated me ever since I became aware of the existence of the *new* doctrine. The aim of this report is to explore some initial and theoretical considerations on how a globalising State [1] may affect classical dichotomies such as national / anational, public / private and law / no-law. I hope this may contribute to further and deeper studies on the *lex mercatoria* doctrine. The report is conceived as a sketch and in no way claims to be conclusive.

2. The *Lex Mercatoria*

The old *ius mercatorum* was a universal law [2] created by the merchants in the late Middle Ages to regulate their trade in lieu of Roman law. It was developed by *mercantile corporation* through decisions of the *curiae mercatorum,*[3] as a result of the growth of commerce and legal systems, both ecclesiastical and secular, which included the practices of fairs, markets and ports.[4] Medieval commercial tribunals applied

---

1 Financial flows move around the world with little or no State control; information technologies create global networks that disregard physical borders and cultural influences and images travel virtually without any national controls whatsoever. See Alfred C. AMAN, "The Globalizing State: A Future-Oriented Perspective on the Public – Private Distinction, Federalism and Democracy", 31 *Vanderbilt Journal of Transnational Law* 769 (1998).

2 G. GILMORE & BLACK, The Law of the Admiralty, 2nd De., 1975.

3 W. MITCHEL, *An Essay on the Early History of the Law Merchant,* 7-52, 1904.

4 W. BEWES, *The Romance of the Law Merchant,* Vol. XI (1906).

universal law merchant to deal with the legal problems caused by a burgeoning commerce that did not respect the borders drawn by feudal lords.[5]

Some of these customs and practices were incorporated into national laws for those new entities organised as sovereign bodies. The culmination of the nationalisation process in continental Europe was the adoption of the French *Code de Commerce* in 1807 [6] and the German *Allgemeine Handelsgesetzbuch* in 1861. By the 1700s England had turned into a national trading power that incorporated into the common law matters of trade law, in the famous case *Pillans v. Van Mierop.*[7] The nationalisation of the law merchant started in the sixteenth century and continued throughout the eighteenth and nineteenth centuries. By the twentieth century it was a dogma that national law had a monopoly to govern international transactions.[8]

As a result of this nationalisation process by national judges and legislators, commercial law tended to lose its own transnational nature and the way was paved for its divorce from the actual experience of custom, which became a second-class source of merchant law. International conflicts of law doctrines appeared to solve those problems arising from international commercial transactions among and between national States.

During the 1960s, various eminent scholars [9] began to develop the concept of a new *lex mercatoria*. The fundamental concept was that a new law merchant or transnational commercial law was alive and growing.

3. The New *Lex Mercatoria*

There are several definitions of *lex mercatoria:*

> *"The principles of the developing transnational or international law merchant, capable of being applied by decision-makers (judges or arbitrators) as a source of legal rules, in order to give content to decisions, in much the same way that the decision-makers would apply a real legal system such as the* lex fori *or the* loci arbitri.*"* [10]

> *"A set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade without reference to a particular system of law."* [11]

> *"Rules of law which are common to all or most States engaged in international trade or to those States that are connected with the dispute, and if not ascertainable, then the rules which appear to be the most appropriate and equitable."* [12]

> *"A body of customary law consisting of the business practices and customs of international businessmen."* [13]

---

5 The law merchant governed a special class of people (merchants) in special places (fairs, markets, and seaports). *Cf.* H. BERMAN / Y C. KAUFMAN, "The Law of International Commercial Transactions (*Lex Mercatoria*)", *Harvard International Law Journal* 221 (1978).

6 It was contemporary in fact with the codification by Colbert, in 1673, of laws for terrestrial commerce and, in 1681, for maritime commerce.

7 Burr. 1663, 97 *Eng,.Rep.* 1305 (K. B. 1765).

8 Bernardo E. CREMADES & Steven L. PLEHN, "The New Lex Mercatoria and the Harmonisation of the Laws of International Commercial Transactions", 2 *B. U. Int. L. J.* 317 (1984).

9 The most recognised were SCHMITTHOFF, GOLDMAN, KAHN and FOUCHARD,

10 Keith HIGHET, "The Enigma of Lex Mercatoria", 63 *Tulane Law Review* 613 (1989).

11 B. GOLDMAN, "The applicable Law: General Principles of the Law – Lex Mercatoria", *Contemporary Problems in International Arbitration Law* (ed.), London 1986, 125.

12 Ole LANDO, The Lex Mercatoria in International Commercial Arbitration, 34 *ICLQ* 747 (1985).

Some prefer the notion of *transnational rules* or *general principles of international commercial law* for being rooted in the national systems, whereas the *lex mercatoria* emphasises the content of the rule tailored to the merchant community rather than the way in which such rules come about.[14] The concept "transnational" [15] is somehow broader than *lex mercatoria.*[16] Transnational commercial law [17] is conceived as a law which is not particular to a product of any one legal system and might even include customs as well as jurisprudence and other sources.[18]

Whatever the definition, there is a clear purpose and that is to regulate international commercial transactions by a *law* which avoids the vagaries of local laws, and interprets as much as possible actual merchant practices and needs.

The new *lex mercatoria* is being developed within the framework of the nation-State to transcend political boundaries and hence respond to the economic unity of markets and provide better legal understanding of trade dynamics.

The historical analogy [19] cannot be taken too far, since it is obvious that the particular circumstances of our time differ greatly from those of the Middle Ages [20] Nevertheless, the basic concept of *lex mercatoria* as being transnational and *corporative* remains well-nigh unchanged. History itself provides the evidence. The *Law Merchant* indeed did exist without a State or a national system of law.

However, there is a further new factor that will change any analogy we might perceive and which deserves special consideration.

4. From the Middle Age to the Information Age

The impact of information technologies on custom derives from changes in the way we locate and understand commercial practice. Already, they have made it possible to identify commercial activities much faster than ever before. This is liable to usher in a whole new era of custom.

In the past, the range of commercial conduct and the omnipresent danger of missing pertinent signals gave a conservative bias to custom.

General principles have been drawn from the developed legal systems, and are therefore those which are common to the major legal systems of the world. The work that UNIDROIT is conducting on digital information is indeed linked to the concepts of custom. By this I mean the sources of the *lex mercatoria* or even *lex mercatoria* itself.

The information revolution will make it possible to complete a whole range of interactive communicative functions immeasurably faster, even though the fundamental

---

13 Alexander GOLDSTAJN, "The New Law Merchant",12 J. *Bus. L.* 12 (1961).

14 Emmanuel GAILLARD, "Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules", 10 *ICSID Review Foreign Investment Law Journal*, 208 (1995).

15 The word "international" relates to relations between States.

16 JESSUP, *Transnational Law*, New Haven (1956); GOLDMAN, *Frontières du Droit et Lex Mercatoria*, Archives de Philosophie du droit (1964); Eugen LANGEN, "Vom internationalen Privatrecht zum transnationalen Handelsrecht", *NJW*, 1969, 358-360; *idem*, "Transnationales Handelsrecht", *NJW*, 1969, 2229-2232-2233 and *Transnational Commercial Law*, A.W Sijthoff Leiden (1973).

17 It has also been called *Internationales Wirtschaftsrecht or Droit international des contracts*.

18 Some scholars have made the analogy with international public law and the impossibility of providing an exhaustive list of sources; see Roy GOODE, "Usage and its Reception in Transnational Commercial Law", 46 *ICLQ* 1 (1997).

19 Historic analogy is consistent with the need for "legal" precedents and therefore with the need for recognition.

20 José María GONDRA, "La Moderna Lex Mercatoria y la Unificación del Derecho del Comercio Internacional", 127 *Revista de Derecho Mercantil* 17 (1973).

operations remain the same. The brave new cyberworld will need different rationales for any State involvement.

It is my belief that the foundations of transnational commercial law will be shaken by the information revolution.[21] Both *lex mercatoria* and the *new lex mercatoria* emerged as a consequence of commercial revolution. The main difference to-day is the ferocious pace at which the revolution is taking place.

5. Positivism and *Lex Mercatoria*

The new *Lex Mercatoria* has had neither a peaceful existence nor has its validity gone unchallenged. One need only look at the titles of articles written on the subject to realise how controversial the doctrine has been: *Costruzione dottrinaria o strumento operativo,*[22] *The Enigma of Lex Mercatoria,*[23] *The myth of Lex Mercatoria;*[24] *The New Lex Mercatoria: Legal Rethoric and Commercial Reality,*[25] *The New Lex Mercatoria: Reality or Academic Fantasy,*[26] *La moderna lex mercatoria tra mito e realtá,*[27]*The lex mercatoria: To what extent does it exist*? [28]

The doctrine of *lex mercatoria* faces great philosophical, legal and pragmatic challenges almost 30 years after its resurrection. The comments that follow will deal only with those related to the transnational concept.

Professor F.A. MANN, one of the main detractors of the doctrine of *Lex Mercatoria*, has written: "No one has ever or anywhere been able to point any provision or legal principle which would permit individuals to act outside the confines of the system of municipal law." [29] Other critics have pointed out that *lex mercatoria* is valid only as the quasi-legal recognition of rules of common sense, equity, and reasonableness, rules that would probably have been suggested, and used, even in the absence of any reference or thought of *lex mercatoria.*[30] Professor LANGER [31] states that these rules do not constitute an objective, supranational legal system, because they are too vague and indistinct.

---

21 John K. GAMBLE, "New Information Technologies and the Sources of International Law: Convergence, Divergence, Obsolescence and Transformation*",* 12 *GYIL* 171 (1997).

22 Fabio BORTOLLOTTI, *La "nuova" lex mercatoria. Costruzione dottrinaria o strumento operativo?*, Contratto e Impresa / Europa 733 (1996).

23 *Lex Mercatoria* is in fact an enigma created by a paradox. See Keith HIGHET, "The Enigma of Lex Mercatoria*",* 63 *Tulane Law Review* 613 (1989).

24 *Lex mercatoria* is an elusive system and a mythical view. See Georges R. DELAUME, "Comparative Analysis as a Basis of Law in State Contracts: The myth of Lex Mercatoria"*,* 63 *Tulane Law Review*, 575 (1989).

25 Michael T. MEDWING, "The New Law Merchant: Legal Rhetoric and Commercial Reality*",* 24 *Law & Policy in International Business*, 589 (1993).

26 Vanessa L.D. WILKINSON, "The New Lex Mercatoria: Reality or Academic Fantasy", 12 *Journal of International Arbitration*, 487 (1995).

27 BONELL M.J. – *La moderna lex mercatoria tra mito e realtá*", Diritto del commercio internazionale 315, (1992).

28 W. O. STOECKER, "*The lex mercatoria: To what extent does it exist?"*, *J. Int. Arb.*, 101 (1990).

29 Cited in C.H. LEBEDEV, Unification des normes juridiques dans les rapports économiques internationaux (Quelques observations générales), *Revue de Droit Uniforme* 2 (1981). F. A. MANN, "*Lex Facit Arbitrum International Commercial Arbitration*", *Liber Amicorum for Martin Domke*, 1967, 60.

30 The *lex mercatoria* is only a *principia mercatoria* at best. See Keith HIGHET, "The Enigma of Lex Mercatoria", 63 *Tulane Law Review*, 613 (1989).

31 Eugen LANGEN, "Vom internationalen Privatrecht zum transnationalen Handelsrecht, *NJW*, 1969, 358-360; "Transnationales Handelsrecht", *NJW*, 1969.

Positivism does not recognise the *lex* as a legal order and therefore holds that it is impossible to have a contract without having a law to rule it.[32] The positivist doctrine places custom after legislation. This view would raise questions such as: Is the *lex* a law proper, or it is a body of rules which the parties choose (expressly or impliedly) to apply to their individual contract? What is the jurisprudential base of the *lex?* [33] Those are all valid questions in the framework of the positivist approach to law; however, the bases of *lex mercatoria* should be sought beyond the positivist doctrine.

Considerations of history, economics and sociology should likewise be taken into account. Even where they are not, the positivist view refers only to the case of a dispute arising in the context of litigation, described by Professor GOLDMAN as "pathologist", and does not consider the "psychology" that refers to the effective application by the merchants of transnational rules.[34]

Professor SCHMITTHOFF recognises the existence of the rules governing international commercial exchanges as sufficiently detailed and uniform to constitute a new *lex mercatoria,* but argues that they must rely on and take their binding force as law from being incorporated into national legal systems.[35] Other scholars consider that *lex mercatoria* is indeed an international body of law, founded in the commercial understandings and contract practices of an international community composed principally of mercantile, shipping, insurance, and banking enterprises in all countries.[36] For them, these commercial understandings are laws.[37]

The assumption that rules and institutions cannot be called "law" unless they emanate from a local sovereign body (nation-state) is a-historic. Long before Jean BODIN promoted the notion of sovereignty [38] and John AUSTIN espoused legal positivism,[39] there was law.[40] It may indeed be wrong to think of law as a dichotomy, with only two alternatives: law and no-law. This dichotomy may have to bow to the facts and need to be *reframed* in the near future.[41]

1. What is National?

The sovereignty paradigm views the geography of the planet as a collection of sovereign States, where each State is the ultimate and supreme political entity within its jurisdictional sphere. Private non-State actors are subject to the absolute exercise of the State. International law governs relations between these political entities.[42]

The integration of national economies into the global economy is closely related to the *new* denationalised sources of law. The word "national" here has to be understood

---

32 Keith HIGHET, "The Enigma of Lex Mercatoria*",* 63 *Tulane Law Review*, 613 (1989).

33 Michael MUSTILL, "Contemporary Problems in International Commercial Arbitration: A Response", 17 *International Business Lawyer*, 161 (1989).

34 B. GOLDMAN, "Lex mercatoria", 3 *Forum Internationale*, 8 (1983).

35 Clive SCHMITTHOFF, *Unification of International Trade* (1964).

36 H. BERMAN / Y C. KAUFMAN, "The Law of International Commercial Transactions (Lex Mercatoria)", *Harvard International Law Journal*, 221 (1978).

37 However, there is no evidence of national courts applying the *lex mercatoria*.

38 Jean BODIN, *Six Livres de la République,* Scientia Aalen 1961 (1576).

39 John AUSTIN, *Lectures on Jurisprudence,* 5th ed. (1885).

40 Friedrich K. JUENGER, "American Conflicts Scholarship and the New Law Merchant*"*, 28 *Vanderbilt Journal of Transnational Law*, 411 (1995).

41 Gunter TEUBNER, "Breaking Frames: The Global Interplay of Legal and Social Systems", 45 *American Journal of Comparative Law*, 149 (1997).

42 Andrew L. STRAUSS, "Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts", 36 *Harvard International Law Journal*, 373 (1995).

as "one modality in a complex global process, rather than a unified place or jurisdiction."[43]

The very idea of *lex mercatoria* carries with it an element of supranationality. The idea of conventional conflict of law wisdom carries with it elements of national-State sovereignty, which decrees that sovereign power is limited by territorial boundaries.[44]

As Professor TEUBNER has described it,[45] globalisation breaks the frame of the historical unity of law and State. "*Lex mercatoria*, the transnational law of economic transactions, is not the only case of global law without State. It is not only the economy, but various sectors of world society that are developing a global law of their own." [46]

The old law merchant was developed at a time of profound social and political desegregation.[47] Although some studies characterise the modern constraints on the State as examples of desegregation and a paradox of the information age, no studies have yet been developed to link those phenomena directly with the *lex Mercatoria* doctrine.

However, there are some similarities: the relative autonomy of the merchants is a common characteristic of both periods. Whereas in the Middle Ages there was no nation-State, the trade corporations were powerful enough to push their own legislation and jurisdiction of sorts to apply it. In the epoch of nation-States, the modern commercial corporations, it could be argued, have enormous power and hitherto unthought-of tools to serve the instincts of *homo oeconomicus*.[48]

Redefining the relationship between an independent transnational commercial law and the national laws, public and private, remains a challenge and the source of much philosophical debate.

2. What is Private?

The new role of the globalizing State has changed the nature of the generally accepted dichotomy of public and private economic affairs and as a consequence is changing the very concepts of what is public law and what is private law.

The new *lex mercatoria* has been considered part of international trade law. This means that it refers only trade relations among and between private subjects. However, the old *lex* would seem not to have made such a distinction.[49] The *Lex* presents new challenges to define the borders of what has become known in modern times as

---

43 Alfred C. AMAN, "The Globalizing State: A Future – Oriented Perspective on the Public – Private Distinction, Federalism and Democracy", 31 *Vanderbilt Journal of Transnational Law*, 769 (1998).

44 This conception was deeply rooted in Anglo-American Law even before the emergence of the territorial State as the archetypal political unit. See Harold G. MAIER, "International Issues in Common Law Choice of Law: American Conflicts teaching Exits the Middle Ages", 28 *Vanderbilt Journal of Transnational Law*, 361 (1995).

45 Gunter TEUBNER, "Breaking Frames: The Global Interplay of Legal and Social Systems*"*, 45 *American Journal of Comparative Law*, 149 (1997).

46 There are examples in labour, human rights, Internet law and sports; see GIDEDENS, 1990; Martti KOSKENNIEMI, "The Future of Statehood", 32 *Harv. Int. L. Journal*, 397 (1991).

47 GOLDSCHMITT, *Universalgeschichte des Handelsrechts,* Stuttgart (1891).

48 R. DAVID, "II diritto del commercio internazionale: un nuovo compito per i legislatori nazionali o una nuova lex mercatoria?", *Rivista di diritto civile*, 577 (1976).

49 18th century writers and courts held a larger concept of international law than their successors. They did not distinguish as sharply between law of nations, that regulates between States, and common or universal law, as *uis gentium,* interpreted by courts in all civilised nations to have much the same content and often regulating the conduct of individuals...The law merchant and the law maritime were among the principal subjects of this universal law or *ius gentium. See* Henry STEINER and Detlev VAGTS, *Transnational Legal Problems: Material and text*, 3d ed., Mineola, New York 1986, 578-579.

international economic law, a new branch of international (public) law.[50] Indeed, public international law is an *element* (to use LANDO's word) [51] of the new law merchant. So far, the factual acceptance of *lex mercatoria* as the applicable law in State contracts has been rather meagre,[52] although its be useful when neither the public party welcomes the application of another State's law, nor the private party that of the contracting State.

The word "transnational" refers to all rules, which regulate actions or events that transcend national frontiers and are not rooted either in private or in public international law but paradoxically in both and in any of them. This distinction was dogma as little as 30 years ago regarding arbitration under private and public international law and their relationship with national laws. By definition, public international law arbitration is detached from municipal law and private international arbitration is taking the same road.[53]

The involvement of governments in private business enterprises and *vice versa*, together with the globalisation of investments and privatisation as it gathers momentum makes it very difficult in practice to draw a dividing line.[54] In this sense, *lex mercatoria* might be considered as part of a broad international economic law or, for instance, we might regard the OMC framework as part of the scope of international commercial law. "What once may have been public now employs the private sector in many ways. What once may have been private now has important and global dimensions." [55] This does not follow that the role of the State is over, but that it must change and be more receptive to transnational needs in a transnational world. Since the State does not or in some cases no longer has a monopoly on certain areas of the law, new definitions of what is public and what is private are required.[56]

6. Transnational Arbitration and the UNIDROIT Principles

The most remarkable example of the transnational concept is that of transnational arbitration and the UNIDROIT Principles of International Commercial Contracts working in tandem.

According to those that defend the doctrine of the new *lex mercatoria,* arbitration in transnational commercial disputes may be regarded as universal custom. The commercial community certainly prefers to resolve its disputes outside local courts and local laws, and if the influence of the UNIDROIT Principles [57] is growing this may be due, apart from the fine balance it strikes among the main legal families, to the fact that both, arbitration and principles may be transnational.[58] This facilitates the new *jus commune* approach needed in order to develop the transnational concept of *lex*

---

50 Stephen ZAMORA, "Is there Customary International Economic Law?", 32 *GYIL*, 9 (1989), Roy GOODE, "Usage and its Reception in Transnational Commercial Law", 46 *ICLQ*, 1 (1997).

51 Ole LANDO, "The Lex Mercatoria in International Commercial Arbitration", 34 *ICLQ*, 747 (1985).

52 Georges DELAUME, "The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal", 3 *ICSID Review – Foreign Investment Law Journal*, 79 (1988).

53 Thilo RENSMANN, "Anational Arbitral Awards: Legal Phenomenon or Academic Phantom?", 15 *Journal of International Arbitration*, 145 (1998).

54 Alfred AMAN, *Administrative Law in a Global era*, 8 (1992).

55 Alfred C. AMAN, "The Globalizing State: A Future-Oriented Perspective on the Public – Private Distinction, Federalism and Democracy", 31 *Vanderbilt Journal of Transnational Law*, 773 (1998).

56 Philip CERNY, "What is next for the State?", in *Globalisation Theory and Practice*, 123 (Eleonore Kofman & Gillian Youngs (eds.), 1996).

57 *Principles of International Commercial Contracts* (UNIDROIT (ed.), 1994).

58 M. J. BONELL, "The UNIDROIT Institute for the Progressive Codification of International Trade Law", *ICLQ*, 1978, 413-441.

mercatoria. Both provide oxygen to each other. In fact, modern arbitrators would appear to have more in common with the medieval mercantile courts than with any national court.

Application of the UNIDROIT Principles substantially reduces the unpredictability that some critics regard as the main problem in applying *lex mercatoria.*[59] In the words of Professor B. GOLDMAN, "the application of the *lex mercatoria* is, indeed, a most natural task of international arbitral tribunals, since international commercial arbitration is the preferred method for the settlement of disputes arising in international trade … and represent, one might say, the jurisdictional power of this community." [60]

If general principles of law are sources of *lex mercatoria,* then the UNIDROIT Principles are, at this time, the main source needed to restore the confidence in transnational instruments that has been lost in the march of time. However, to be part of *lex mercatoria*, they must first be accepted by the commercial community. This process would appear to be a circular one. The Principles were basically drawn from a remarkable exercise of applied international comparative law. If that is true, most of them come from national and international rules. If so, they must have enjoyed *some* local acceptance in the commercial community. Once drafted in transnational terms, they break the national and international frames and dichotomy makes way for co-ordination, if accepted by the commercial community and enforced by national authorities subject to mandatory rules.

Some systems of law have been opening doors to permit the application of principles that differ from national laws in arbitration, without referring directly to conflict of law rules.[61] The arbitrators do not represent any given State; their authority rests upon agreement between the parties.

International Commercial Arbitration has the role of filling the gaps left by the inherent shortcomings of a fragmented system.[62] As "official law", it has been able to transform the informal *lex mercatoria* into "official law" as well. It has been instrumental in getting a growing number of arbitral awards based on the *lex* [63] and on the UNIDROIT Principles [64] recognised by national courts. The Principles are to be applied either by the choice of the Principles by the parties [65] or by an implied choice of "general principles of law" "*lex mercatoria*" or the like.[66] Also, they apply to fill the gaps of national law. When the parties have chosen to apply the Principles, the courts are obliged to apply them. As we have seen, this raises no problems when the applicable principles are combined with an arbitration agreement. When the parties have not

---

59 Klaus Peter BERGER, "International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts", 46 *The American Journal of Comparative Law*, 129 (1998).

60 B. GOLDMAN, "Lex mercatoria", 3 *Forum Internationale*, 8 (1983).

61 Art. 13 (3) International Chamber of Commerce Arbitration Rules; Art. 33(1) UNCITRAL Arbitration Rules; Art. 26(2) UNCITRAL Model Law on International Commercial Arbitration; Art. 1496 French Civil Procedure Code; Art. 14445(2) Mexican Commercial Code.

62 BATTIFOL, *Droit International privé,* TII, Paris, 228 (1971).

63 *NORSOLOR S.A. v Pabalk Ticaret Limited Sirketi*, *Journal du Droit International* (Clunet) 836 (1991); *Fourgerolle (France) v Banque du Proche-Orient (Lebanon)*, *Rev. Arb.* 183 (1982); *Deutsche Schachtbau- und Tiefbohrgesellschaft GmbH (D.S.T.) v Ras Al Khaimah Nat´l Oil Co* (1987), *Lloyd´s Rep.* 246 (ENG. C.A.); *Damiano v Topfer*, 105 *Foro It. I* 2285, 2288 (Cass. 1982 Italy; *Compañía Valenciana de Cementos Portland S.A. c. Sté Primary Coal Inc.*, Cassation Civile 1, 22 ottobre 1991 n. 1354 PRF (France) – Commented in: Ugo DRAETA, Cassation Civile 1, 22 Ottobre 1991 n. 1354 PRF – *Compañía Valenciana de Cmentos Portland S.A. c. Sté Primary Coal Inc.*", *Diritto del commercio internazionale* 213 (1992).

64 See Michael BONELL, "UNIDROIT Principles: A Significant Recognition by a United States Court", *Uniform Law Review*, 1999, 651.

65 Preamble, Paragraph 2.

66 Preamble, Paragraph 3.

chosen any applicable law or principles, the reaction of a national court may indeed be to apply a local law.[67]

Some scholars limit the application of *lex mercatoria* to the validity of a recognised floating or a-national arbitral proceedings. Thus far, we have seen that without arbitration the emergence of a new law merchant would have been extremely difficult.[68] As to its application before national courts, this remains to be seen.

7. Conflicts of Laws *v Lex Mercatoria*

It is reasonable to say that in order to exist, a body of law must answer at least four prerequisites: it must have *ascertainable* rules, there must be *certainty* of the rules [69] and their content, they must be *enforceable* and *autonomous*.[70] It is not within the scope of these comments to analyse each one of these prerequisites. Taking as a premise that they are indispensable, we would need to compare them with the current performance of the dominant system of conflict of laws.

The methodology of the classical doctrine of international private law disregards the interests of the parties and those of trade. It has achieved a measure of consistency by dint of time and hard scholarly and practical work, but not with the ease of the merchants, that have often had impractical solutions foisted upon them as a result of the application of the applicable national rules. Unilateralists and multilateralists alike take the position that substantive considerations should play no role in the choice of the applicable law. However, modern instruments such as the Inter-American Convention on the Law Applicable to International Contracts (1994) have challenged this concept by allowing the courts to take into account all objective and subjective elements of the contracts and the principles of international commercial Law.[71]

It would be hard to sustain that the conflict of laws doctrine has in more than two hundred years of intense study achieved an acceptable body of ascertainable rules accessible to the commercial community or to argue that it has provided the certainty and lack of complexity demanded by international trade.

8. Final Remarks

Once States and merchants grow more confident, the return of a new *lex mercatoria* is likely to be smooth. The use of the tools of information technology will fuel the process. As it is, the process is only just beginning and suffering the pangs of adolescence, the growing pains that denote a lack of confidence and years.[72]

The UNIDROIT Principles have redefined the panorama of the transnational concept itself, and made possible the development of *lex mercatoria*.

---

67 See; Fall 1933, Oberlandesgericht, IPR spr. 1933, No 1, Cour de Cassation, Fr. 21 June 1950, D. Jur. 749.

68 Carlo CROFF, "The applicable Law in an International Commercial Arbitration: It is Still a Conflicts of Law Problem?", 16 *Int'l Law*, 613 (1982).

69 A. GIARDINA, "La *lex mercatoria* e la certezza del diritto nei commerci e negli investimenti internazionali", *Riv. dir. int. pr. pr.*, 461 (1992).

70 Vanessa L.D. WILKINSON, "The New Lex Mercatoria: Reality or Academic Fantasy", 12 *Journal of International Arbitration*, 487 (1995).

71 Article 9.

72 B. Goldman talks about "the resuscitation of that old lady called *lex mercatoria*": see B. GOLDMAN, "Lex mercatoria", 3 *Forum Internationale* 3 (1983).

Being transnational means that *lex mercatoria* is neither public nor private, national nor international. It transcends the positivist rigidity in defining systems.

In establishing the role of the State, sooner or later we will have to realise that the very concept of what is national or public is only a facet of a single, dynamic system, not simply an arrangement of parts and a whole. The new role of the State will have to be defined in order to defend common values such as democracy and social fairness. However, it will have to use and accept new frameworks under new paradigms.

B i b l i o g r a p h y

1. *Lex Mercatoria*

YU Hong-Lin – *Total Separation of International Commercial Arbitration and National Court Regime,* 15 Journal of International Arbitration 145 (1998).

FALL Aboubacar – *Defense and Illustration of Lex Mercatoria in Maritime Arbitration,* 15 Journal of International Arbitration 37 (1998).

BERGER Klaus Peter – *International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts,* 46 The American Journal of Comparative Law 129 (1998).

RENSMANN Thilo – *Anational Arbitral Awards: Legal Phenomenon or Academic Phantom?,* 15 Journal of International Arbitration 145 (1998).

GAMBLE John K. – *New Information Technologies and The Sources of International Law: Convergence, Divergence, Obsolescence and or Transformation,* 41 German Yearbook of International Law 170 (1998).

GLENN H. Patrick – *The Capture, Reconstruction and Marginalization of "Custom",* 45 The American Journal of Comparative Law 613 (1997).

GOODE Roy – *Usage and its Reception in Transnational Commercial Law,* 46 ICLQ 1 (1997).

BERGER Klaus P. – The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts, 28 Law & Policy in International Business 943 (1997).

MOLINEAUX Charles – Moving Towards a Construction Lex Mercatoria: a Lex Constructionist, 14 Journal of International Arbitration 55 (1997).

TEUBNER Gunter – Breaking Frames: The Global Interplay of Legal and Social Systems, 45 American Journal of Comparative Law 149 (1997)

BORTOLLOTTI Fabio – *La "nuova" lex mercatoria. Costruzione dottrinaria o strumento operativo?,* Contratto e Impresa / Europa 733 (1996).

BORTOLLOTTI Fabio – *Verso una nuova lex mercatoria dell'agenzia commerciale internazionale? Il modello di contratto di agenzia della CCI*, Contratto e Impresa / Europa 809 (1996).

STRAUSS Andrew L. – *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts,* 36 Harvard International Law Journal 373 (1995).

FONTAINE Marcel – *Les Principes UNIDROIT, Guide de la Redaction des Contrats Internationaux, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 73. (Dossiers).

FARNSWORTH E Allan – *An American View of the Principles as a guide to drafting Contracts, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 85. (Dossiers)

GAYMER Vivien – *The UNIDROIT Principles as a Guide for Drafting Contracts: A View from an International Commercial Lawyer, Unidroit Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 95. (Dossiers).

RAZUMOV Konstantin – *Les Contrats Internationaux et les Nouveaux Principes UNIDROIT: La Pratique Contractuelle Commerciale Russe, UNIDROIT Principles of*

International Commercial Contracts: a new lex mercatoria? Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 105. (Dossiers).

VAN HOUTTE Hans – *The UNIDROIT Principles as a Guide for Drafting Contracts: A View from an International Commercial Lawyer, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 115. (Dossiers).

DE NOVA Giorgio – *The UNIDROIT Principles as a Guide for Drafting Contracts: A View from an International Commercial Lawyer, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 129. (Dossiers).

GIARDINA Andrea – *L´application des Principes UNIDROIT aux Contrats internationaux, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 143. (Dossiers).

KOMAROV Alexander S. – *Remarks of the Application of the UNIDROIT Principles of International Commercial Contracts in International Commercial Arbitration, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 155. (Dossiers).

RAESCHKE-KESSLER Hilmar – *Should an Arbitrator in an International Arbitration Procedure apply the UNIDROIT Principles?, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 167. (Dossiers).

VAN HOUTTE Hans – *The UNIDROIT Principles of International Commercial Contracts and International Commercial Arbitration: The Reciprocal Relevance, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 181. (Dossiers).

FURMSTON Michael P. – *The UNIDROIT Principles and International Commercial Arbitration, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 181. (Dossiers).

BERAUDO Jean-Paul – *L´application des Principes UNIDROIT par les Tribunaux Étatiques e Supranatioaux, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 217. (Dossiers).

DROBNIG Ulrich – *The Use of the UNIDROIT Principles by National and Supranational Courts, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 223. (Dossiers).

MORENA Renzo – *Tendances de la jurisprudence et de la doctrine Juridique Italiennes en matière de lex mercatoria, UNIDROIT Principles of International Commercial Contracts: a new lex mercatoria?* Paris, International Chamber of Commerce – International Institute of Business Law and Practice, 1995, 233. (Dossiers).

HARTKAMP Arthur – *The Use of the UNIDROIT Principles of International Commercial Contracts by National and Supranational Courts, UNIDROIT Principles for International Commercial Contracts: a new lex mercatoria?* Paris, International

Chamber of Commerce – International Institute of Business Law and Practice, 1995, 253. (Dossiers).

JUENGER Friedrich K. – *American Conflicts Scholarship and the New Law Merchant,* 28 Vanderbilt Journal of Transnational Law 199 (1995).

MAIER Harold G. – *International Issues in Common Law Choice of Law: American Conflicts Teaching Exits the Middle Ages* 28 Vanderbilt Journal of Transnational Law 361 (1995).

GAILLARD Emmanuel – *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules,* 10 ICSID Review Foreign Investment Law Journal 208 (1995).

WILKINSON Vanessa L.D. – *The New Lex Mercatoria: Reality or Academic Fantasy,* 12 Journal of International Arbitration 487 (1995).

BERNARDINI Piero – *Contratti Internazionali e Diritto Applicabile*", Diritto del commercio internazionale 393 (1993).

KAPPUS Andreas – "*Lex Mercatoria" als Geschäftsstatut für Staatlichen im Deutschen Internationalen Schuldrecht*. Iprax Heft 3 (1993).

MEDWING Michael T. – *The New Law Merchant: Legal Rhetoric and Commercial Reality.* 24 Law & Policy in International Business 589 (1993).

MATRAY L. – *Union Internationale des Avocats. Quelques problèmes de la lex mercatoria*" Rev. dr. int. dr. comp. 333 (1992).

MERTENS H.-J – *Nichtlegislatorische Rechtsvereinheitlichung durch transnationales Wirtschaftsrecht und Rechtsbegriff* – 56 Rabels Z 219 (1992).

GIARDINA A. – *La lex mercatoria e la certezza del diritto nei commerci e negli investimenti internazionali*", Riv. dir. int. pr. pr. 461 (1992).

REMIEN V.O. – *Rechtseinheit Ohne Einheitsgesetze?*, 56 Rabels Z 300 (1992).

BONELL M.J. – *La moderna lex mercatoria tra mito e realtá*", Diritto del commercio internazionale 315, (1992).

HUMPHREYS G. – *La Lex Mercatoria en matière d'arbitrage international: quelques différences dans les optiques anglo-françaises*, Revue de droit des affaires internationales 849 (1992)..

DRAETA Ugo – *Cassation Civile 1, 22 Ottobre 1991 n. 1354 PRF – Compañía Valenciana de Cimentos Portland S.A. c. Sté Primary Coal Inc.*", Diritto del commercio internazionale 213 (1992).

STRENGER I. – *La notion de lex mercatoria en droit du commerce international*, 227 R. des C. 207 (1991-II).

JACKSON Joseph – *The New York Convention and Denationalized Arbitral Awards,* 8 J. Int. Arb. 5 (1991).

AVANESSIAN Aida B. – *The New York Convention and Denationalized Arbitral Awards,* 8 J. Int. Arb. 5 (1991).

LIONNET Klaus – *Should the Procedural Law Applicable to International Arbitration Be Denationalized or Unified? The Answer of the UNCITRAL Model Law,* 8 J. Int. Arb. 5 (1991).

PAULSSON J. – *La Lex mercatoria dans l'arbitrage C.C.I*., Revue de l'arbitrage 55 (1990).

STOECKER W.O. – *The lex mercatoria: To what extent does it exist*? J. Int. Arb. 101 (1990).

HIGHET Keith – *The Enigma of Lex Mercatoria,* 63 Tulane Law Review 613 (1989).

SMIT Hans – *A-national Arbitration,* 63 Tulane Law Review 629 (1989).

MUSTILL Michael – *Contemporary Problems in International Commercial Arbitration: A Response.* 17 International Business Lawyer 161, (1989).

DELAUME Georges R. – *Comparative Analysis as a Basis of Law in State Contracts: The Myth of Lex Mercatoria,* 63 Tulane Law Review 575 (1989).

DANILENKO Gennady, *The theory of International Customary Law*, 31 German Yearbook of International Law 9 (1988).

DELAUME Georges – *The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal,* 3 ICSID Review – Foreign Investment Law Journal 79 (1988).

MUSTILL Michael Lord – *The New Lex Mercatoria: The First Twenty-five Years,* Bos and Brownlie 149 (1988).

TRIEBEL Volker – *Grenzen der Lex Mercatoria in der Internationalen Schiedsgerichtsbarkeit*, 4 RIW 245 (1988).

BAXTER Y.F.G. – *International Business and Choice of Law*, 36 ICLQ 92 (1987)..

HUNTER Martin – *Lex Mercatoria,* 3 Lloyd´s Maritime and Commercial Law Quarterly 277, (1987).

MUSTILL Michael Lord – *The Law of Lex Mercatoria: the first 25 Years,* Liber Amicorum for Lord Wilberforce, Oxford (1987). 153.

LANDO Ole – *The Lex Mercatoria in International Commercial Arbitration,* 34 ICLQ 747 (1985).

KERR Michael – *Arbitration and the Courts: The UNCITRAL Model Law,* 34 ICLQ 1 (1985).

HOFFMANN B.V. – *Lex mercatoria vor internationalen Schiedsgerichten*, Iprax 106 (1984).

FALLON M. – *La lex mercatoria vingt ans après. Notes de lecture de études offertes á B. Goldman sur le droit des relations économiques internationales*, Annales de Droit, Louvain, 517 (1984).

GOLDMAN B. – *lex mercatoria*, 3 Forum Internationale 3 (1983).

STERN B. – *Lex mercatoria et arbitrage international*. A propos des mélanges Goldman, Revue de l'arbitrage 447 (1983).

THOMSON D. – *The Lex Mercatoria in Paris and Vienna,* 17 J. W. T. L 358 (1983).

GOLDMAN B. – *Une bataille judiciaire autour de la "lex mercatoria. L'affaire NORSOLOR*, Revue de l'arbitrage 79 (1983).

PAULSSON Jan – *Delocalisation of International Commercial Arbitration : When and Why it Matters,* 32 ICLQ 53 (1983).

LEBEN Ch. – Les études offerts á Berthold Goldman, *la lex mercatoria au cœur des débats*, Journ. dr. int. 360 (1983).

GIARDIANA Andrea – *Arbitrato transnazionale e lex mercatoria di fronte alla Corte di Cassazione*", Riv. dir. int. pr. pr. 754 (1982).

LEBEDEV C.H. – *Unification des normes juridiques dans les rapports économiques internationaux (Quelques observations générales)*, Revue de Droit Uniforme 2 (1981).

DE CASTRO Y BRAVO Federico, "*El arbitraje y la nueva Lex Mercatoria*", Anuario de Derecho Civil 619 (1979).

VON OVERBECK A.E. – *Le champ d'application des règles de conflit ou de droit matériel uniforme prévues par des traités*, 58 Institut de Droit international, Annuaire 97 (1979).

GOLDMAN B. – *La lex mercatoria dans les contrats et l'arbitrage international: réalités et perspectives*, Journ. dr. int. 479 (1979).

BERMAN H. / KAUFMAN Y.C. – *The Law of International Commercial Transactions (Lex Mercatoria)*, Harvard International Law Journal 221 (1978).

UNIDROIT, *New Directions in International Trade Law,* Acts and Proceedings of the 2nd Congress on Private Law held by the International Institute for the Unification of Private Law, Vol. 2, Rome, 9 – 15 September (1976).

DAVID R. – *Il diritto del commercio internazionale: un nuovo compito per i legislatori nazionali o una nuova lex mercatoria*?, Rivista di diritto civile 577 (1976).

GONDRA José María., *La Moderna Lex Mercatoria y la Unificación del Derecho del Comercio Internacional,* 127 Revista de Derecho Mercantil 7 (1973).

DERAINS Y. – *Le statut des usages du commerce international devant les juridictions arbitrales*, Revue de l'arbitrage 122 (1973).

LANGEN Eugen – *Transnational Commercial Law,* A.W Sijthoff Leiden, (1973).

LANGEN E. – *Vom internationalen Privatrecht zum transnationalen Handelsrecht*, NJW, 1969, pp. 358-360; id.

LANGEN E. – *Transnationales Handelsrecht*, NJW, 1969, pp. 2229-2232-2233.

2. International Private Law

DODGE William S. – *Extraterritoriality and Conflict of Laws Theory : An Argument for Judicial Unilateralism,* 39 Harv. Int. L. J. 101 (1998).

BURNSTAIN Mattheu R. – *Conflicts on the Net: Choice of Law in Transnational Cyberspace,* 29 Banderbilt Journal of Transnational Law 75 (1996).

REYNOLDS William L. – *Why Teach International Family Law in Conflicts?,* 28 Vanderbilt Journal of Transnational Law 411 (1995).

LIPSTAIN K. – *One Hundred Years of Hague Conferences on Private International Law,* 42 ICLQ 553 (1993).

BORCHERS Patrick J. – *The Internationalization of Contractual Conflict of Law,* 28 Vanderbilt Journal of Transnational Law 421 (1995).

SILBERMAN Linda J. – *Judicial Jurisdiction in the Conflict of Laws Course: Adding a Comparative Dimension,* 28 Vanderbilt Journal of Transnational Law 389 (1995).

LANDO O. – *The 1955 and 1985 Hague Conventions on the Law Applicable to the International Sale of goods*, Rabels Z. 155 (1993).

BAXTER Ian F.G. – *International Business and Choice of Law,* 36 ICLQ 93 (1987).

MANN F.A. – *The Proper Law in the Conflicts of Laws,* 36 ICLQ 437 (1987).

GROSSFELD Bernhard and ROGERS C. Paul – *A Shared Values Approach to Jurisdictional Conflicts in International Economic Law,* 32 ICLQ 931 (1983).

AUDIT B. – *Le caractère fonctionnel de la règle de conflit*, R. Des C., 1984-III, pp. 223-397.

RODRÍGUEZ MATEOS P., *Una perspectiva funcional del método de atribución*, REDI, 1988, pp. 70-126.

STURM F. – *Comment l'antiquité réglait-elle ses conflits de lois*, Journ. dr. int., 1979, pp. 259-273.

GONZÁLEZ CAMPOS J.D. – *Les liens entre la compétence judiciaire et la compétence législative en droit international privé*, R. des C., 1977-III, t. 156, pp. 227 ss. y, en especial, pp. 248-255.

BATIFFOL Henri – *Le pluralisme des méthodes en droit international privé*, R. Des C., 1973-II, pp. 75-147.

STERN B. – *Wechselwirkungen zwischen Kollisionsrecht und Sachrecht*, 37 Rabels Z.466 (973).

MIAJA DE LA MUELA A. *Las normas materiales de Derecho internacional privado*, REDI, 1963, pp. 425-457.

RIPHAGEN W. – *The Relationship between Public and Private Law and the Rules of Conflict of Laws*, R. des C., 1961-Y, t. 102, pp. 215-334.

MEIJERS E.M. – *L'histoire des principes fondamentaux du droit international privé à partir du Moyen-Age, spécialement dans l'Europe occidentale*, R. des C., 1934-III, pp. 543-686.

3. Geo-Law

WALSTER Bryan L. – *Shared Technical Decision-making and the Desegregation of Sovereignty: International Regulatory Policy, Expert Communities, and the Multinational Pharmaceutical Industry,* 72 Tulane Law Review 1597 (1998).

AMAN Alfred C. – The *Globalizing State: A Future-Oriented Perspective on the Public – Private Distinction, Federalism and Democracy,* 31 Vanderbilt Journal of Transnational Law 769 (1998).

TEUBNER Gunther – *Review Essay Breaking Frames: The Global Interplay fo Legal and Social Systems,* 45 The American Journal of Comparative Law 149 (1997).

GRIGERA Horacio A. – *Sovereignty and Regionalism,* 27 Law & Policy in International Business, 1073, (1996).

KOOIJMANS P.H. – *Tolerance, Sovereignty and Self-Determination,* NILR 211 (1996).

STRAUSS Andrew L. – *Beyond National Law: The Neglected Role of the International Law of Personal Jurisdiction in Domestic Courts*, 36 Harv. Int. L. J. 373 (1995).

DEHOSSE Renaud – *Comparing National and EC Law: The Problem of the Level of Analysis,* 42 The American Journal of Comparative Law 761 (1994).

WEYRAUCH Walter Otto & BELL Maureen Ann – *Autonomous Lawmaking: The Case of the Gypsies,* 103 Yale L. J. 323 (1993).

BRAGDON Susan H – *National Sovereignty and Global Environmental Responsibility: Can the Tension be Reconciled for the Conservation of Biological Diversity*? 33 Harv. Int. L. J. 381 (1992).

BERMAN Nathaniel – *A Perilous Ambivalence: Nationalist Desire, Legal Autonomy, and the Limits of Interwar Framework,* 33 Harv. Int. L. J. 353 (1992).

PIONTEK E. – *European Integration and International Law of Economic Interdependence*", R. des C., 1992-V, t. 236, pp. 9-126, en especial pp. 37 ss.

KOSKENNIEMI Martti – *The Future of Statehood,* 32 Harv. Int. L. Journal. 397 (1991).

MAYER P. – *La neutralisation du pouvoir normatif de l'Etat en matière de contrats d'Etat*, Journ. dr. int., 1986, pp. 5-78.

MEYER Michael A. – *New Developments in Humanitarian Law: A Challenge to the Concept of Sovereignty,* 34 ICLQ 267(1985).

LOWE A.V. – *The Problems of Extraterritorial Jurisdiction: Economic Sovereignty and the Search for a Solution,* 34 ICLQ 724 (1985).

LALIVE J.F. – *Contrats entre Etats ou entreprises étatiques et personnes privées*, R. des C., 1984, t. 181, pp. 13 ss.

AUDIT B. – *Extraterritorialité et commerce international. L'affaire du gazoduc sibérien*, Rev. crit. dr. int. pr., 1983, pp. 401-434.

SORENSEN Max – *Autonomous Legal Orders : Some Considerations Relating to a Systems Analysis of International Organizations in the World Legal Order,* 32 ICLQ 559 (1983).

ELIAN G. – *Le principe de la souveraineté sur les ressources nationales et ses incidences juridiques sur le commerce international*, R. des C., 1976-I, t. 149, pp. 1-85.