

SCHOOL OF INTERNATIONAL STUDIES
PHD IN INTERNATIONAL STUDIES – XIX CYCLE

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**THE PROCESS OF HARMONISATION OF
THE LAW OF INTERNATIONAL
COMMERCIAL ARBITRATION: DRAFTING
AND DIFFUSION OF UNIFORM NORMS**

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ABSTRACT

This work purports to analyse the process of the harmonisation of the law of international commercial arbitration with particular reference to the drafting and diffusion of uniform rules. In the first chapter a theoretical framework is developed to investigate the effects of globalisation on law and international relations, introducing the concepts of legitimacy of global governance, epistemic communities and norm diffusion as elaborated in International Relations theory. The second chapter analyses the debate on the harmonisation of international trade law and outlines the main techniques, means and actors of this process, with particular reference to their membership, statutory purposes and most of all the decision-making methods followed in the production of uniform rules. The following chapters analyse the *travaux préparatoires* of the main harmonisation tools of the law of international commercial arbitration, namely the UNCITRAL Model Law on International Commercial Arbitration, the UNIDROIT Principles of International Commercial Contracts, and the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, with a view to assessing their impact on national jurisdictions, national courts and arbitral tribunals. The main findings of this survey are twofold. First, a common decision-making method within the “formulating agencies” in charge of drafting the uniform rules of the law of international commercial arbitration is emerging. Although formally inter-governmental bodies made up of state representatives, these formulating agencies do not follow the traditional decision-making process founded on bargaining and unanimity (or majority) voting, which is typical of international law-making. Their membership resembles more that of an “epistemic community”, i.e. a group of experts who are constantly attempting to reach a consensus rather than a majority or unanimity and whose interests, proposals and positions are not fixed, but are susceptible to being changed whenever a better argument founded on reasonable grounds is put forward. Second, these uniform rules are characterised by a strong level of hybridation, in which the distinction between hard and soft law tends to blur. Accordingly, the increasing level of harmonisation of the law of international commercial arbitration can be read as a process leading to the creation of a hybrid legal order, combining both a state-centric system (organized essentially around the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the various national arbitration laws) and a multi-centric system made up of a complex network of private contracts, non-national norms elaborated by formulating agencies and international arbitral institutions, as well as customs and general principles of law.

Finally, this work briefly examines the issue of the legitimacy of this hybrid legal order by applying the two different approaches to legitimacy outlined in the first chapter. It is argued that

accountability of international commercial arbitration is ensured through the instrument of delegation: the increasing use of soft law and the wide scope of party autonomy in arbitration are indicators that states are delegating to international organisations and non-state actors the task of determining the most appropriate standards for the conduct of arbitration, but at the same time they continue to play an important supportive and supervisory function at various moments in the arbitration process. Moreover, the involvement of a wide range of outside experts and stakeholders not belonging to state bureaucracy in the drafting process of the main formulating agencies is an attempt to strengthen the legitimacy of their harmonisation tools and facilitate their reception in practice. Thirdly, the particular decision-making method followed by these formulating agencies, largely based on consensus and in which the various stakeholders' interests are taken into consideration, allows the adoption of widely acceptable solutions founded on rational arguments and therefore represents an example of legitimate governance in habermasian terms.

CHAPTER ONE: THE THEORETICAL FRAMEWORK

INTRODUCTION

Globalisation¹ has spurred the emergence of a new academic industry: “globalisation theory”.² In most disciplines – from the humanities, to the social sciences, but also to physical sciences – this process is stimulating major rethinking in several fields of knowledge.³

A common general theme across social sciences is that the processes of globalisation are profoundly changing the significance of national boundaries and generally are making them less important. This undermines the validity of “black box” theories, which consider nation states, societies or legal systems as discrete, self-contained phenomena, which can be studied in isolation from one another⁴. More generally, one can easily argue that, in analyzing the contemporary world – whatever approach or method one may adopt – it is not enough to concentrate only on the traditional, small number of actors, i.e. sovereign states, official international organizations, and individuals.

The purpose of this chapter is to show how globalization has affected the study of two realms of knowledge: international relations and legal theory. In the first section I will outline the main opinions expressed in the state and globalization debate as conducted in international relations and international politics. The most important finding stemming from this debate is the perception that a new, post-westphalian international order is emerging, no longer centered on states as the sole actors in the international scene. International relations, which traditionally focused on relations between nation states, have now extended their purview to include non-state relations across frontiers and a wide range of non-state actors involved in any area and level of governance. The legal consequences of this new conception of the international order are further developed by legal theorists in the law and globalization debate, whose main features are sketched in section two, with particular reference to the notion of legal pluralism. As new actors are emerging in the study of international relations, one cannot give an adequate account of law in the modern world without

¹ For the various definitions of the term see the following paragraphs.

²W. Twining, *Globalisation and Legal Theory*, Northwestern University Press, 2000, p. 6

³W. Twining, *op. cit.*, p. 50

⁴W. Twining, *op cit.*, p. 8

paying any attention to transnational non-governmental organisations, to organised crime, multinational companies, transnational law firms, which are setting up their own normative orders somewhat independently of the sovereign state. The remaining part of the second section analyses two theories of legal pluralism: Teubner's concept of "global law without a state" and the New Haven School approach to transnational legal process. Section three addresses the issue of legitimacy of global governance by illustrating two different approaches emerged in the literature: a normative and a descriptive one; section four analyses how the origin and diffusion of norms in the international system is accounted for in International Relations theory. The conceptual framework outlined in this chapter will then be applied in the remainder of the present work in order to explain current developments of international commercial arbitration.

SECTION I: THE STATE AND GLOBALISATION DEBATE

Sceptical and globalist accounts of globalisation

Globalisation is one of the "buzzwords" of our times¹: everybody speaks about it, but nobody knows what it exactly means². Despite its extreme vagueness, this concept has for two decades been lying at the centre of one of the most heated debates in contemporary politics, which has generated an "exploding"³. literature. The main issue of this debate is whether the alleged existence of globalisation is really bringing about a profound reconfiguration of the organising principles of social life, so as to subvert the current framework of the international political order. As we will see, the various definitions of globalisation largely depend on the answers given to this issue.

Despite the heterogeneity of the views expressed in the debate, it is nonetheless possible to identify two main schools of thought: the globalists, who consider globalisation a real and significant phenomenon, and the sceptics, who consider it as a primarily ideological or social construction of marginal explanatory value.⁴.

The sceptical view

According to the sceptical view, globalisation does not pose a significant threat to the present state of international political order: globalisation simply constitutes one of the main constraints states have always faced throughout their history. In this sense, it is neither unprecedented nor historically

¹Cfr R.O. Keohane and J.S. Nye Jr, *Globalization: What's New? What's Not? (And So What?)* in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, Polity Press, 2003, p. 75

²D. Held and A. McGrew, *The Great Globalization Debate: An Introduction*, in ID(eds), *The Global Transformations Reader*, cit., p. 2 <<no singular account of globalization has acquired the status of orthodoxy; on the contrary, competing assessments continue to frame discussion>>.

³ J.N. Rosenau, *Distant Proximities: Dynamics beyond Globalisation*, Ch 1: An Emergent Epoch, Princeton University Press, 2003, p. 13

⁴ D. Held and A. McGrew, *The Great Globalization Debate: An Introduction*, in ID (eds), *The Global Transformations Reader*, cit., p. 2

unique and therefore it is not able to undermine the deep structure of the international system, which remains founded on state sovereignty. Far from being hollowed out, state regulatory power is growing in the context of globalisation: the increase in international activities is dependent upon international cooperation - where possible - or more often upon the exercise of hegemonic power. According to this view, globalisation is but the product of the policy of hegemonic powers to create the necessary conditions for a liberal international political economy based on free trade. Globalisation is a convenient myth which helps to justify and legitimise the creation of a global free market and the consolidation of Anglo-american capitalism within the world's major economic regions. The internationalisation of economic and social relations is a reflection of the policies and preferences of the great powers of the day, since only they have sufficient military and economic strength to create and maintain the conditions necessary for a prosperous and liberal international order. In sum, states are not "passive victims" or "transmission belts" of globalisation, but, on the contrary, its primary architects.⁵

The globalist view

On the contrary, according to the second group of theories, globalisation is eroding or hollowing out state sovereignty, undermining the traditional westphalian order of territorial, independent sovereign states. The so-called westphalian order is the international order that was established in Europe pursuant to the Peace of Westphalia in 1648, which brought to an end the Thirty Years War. This peace settlement is commonly regarded to have laid down the foundation of the modern international order: the international system of sovereign states. The westphalian order is based on four main principles⁶. The first is territoriality, according to which states have fixed territorial boundaries defining the limits to their jurisdiction and scope of their political authority. On this reading, territoriality is a crucial principle of modern political organisation: humankind is divided into political units defined in terms of fixed and exclusive territorial realms.⁷ The second principle is internal sovereignty, whereby states, within their territory, can claim effective supremacy, since they represent the ultimate and undisputed source of legal and political authority. Accordingly, in the westphalian order mankind is organised into a limited number of sovereign territorial states, which recognise no higher legal or political authority than themselves. The third is autonomy or

⁵ D. Held and A. McGrew, D. Goldblatt and J. Perraton, *The Globalization Debate*, in ID, *Global Transformations: Politics, Economics and Culture*, Polity Press, 1999, p. 6

⁶A. McGrew, *Globalization and Territorial Democracy: an Introduction*, in ID (ed), *The Transformation of Democracy? Globalization and Territorial Democracy*, ch 1, Cambridge University Press, 1997, p. 3

⁷*Ibidem*

external sovereignty, whereby states are entitled to conduct their internal and external affairs in a manner which only they are competent to decide, free from external intervention or control.⁸ Finally, the fourth principle is legality, which provides that there is no legal authority above and beyond the state, able to impose legal duties upon it or its citizens. Relations among sovereign states may be subject to international law, but only to the extent that each state agrees to being so bound.

According to the globalist thesis, globalisation fundamentally compromises the principles upon which the westphalian order was constructed. On this reading, globalisation is essentially conceived as the growing interconnectedness of social activities across the globe, occurring as more and more people, goods, capitals, technology flow swiftly and smoothly across borders. This growing interconnectedness poses three main constraints on state sovereignty. The first is mutual vulnerability among states: events originating in one state or part of the world can have an immediate and direct effect on individuals and communities residing in distant part of the globe. Accordingly, globalisation erodes the boundaries between what is foreign and what is domestic, what is national and what is international. For example, pollution generated in UK contributes to the acid rain, which spoils forests in Norway or Sweden: it is therefore at the same time a domestic and international matter. The second is the emergence of forms of social activities which are transnational in character that transcend national borders, the most important of which is the organisation of global industrial production carried out by multinational corporations. Economic, social and political activities are increasingly "stretched" across the globe: they are no longer primarily or solely organised according to a territorial principle.⁹ The third is the emergence of global problems and threats (proliferation of weapons of mass destruction, global warming and pollution, terrorism), which in no way can be solved by a single government alone, but only through multilateral or international cooperation. New global limits, especially environmental and population threats have become too broad and too menacing to be handled by nation-states alone¹⁰. The proliferation of multilateral institutions and international regimes designed to manage these new common problems compromises further the state's autonomous capacities. Governments and

⁸ Internal and external sovereignty are two diametrically opposed concepts. The former is the state power to impose an order that allows individuals to peacefully coexist within the state territory, the latter means independence of any other outside authority. Accordingly, internal sovereignty is based on the concept of supreme authority; on the contrary, external sovereignty presupposes the lack of supreme authority and therefore the independence of states in the international systems. On this point see W. Reinicke, *Globalization and Public Policy: An Analytical Framework*, in ID, *Global Public Policy: Governing without Government?*, Brookings Institution Press, 1998, p. 56-58

⁹ D. Held and A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations: Politics, Economics and Culture*, cit., p. 28

¹⁰ M. Mann, *Has Globalization Ended the Rise and Fall of the Nation-State?*, *Review of International Political Economy*, 1997, 4-3, p. 473

societies across the globe need to adjust to a world in which there is no longer a clear distinction between international and domestic.¹¹

The result of these constraints is that national governments have lost control on an increasing range of activities occurring within their territory; on the other hand a new set of arrangements is emerging in which states, institutions and non-state actors combine in order to regulate new global issues. National governments are no longer able to control an increasing range of activities occurring within their territories (free flows of capitals, information, goods, technology). This wide range of transnational activities fosters the emergence of global and transnational networks linking people and organisations in different parts of the world (e.g. multi-national corporations, transnational groups). As a consequence of these new emerging forms of economic and political organisation at global level restricting the scope for the exercise of state sovereignty, the world order is a post-westphalian order, in the sense that is no longer state-centric. World order is no longer composed by independent states exerting their sovereignty within their fixed territory; states are forced to share their sovereignty with other actors in the international system in order to regulate phenomena lacking a defined territorial scope. Globalisation, globalist thesis supporters conclude, is thereby demolishing the pillars of the westphalian temple. Consequently, globalisation is not only a process involving transnational flows of people, goods and capital across national boundaries. It denotes a significant shift in the social organisation and activity of mankind: a trend towards transnational patterns of relations, interactions and exercise of power. Globalisation is a powerful transformative force which is responsible for a massive shake-out of societies, economies, institutions of governance and world order.

At the core of the globalist thesis lies the idea of a transformation of the relationship between sovereignty, territoriality and state power¹². As economic, social and political activities increasingly transcend national frontiers, a direct challenge is launched to the territorial principle of modern social and political organisation. Globalisation disrupts the correspondence between society, economy and polity within an exclusive national territory: social, economic and political activities can no longer be understood as having the same scope and extension as national territorial boundaries.¹³ This does not mean the demise of the state as an effective political organisation (the "hyperglobalist" views¹⁴, which prophesised the end of the state, regarded it as an unnecessary unit,

¹¹ D. Held and A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations: Politics, Economics and Culture*, cit., p. 7

¹² J. G. Ruggie, *Territoriality and Beyond*, IO, 1993, 41, p. 14

¹³ D. Held and A. McGrew, *The Great Globalization Debate: An Introduction*, in Id (eds), *The Global Transformations Reader*, cit., p. 8

¹⁴ The best-known supporter of the hyperglobalist thesis is Susan Strange. In her famous book *The Retreat of the State: The Diffusion of Power in the World Economy*, Cambridge University Press, 1996), she argues that the impersonal forces of world markets are now more powerful than states, whose authority and legitimacy

as a passive victim of globalisation, have now been set aside): globalisation leads to a reconstruction of the power, functions and authority of national governments. Territorial boundaries have become increasingly problematic: although states formally retain the ultimate legal claim to supremacy over what occurs within their territory, their effective control must come to terms with the expanding jurisdiction of complex global systems, global infrastructures of communication and transport, institutions of global governance, which support new forms of economic and social organisation, transcending national boundaries. What is at stake is not the legal concept of state sovereignty, since formally states remain sovereignty entities: globalisation challenges operational or *de facto* sovereignty, that is to say the ability of states to practice this concept in the daily affairs of politics¹⁵. In this context, the notion of the nation-state as a self-governing, autonomous unit appears to be more a normative claim than a descriptive statement.¹⁶ The forms and functions of the state need to adapt to this changing global order: rather than bringing about the end of the state, globalisation has encouraged a range of adjustment strategies to manage the growing arrays of cross-border issues. In this new context, the power of national governments is not necessarily diminished, but is being reconstituted and restructured in response to the growing complexity of processes of governance.

Striking a balance between sceptical and globalist views of globalisation

In more recent times participants to the globalisation debate have attempted to strike a balance between these two opposite views. They argue that neither of these views fully captures the complex relationship between state and globalisation.¹⁷ The more enthusiasts among the globalist

are in decline. In Strange's view, the governments and their ministers have lost the authority over national societies and economies that they used to have. Where states were once the masters of markets, now it is the markets which, on many crucial issues, are the masters of the governments of states. To the declining authority of the states, it is juxtaposed a growing diffusion of authority to other institutions and organisations, and to local and regional bodies. Competition for world market shares has replaced competition for territory, or for control over the natural resources of the territory. In this new kind of "war", the search of allies is not confined to other states or inter-governmental organisations, but is extended to multi-national firms. States are engaged in a regulatory competition in order to persuade such firms to locate production of goods and services in their territory. Globalisation sparks a race to the bottom in states structures, as they adapt national political and economic life to the global economy in order to secure the national economy's survival. In sum, the authority of governments of all states has been weakened as a result of the accelerated integration of national economies into one single global economy. Consequently, a serious vacuum is opening up in international order: a vacuum not adequately filled by inter-governmental institutions or by hegemonic power. The diffusion of authority away from national governments has left a gap of non-authority.

¹⁵W. Reinicke, *Globalization and Public Policy*, cit., p. 56

¹⁶ D. Held and A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations: Politics, Economics and Culture*, cit., p. 8

¹⁷J.M. Hobson and M. Ramesh, *Globalisation Makes of States What States make of It: Between Agency and Structure in the State/Globalisation Debate*, New Political Economy, 2002, 7, 1, p. 7

thesis supporters seem to exaggerate state's decline; on the other hand, the staunchest defenders of the sceptical view seem to downplay the importance of international and transnational relations¹⁸. The main flaw with these two opposite views is that they both consider states and global networks as separate realms involved in a zero-sum game: either globalisation is considered weak and consequently states have all the power, or globalisation is considered strong and states are considered to be losing power. In doing so, they exaggerate the power of one realm over the other and end up providing a reductionist explanation, showing only one side of the coin.¹⁹ In the sceptic view, globalisation remains weak to the extent that the national sovereign state remains strong. Globalisation is conceived as a weak, even redundant phenomenon, unable to replace or constrain the state. The state has defensive power which allows it to resist globalisation's imperatives and conduct policies free of global constraint. Globalisation becomes a product of state action, which creates a permissive environment within which global structures develop. In contrast, the globalist view emphasises the overwhelming constraints imposed by globalisation, which are weakening or even hollowing out the states. States have no or little power with respect to globalisation: globalisation is conceptualised as the realm of necessity to which states are forced to adapt. Both views fail to consider that the global and the national realms are at the same time intertwined and provided with a certain degree of autonomy. In highlighting the global realm, globalists ignore the autonomous power of domestic structures; in privileging state's autonomy, the sceptics do not sufficiently enquire to what extent the state is embedded and influenced by the global level.

The main task is to establish to what extent the nation-state is being transformed, to what extent it is declining, or on the contrary still growing. How do states react to globalisation and any potential challenge raising from it? How does globalisation challenge a government's sovereignty? Have governments different options in responding to globalisation? What are these options, how do they differ, and what will be their consequences?²⁰ According to most writers, globalisation is a contradictory process, which entails both state-weakening and strengthening tendencies. There are as many arguments supporting "high stateness" as those supporting "low stateness".²¹ On the one hand, there are arguments supporting the thesis that the intensified development of economic transactions that cross national boundaries has significantly marginalised state power. For example, one can argue that wealth is now mostly generated by transactions occurring across national borders rather than within states and that in this context the most economically empowered actors

¹⁸M. Mann, *Has Globalization Ended the Rise and Rise of the Nation State?*, Review of International Political Economy, 1997, 4-3, p. 494

¹⁹J.M. Hobson and M. Ramesh, *Globalisation Makes of States What States make of It: Between Agency and Structure in the State/Globalisation Debate*, cit., p. 7

²⁰W. Reinicke, *Globalization and Public Policy*, cit., p. 53

²¹P. Evans, *The Eclipse of the State: Reflections on Stateness in an Era of Globalization*, World Politics, 1997, 50, p. 64

are multinational corporations, which consider the productive resources of the world as a whole, and locate various stages of production at points of greatest cost advantage²². Consequently, whether a given territory is included in this global production network depends on the decision of these private actors rather than the states²³. Moreover, one can emphasise the “dictatorship of international financial markets” and maintain that states have lost control over capital flows. Accordingly, if a state engages in policies deemed unwise by private financial traders, it will be punished by an outbound capital drain.²⁴

On the other hand, there are data showing that globalisation has brought about an increase in stateness. Global capitalist economy, which arguably represents the strongest challenge to state's authority, does not constitute a “pure” global network. On the contrary, capitalist relations are profoundly mixed, based on the interaction between national, international and transnational networks. The nation state still structures many economic networks, since 80% of world production is for the domestic market.²⁵ True, financial trading is largely transnational. But company shares tend to be connected to particular national stock exchange markets, national corporate laws and accountancy practices²⁶. In addition, since financial markets are highly unpredictable and risky, they need state or interstate public regulation able to ensure fair competition and limit the damage of reckless speculation. Therefore, if state intervention in financial markets were completely excluded, the operation of the international financial system would quickly degenerate into chaos.²⁷ Moreover, national states still play an important role in capitalism, especially by providing disadvantaged citizens with protection from the undesired consequences of capitalism. In this respect, the existence of a large public sector is crucial for the protection of the population from external traumas induced by the state's dependency on international economy.²⁸ Thus, capitalist economy can be better understood as an “impure” network, a combination of national, international and transnational social relations²⁹. By the same token, new social issues like abortion, children and women protection have led states to pass new legislation in the private realm. On the one hand, such cultural struggles are often prompted by transnational and global pressure groups, but on the other hand most contending actors use these global networks in order to demand more regulation in their own nation state. This is because authoritative social regulation still remains for the most part

²² R. Cox, *The Global Political Economy and the Social Choice*, in R. Cox and T. Sinclair, *Approaches to World Order*, ch 10, Cambridge University Press, 1996, p. 192

²³ P. Evans, *The Eclipse of the State: Reflections on Stateness in an Era of Globalization*, cit., p. 66

²⁴ P. Evans, *The Eclipse of the State: Reflections on Stateness in an Era of Globalization*, cit., p. 67

²⁵ M. Mann, *Has Globalization Ended the Rise and Rise of the Nation State?*, cit., p. 479

²⁶ *Ibidem*

²⁷ P. Evans, *The Eclipse of the State: Reflections on Stateness in an Era of Globalization*, cit., p. 72

²⁸ P. Evans, *The Eclipse of the State: Reflections on Stateness in an Era of Globalization*, cit., p. 68

²⁹ M. Mann, *Has Globalization Ended the Rise and Rise of the Nation State?*, cit., p. 489

a nation state competence: accordingly, the emergence of new social issues in need of regulation may ultimately enhance the state's role³⁰. In conclusion, the patterns of social relations in the present context of globalisation are too varied and contradictory to simply argue that the state system is either weakening or strengthening³¹. On the one hand, global networks are indeed strengthening, but on the other hand such networks do not have the power to impose a single uniform model of social and economic relations: they are shaped by the particularities of nation states and mediated by international relations.

State and globalisation: a collective-sum approach

The contradictory patterns of globalisation processes have led some authors to develop a theory of the relationship between state and globalisation which somewhat reflects this contradiction. In this view, the state is on the one hand bestowed with agential power, enabling it to adapt or react to global constraints, on the other hand it is considered as embedded within, and shaped by domestic and global forces. But in contrast to the previous theories, which forced to single out a winner between the state and the global structure, this theory is centred on the idea that the interaction among local, domestic, international and global actors can lead to potential gains for all the parties involved. Whereas mainstream theories conceive the relationship between state and globalisation in terms of a zero-sum game, this new view adopts a collective-sum approach: each actor can enhance its power by interacting with the others at various levels. In particular, states can increase their power by working with social forces at domestic, regional, and global levels. By postulating state interaction at different levels, this theory no longer conceives states as “territorially fixed” entities, able to exert their power only within their domestic territory. On the contrary, states become “spatially promiscuous”: although they cannot physically move across territory, they are nonetheless able to act and to exert their power both at global, domestic and local levels, in order to pursue their interests. More specifically, states are both constitutive and adaptive actors: constitutive, because they are able to circumvent or even shape global, domestic, local constraints;

³⁰M. Mann, *Has Globalization Ended the Rise and Rise of the Nation State?*, cit.,p. 491-482

³¹Some even argue that, although the technological revolution that has driven the current wave of globalisation will continue, globalisation has nonetheless passed its peak, since signs of its slowdown have been obvious for some time: the institutional foundations of globalisation (i.e. the set of rules and institutions which oblige governments to keep their markets open) have weakened considerably in the past few years; politicians and their constituencies in the major world 's economies (United States, Europe, China) have grown increasingly reluctant about letting capital, goods, and people move freely across their borders; energy- the ultimate global commodity unparalleled in importance - has become the object of intense protectionism. cfr R. Abdelal and A. Segal, *Has Globalization Passed Its Peak?* Foreign Affairs, 2007, 86, 1, p. 104.

adaptive, because sometimes they adapt their structures to pressures stemming from the same levels. For example, states can often decide to bind themselves to international agreements in order to overcome opposition from powerful domestic groups (as in the case of WTO membership, which enabled states to overcome domestic demands for protectionism by industrial groups). Far from eroding state sovereignty, international institutions are in this way used as “scapegoats” in order to pursue a precise domestic strategy. By the same token, European states have jointly agreed to implement measures preventing regulatory tax competition among them, in order to hamper global constraints stemming from multinational corporations, which tend to allocate their production on the basis of better fiscal conditions. So, states can sometimes act on the national level, in order to mitigate the negative effects of globalisation: they can decide to increase labour costs in order to discourage systems of production based on low wages, or decide to limit tax benefits only to highly-technological firms. On the other hand, states are not totally free from domestic and global constraints. In many cases states create the domestic political-economic environment (developed industrial infrastructures, low tax regimes, disciplined and cheap labour force) hospitable to MNCs. In pursuing this constitutive and adaptive strategies, states help to promote the interaction among the regional, national, global levels, thus enabling the development of an increasingly integrated global architecture.

The concept of global governance

One of the most important issues in the globalisation debate is the alleged emergence of a global governance, that is to say the creation of a political order at the global level in the absence of a supranational state with a legitimate monopoly over the use of force and the capacity of authoritatively enforcing the law or other rules³². According to the globalist thesis, the problems facing the contemporary world cannot be solved either by leaving everything to the actions of individual states, or to the workings of the market: existing decision-making mechanisms are insufficient to deal with them³³. The progressive development of a global economy, the expansion of transnational social relations which generate new forms of collective decision-making, the rise of intergovernmental and quasi-supranational institutions, the intensification of transnational communication systems are all factors leading to the emergence of a “global governance”, that is a

³²T. Risse, *Global Governance and Communicative Action*, Government and Opposition, 2004, 39, 2, p. 289

³³F. Halliday, *Global Governance: Prospects and Problems*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate.*, cit., p. 489

new system of institutions, rules and mechanisms which would provide a framework of regulation across the globe.³⁴ Although globalists agree that globalisation heralds the end of the dominance of the nation state as the proper model for political organisation, there is no agreement on what lies beyond the state, which alternative form of global political order³⁵ is likely to emerge, how this “world domestic policy without a world government”³⁶ will be shaped. There is also no guarantee that anything better will replace the modern state³⁷.

In this respect, some globalists argue that the emerging global governance is shattering the unitary structure of the state: the national government apparatus is no longer regarded as the sole centre of legitimate power within state's borders. According to the traditional view of international relations, states are unitary actors on the international stage and speak with one voice through the mouth of their heads of state, who act as “gatekeeper” of all domestic and international instances³⁸. Now – globalists contend – states need to be rearticulated with, and relocated within, this overarching political framework, which undermines the idea of sovereignty within fixed borders and territories³⁹. Accordingly, the state is disaggregating into its component institutions and global governance networks are emerging⁴⁰. At international and global level ministries, heads of state, but also government institutions which shape domestic politics (administrative agencies, courts, legislatures) are all networking with their foreign counterparts⁴¹. In these interactions, each institution represents not only the unitary “national interest”, but also a subset of interests which are likely to be shared by its foreign counterpart. The resulting model of global governance is therefore horizontal rather than vertical, composed of national government officials rather than international bureaucrats, decentralised and informal rather than organised and rigid. On this reading, the concept of global governance denotes an irreversible process where authority in the international order is

³⁴D. Held and A. McGrew, *World Orders, Normative Choices: Introduction*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p. 483-484

³⁵H. Bull, *Beyond the States System?* in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p. 577

³⁶J. Habermas, *The Postnational Constellation*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p. 545

³⁷D. Held and A. McGrew, *World Orders, Normative Choices: Introduction*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p. 486

³⁸A.M. Slaughter, *Governing the Global Economy through Government Networks*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p. 189

³⁹D. Held and A. McGrew, *World Orders, Normative Choices: Introduction*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p.484

⁴⁰A.M. Slaughter, *Governing the Global Economy through Government Networks*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, p. 190

⁴¹This is for example much evident in the European Union's system of decision-making, where in the thousands of councils, committees, and working groups national ministers often find themselves to interact with their counterparts from other member states to oppose colleagues in their own government: in this sense the EU system weakens to some extent the internal unitary structure of its member states. Cfr J.T. Mathews, *Power Shift*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p. 211

increasingly disaggregated and resulting in a system that comprises more and more centres of authority in every corner of the world and at every level of community.⁴²

A similar model can be considered also the neo-medieval order, that is the secular and modern equivalent of the kind of universal political organisation that existed in Western Christendom in the Middle Ages⁴³: a system of overlapping authority and multiple loyalty. Just as in medieval times no political body could claim supreme power over a given territory and a given part of the christian population, in the neo- medieval form of universal political order, states need to share their authority over their citizens, and their ability to command their loyalties, with sub-state, regional and world authorities. The global governance structure is thus constituted by overlapping authorities and loyalties that hold peoples together in a universal society.

Another model of global governance is the Empire, as radically reinterpreted by Hardt and Negri. They argue that the present phase of global capitalism is creating a new global order which entails a shift towards a new model of sovereignty⁴⁴. This model of global governance is best described as an Empire, not in the traditional sense of imperial domination by a Great Power over subjugated territories and peoples, but rather as systems of global regulation which have no boundaries, but which nonetheless embody relations of domination and subjugation⁴⁵. As the primary factors of production and exchange – money, technology, people, and goods – move increasingly smoothly across national borders, the nation state has less and less power to regulate these flows and impose its authority over the economy. Sovereignty has therefore taken a new form, composed of a series of national and supranational organisms united under a single logic rule. This new logic rule, the political subject that effectively regulates these global exchanges, the sovereign power that governs the world is the Empire⁴⁶. This new system of governance is different from imperialism. In the imperialist system, the nation states were the centre of power from which sovereignty was exerted over external foreign territories. Imperialism was an extension of European nation states' sovereignty beyond their own boundaries and nearly over the whole world: the entire world map – Hardt and Negri observe - could be coded with European colours. In contrast to imperialism – they argue – the Empire's new form of sovereignty has no territorial centre of power and does not rely on fixed boundaries. It is a decentred and deterritorializing apparatus of rule that progressively incorporates the entire global realm within its open, expanding frontiers. In this new Empire, the

⁴²J. N. Rosenau, *Governance in a New Global Order*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p. 224

⁴³H. Bull, *Beyond the States System?*, cit. p. 580

⁴⁴ D. Held and A. McGrew, *Understanding Globalisation: Introduction*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p. 53

⁴⁵*Ibidem*

⁴⁶ M. Hardt and A. Negri, *Globalization as Empire*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p. 116

USA retains a privileged position, but no single state can be the world leader in the way modern European nations were, since the age of Imperialism is over. The distinct national colours of the imperialist map of the world – Hardt and Negri conclude – have merged and blended in the imperial global rainbow.⁴⁷

Rosenau's model of global governance bears a resemblance to the notion of living law⁴⁸ and is also very useful in order to understand the concept of legal pluralism⁴⁹. He theorises the existence of a bifurcated system – which can be called the two worlds of world politics –: the government and the governance system. The former is the interstate system of states and their national governments, the latter is a multicentric system of diverse types of other collectives that sometimes cooperate, often compete with and endlessly interact with the state-centric system (the governance system).⁵⁰ Governance systems can be found in non-governmental organisations, corporations, professional and business associations, advocacy groups, and many other types of collectivities that are not considered to be governments. Both government and governance consist primarily of rule systems, but whereas the former acquires authority through formal means such as coercive sanctions, the latter does it through repeated practices that are regarded as authoritative, even though they may not be constitutionally sanctioned. Nonetheless, what in both systems makes rules effective is their sphere of authority, that is to say their capacity to generate compliance. It follows that, viewed from their compliance-generating capacity, governance rules may be just as effective (or ineffective) as government rules. On the face of it, it may seem that state governments have an advantage in ensuring compliance, since they have the legitimate power to use force wherever their citizens fail to comply. Yet, Rosenau argues, compliance is essentially rooted in habit, in an instinctive readiness to respond to directives issued by authorities to which one feels committed and loyal. Authority is essentially relational: it links those who issue directives and those for whom the directives are intended. If people ignore, avoid or otherwise do not heed the compliance sought by the authorities, then it can be said that for all practical purposes the latter are authorities in name only, that their authority has evaporated.⁵¹ With the emergence of alternative authorities to which people can transfer their compliance habits, Rosenau concludes, states are less and less able to rely on the effectiveness of their directives.⁵² Consequently, global governance today is characterised by an extensive disaggregation of authority that immensely complicates the tasks of coordination necessary to establish order in world affairs.

⁴⁷M. Hardt and A. Negri, *Globalization as Empire*, cit, p. 117

⁴⁸ On this concept see next section of this chapter p. 33

⁴⁹ On this topic, see the next section of this chapter pp. 31ff

⁵⁰ J. N. Rosenau, *Governance in a New Global Order*, cit, p. 225

⁵¹J. N. Rosenau, *Governance in a New Global Order*, cit, p. 230

⁵²J. N. Rosenau, *Governance in a New Global Order*, cit, p. 227

SECTION II: THE LAW AND GLOBALISATION DEBATE

The main themes of the law and globalization debate

Globalisation is stimulating a fundamental rethinking also of legal theory. One common refrain in this literature is that the study of law should not be restricted only to domestic state law and public international law, but needs to take into account multiple levels of social and legal ordering¹. A sound legal theory aiming at providing a total picture of the law in the modern world needs to include not only municipal legal systems and traditional international law, but also global, regional, transnational, and local orders, in an attempt to explain the relations among them. Globalisation enlarges the traditional focus of international law². Scholars studying the law on the world stage have so far considered the nation states as the only relevant actors on the international scene and the law as the sole product of official, state-sanctioned entities³. Accordingly, they have focused on only two types of normative systems: those enacted by nation states (national law) and those enacted among nation states (international law). Law and globalization scholars argue that the conception of law founded on this dichotomy is inadequate to capture new regulatory phenomena occurring on a global scale. Studying law and globalization allows to expand the scope of what counts as law, thereby recognizing many non-governmental fora where legal or quasi-legal norms are articulated and disseminated⁴.

A theme linked to this big issue is the disengagement of law and state: the law becomes more and more detached from nation state legislation⁵. Law and globalisation scholars have noticed the emergence of a wide number of non-state communities (“jurisgenerative communities” or “moral entrepreneurs”⁶), whose structure does not seem to fit the classic model for international

¹W. Twining, *Reviving General Jurisprudence*, in M. Likosky (ed), *Transnational Legal Processes*, Butterworths, 2002, p. 7

² P. Schiff Berman, *From International Law to Law and Globalization*, *Columbia Journal of Transnational Law*, 2005, 43, p. 490

³ P. Schiff Berman, *From International Law*, cit, p. 485

⁴ P. Schiff Berman, *From International Law*, cit, p. 490

⁵K. Günther, *Legal Pluralism and the Universal Code of Legality: Globalization as a Problem of Legal Theory*, p. 8, paper presented at the 2003 Colloquium in Legal, Political and Social Philosophy at NYU School of Law available on the internet at www.law.nyu.edu/clppt/program2003/readings/gunther.pdf (October 2007)

⁶ E.A. Nadelmann, *Global Prohibition Regimes: The Evolution of Norms in International Society*, *IO*, 1990, 44, p. 482

organisations: they are neither made up of states nor constituted by treaty, they do not enjoy legal personality and have no physical headquarters or stationery⁷. Such non-state communities are increasingly producing new forms of regulation (such as human rights law and the *lex mercatoria*) somewhat outside state control. Accordingly, the nation state ceases to be the only player in the public international law arena: the prerogatives of nation- state sovereignty may be affected and limited by this great variety of norms (sometimes encompassed within the amorphous category of non-state law) articulated and disseminated by non-state actors⁸. In this changed regulatory scenario, the notion of state sovereignty itself is profoundly affected: it is no longer independence of any external influence, but on the contrary the capacity to participate to a wide range of international and transgovernmental regimes, networks and institutions, all of which have become necessary for governments to accomplish what they once could do on their own within a defined territory.⁹ In a world of global markets, global information, of weapons of mass destruction and looming environmental disasters of global magnitude, states operate within an increasingly dense network involving other states, inter-governmental institutions, multinational corporations, and a whole range of cross-border groups.¹⁰ But the coexistence of a plurality of normative orders somewhat affecting the exercise of national sovereignty does not mean the demise of the state at global level. On the contrary, the situation of normative pluralism is an indication that none of them is capable of providing legal certainty alone: globally, legal and social structures compete in offering better solutions¹¹. It is therefore reasonable to assume that these normative orders are somehow incomplete: legal certainty emerges just from their interaction.

Another shared opinion in the law and globalization debate is that most concepts used in legal theory need no longer be considered as distinctively legal, since they are shared with other disciplines, such as sociology, philosophy, economics, and political science. Legal systems are no longer conceived as “self-contained black boxes”, i.e. as closed, impervious entities which must be studied in isolation¹². The idea of legal science as an arcane discipline which can be understood only in terms of its own internal categories and without reference to the social environment within which it develops¹³ is becoming less and less popular. By contrast, global legal theory becomes more and

⁷ A-M. Slaughter, *Global Government Networks, Global Information Agencies, and Disaggregated Democracy*, Mich. J. Int'l L. 2003, 24, p. 1046-48

⁸ P. Schiff Berman, *From International Law*, cit, p. 524

⁹ A. Chayes and A. Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, 1995, p. 4

¹⁰ A. M. Slaughter, *Disaggregated Sovereignty: Towards the Public Accountability of Global Government Networks*, Government and Opposition, 2004, p. 162; J. Meritus, *Considering Non-state Actors in the New Millennium: Toward Expanded Participation in Norm Generation and Norm Application*, NYU Journal of Int'l L and Pol., 2000, 32, p. 553

¹¹ V. Gessner, *Globalization and Legal Certainty*, in V. Gessner and A.C. Budak (eds), *Emerging Legal Certainty: Empirical Studies on the Globalization of Law*, Adelshot, Dartmouth, 1998, p. 444

¹² W. Twining, *Reviving General Jurisprudence*, in M. Likosky (ed), *Transnational Legal Processes*, cit, p. 4

¹³ R. Cotterrell, *The Sociology of Law: an Introduction*, Oxford University Press, 1992, p. 18

more interdisciplinary: its main purpose is to map the relations between law and other disciplines¹⁴. Global law scholars seeking to understand the changing world in which legal rules operate need to look beyond their own academic discipline to embrace the vast literature on anthropology, sociology, geography, and cultural studies concerning globalization. This literature challenges the idea of nation state as the only relevant form of social aggregation, questions the assumed naturalness of territorial borders and helps to reveal new ways in which norms are articulated and disseminated among multiple, often overlapping, communities¹⁵. Only through an interdisciplinary approach to globalisation is it possible to conceptualize a world populated not only by states, but by a wide range of communities each producing its own set of rules. This interdisciplinary approach also entails a broader conception of law which allows to consider the importance of these sets of rules and their interpenetration in official legal regimes¹⁶.

Combining international law and international relations theory: the US perspective

In the wake of these interdisciplinary claims, American scholarship has recently attempted to integrate International Relations theory (IR) and International Law (IL), in order to gain new insights into the study of organised cooperation among states. Each discipline can contribute to the analysis of state cooperation in various ways. It has for example been observed that IR theory emphasises the importance of broadening the range of subjects to be examined beyond states and international organisations (the so-called non-state actors)¹⁷. Besides, IR theory shows that legal arrangements are only one of many ways by which states structure cooperation, other forms such as international regimes, spheres of influence, political commitment being possible and even more important than treaties in some fields¹⁸. On the other hand, IL, by focusing on the analysis of norms and their application, can bring to the table a wealth of data on legal practices and procedures,

¹⁴R. Cotterrell, *The Sociology of Law: an Introduction*, p. 17

¹⁵ P. Schiff Berman, *From International Law*, cit, p. 511

¹⁶ P. Schiff Berman, *From International Law*, cit, p. 556

¹⁷ K.W. Abbott, *Elements of a Joint Discipline*, in *International Law and International Relations Theory: Building Bridges*, ASIL Proceedings, 1992, 86, p. 169

¹⁸ *Ibidem*

interpretation and application of norms at a level of detail which IR, normally more focused on a theoretical perspective, has so far rarely addressed¹⁹.

But the field in which combined studies of IR and IL can produce more interesting results is what Alcott calls the explanatory function, that is to say the explanation of why states set up, maintain, expand, comply with, and try to enforce international cooperation²⁰. In this respect, IR theory can offer interesting alternatives to the classical view of the state as a unitary, self-interested, rational actor which is implied also in many approaches to international law. Liberal and constructivist theories of IR emphasise the role which values and ideas on the one hand, and domestic and transnational stakeholders on the other hand play in shaping states' interests and preferences²¹. On this reading, the norms, values and social structure of international society help to form the identity of actors who operate within it. ²²States can learn from society: new knowledge or new belief (e.g. emerging awareness in civil society towards environmental and human rights issues) can change the state's entire approach to a specific issue. Groups of individuals with particular bodies of knowledge (the so-called epistemic communities) identify problems, develop policy alternatives to solve them, and communicate their positions around the world and convince governments to take action on them²³.

But this interdisciplinary approach is not devoid of criticism. The most recurrent one is that law and social sciences constitute not only two distinct disciplines, but even two distinct cultures, since they are based on entirely different languages and methods of reasoning²⁴. Such remarkable differences frequently cause big communication problems which are difficult to handle. The most important language problem is constituted by the different ways of meaning the concept of law. Social sciences - IR included - generally adopt a very broad concept of law, encompassing the full range of mechanisms of social control, whereas international law is still for its most part centred on the positivist view identifying the law with state law. Although there are a wide number of approaches seeking to go beyond the black-letter rules and analyse new forms of law, they are nonetheless flawed with a fundamental methodological problem: they fail to draw the line between the enlarged conception of law they propose and other social norms²⁵.

¹⁹ *Ibidem*

²⁰ K.W. Abbott, *Elements of a Joint Discipline*, in *International Law and International Relations Theory: Building Bridges*, cit., p. 170

²¹ On this point see *infra* pp. 73 ff

²² H. Koh, *Review Essay: Why do Nations Obey Law?* Yale Law J. 1997, 106, p. 2634

²³ K.W. Abbott, *Elements of a Joint Discipline*, in *International Law and International Relations Theory: Building Bridges*, cit., p. 171

²⁴ O.R. Young, *Remarks*, in *Elements of a Joint Discipline*, in *International Law and International Relations theory: Building bridges*, cit., p. 173-175

²⁵ O.R. Young, *op. cit.*, p. 173

As to the different modes of reasoning, social scientists are fundamentally concerned with the formulation of generalisation: they build models of collective action and ask themselves to what extent empirical reality can fit into these generalisations. By contrast, legal method is not based on the construction of a theory or model to apply to reality. Legal reasoning has a distinctive dialectical quality: on the one hand it uses principles and rules to understand cases; on the other hand it uses cases to derive principles²⁶.

It is because of these differences in language and method that the two disciplines or cultures often end up asking different questions and providing different answers²⁷. Social scientists are mostly concerned with finding explanations and predictions. Thus, they ask questions like: what determines success or failure of international cooperation in international society? What is the role of hegemonic powers in the creation of international institutions or regimes? Instead, lawyers adopt a doctrinal approach to reality: they analyse norms and seek to apply them to facts. Thus, their typical researchable questions are for instance: what is the evolution and development of principles of state responsibility regarding international environmental issues? How has the catalogue of human rights in the post Cold War era changed?

The main tenets of legal pluralism

One of the most important theories supporting the existence of a global legal order is legal pluralism. The terms normative and legal pluralism refer more to a certain approach to social facts than to a systematic, structured theory²⁸. To some legal pluralism is not even a doctrine, but simply the description of a certain state of affairs, the attribute of a specified social group²⁹. The concept, in broad terms, refers to the coexistence of different systems of norms in the same geographical or social space; but over the time two different versions have developed. Initially, the term designated the coexistence of different systems of norms in former colonial countries: local legislation, religious rules, customary law, were all different sources of law recognised by the state and forming part of a single national legal system. In such countries, the state recognised the existence of different rules for specific categories of persons, applicable in specific aspects of social life, such as inheritance, family and land law.

²⁶ O. R. Young, *op. cit.*, p. 175

²⁷ O. R. Young, *op. cit.*, p. 174

²⁸ W. Twining, *Globalisation and Legal Theory*, cit. p. 83

²⁹ J. Griffiths, *What is Legal Pluralism?*, *Journal of Legal Pluralism*, 1986, 1, p. 12

In a second wave of legal pluralism studies, the basic tenet of this approach has been adapted to the context of globalisation. This new wave of legal pluralism has focused on non-state law in modern societies. The idea of legal pluralism has thus been used as an instrument to challenge state centralism, that is the idea that the state has a monopoly of lawful power within its own territory. Legal pluralists maintain that legal centralism is a fiction, a myth, a product of ideology. They also argue that legal centralism constitutes the main hindrance to an accurate, empirical observation of the legal phenomenon. The legal reality of the modern state- they contend – is not at all the tidy, consistent, organized ideal so nicely captured in the common identification of the law with state law. Rather, empirical observation shows that the legal field constitutes an unsystematic set of inconsistent and overlapping parts.³⁰

In contrast with the idea of legal centralism, they suggest that all societies have a diversity of legal orders, of which official state law is only one, and not necessarily the most powerful. On this reading, globalisation creates a multitude of decentered law-making processes in various sectors of civil society, in relative insulation from nation-states³¹. Technical standardization, professional rule production, intra-organisational regulation in multinational enterprises, the *lex mercatoria*³² are all forms of private rule-making on a global scale, which have come into existence not by formal recognition of nation-states, but by acts of self-validation³³.

This last version of legal pluralism challenges the traditional, positivist conception of law. According to the traditional doctrine of legal sources, all forms of legal pluralism are no more than social rules, customs, usages, contractual obligations, intra-organisational agreements, but in no way can they be considered as law. This is because positivism bases the distinction between law and not-law on a hierarchy of legal rules where the higher rules legitimate the lower ones. Normative phenomena outside this hierarchy are not considered law, but merely facts. At the top of this hierarchy lies the constitution of the nation-state, which is the highest product of the democratic legislative process and therefore the ultimate legitimation of legal validity. On this reading, contractual rule-making, as well as intra-organisational rule production, is either seen as non-law or as delegated law-making, which needs recognition by the national legal system.

Legal pluralism supporters suggest that globalisation is breaking this hierarchy. In their view, political law-making has lost its leading role in the globalisation process³⁴: sovereign states are not able to agree on certain legal principles which may guarantee the development of a just legal order

³⁰J. Griffiths, *What is Legal Pluralism?*, cit., p. 4

³¹A. Giddens, *The Consequences of Modernity*, Stanford University Press, 1990, p. 70

³² On this concept see *infra* pp. 85 ff.

³³G. Teubner, *Foreword: Legal Regimes of Global Non-state Actors*, in ID (ed), *Global Law Without a State*, Dartmouth, 1997, p. xiii

³⁴G. Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in ID (ed), *Global Law Without a State*, cit. p. 5

for mankind. The political process has reached only a proto-globality in international relations³⁵. On the other hand, legal pluralism supporters maintain that various sectors of civil society are developing a global law of their own, somewhat independently of nation states, the latter appearing too weak on a global scale. The difference between a highly globalised society and a weakly globalised politics is pressing for the emergence of a global law that is not a product of the nation state's legislative process and is not dependent upon any political constitution and politically ordered hierarchy of norms: in Teubner's terms, a global law without a state.³⁶ This makes it necessary to rethink the traditional doctrine of the sources of law. Globalisation breaks the hierarchy within this order, moves the national law-making process away from its privileged position and puts it on an equal footing with other types of social law-making.

The idea of legal pluralism entails a different approach to the analysis of legal systems. Unlike the lawyer's standpoint - who has a traditional, monistic view of the legal order and tends to equate the concept of law with that of state law, the legal pluralist's standpoint is that of an external observer or of an individual who finds himself or herself governed by a variety of regulatory orders, which overlap, interact, and often conflict. On this reading, law is described in other ways than a hierarchical set of rules backed by coercive sanction. Law is viewed as a language, a system of communication, a way of interpreting or even misreading³⁷ reality. Law is best understood not as an autonomous system of official rules, but rather as a distinctive manner of imagining the real, a constitutive part of culture, shaping and determining social relations³⁸. Legal pluralism scholars emphasise the necessity of looking at the subjective side of law: they stress the significance of legal consciousness, that is the way in which ordinary citizens think about the law and transform or subvert official legal statements, thereby "constructing" law on the ground.³⁹

The concept of living law and the sociological approach to law

The distinction, drawn by the Austrian Law Professor Eugen Ehrlich in the 1930s, between "lawyer's law" (or "norms for decision") and living law, constitutes an essential starting point for

³⁵ G. Teubner, *Global Bukowina: Legal Pluralism in the World Society*, cit. p. 6

³⁶ G. Teubner, *Foreword: Legal Regimes of Global Non-state Actors*, cit. p. xiv

³⁷ B. de Sousa Santos, *Law: A Map of Misreading. Toward a Postmodern Conception of Law*, J. Law & Soc., 1987, 14, p. 279.

³⁸ P. Schiff Berman, *From International Law*, cit, p. 493

³⁹ P. Schiff Berman, *From International Law*, cit, p. 496

those writers emphasising the legal pluralism of modern Western societies⁴⁰. The theory of “living law” entails an approach to the study of law largely different from that followed in traditional legal studies.

Generally speaking, legal doctrine seeks to explain the character of law by focussing essentially on the relationship between rules, principles, and values incorporated explicitly or implicitly within the legal system⁴¹. Pure legal analysis looks essentially at the rules, principles, and concepts set out in law books and authoritatively stated in legislation or deduced from judicial decisions⁴². On this reading, law is essentially conceived as “lawyer's law”: law is the law of the state as recognised by lawyers, and applied or interpreted by courts or other legal authorities. According to the lawyer's law viewpoint, other normative systems in a society may be seen as derived directly or indirectly from state law, or as created or maintained by delegation from it, or as sources influencing the content of law. They are, however, distinct from and ultimately subordinate to it.

Conversely, the numerous approaches to legal analysis which can be classified as sociological in the broadest sense are unified by their deliberate self-distancing from the professional viewpoint of the lawyer.⁴³ Law is always viewed from the perspective of an external observer of legal institutions, doctrine and behaviour, rather than that of a participant, although participants' observation may be taken into account as data for the observer. On this reading, whereas “lawyer's law” refers exclusively to actions by legislators, judges, jurists and other legal officials, “living law” primarily consists in the rules actually followed in social life⁴⁴, the norms recognised as obligatory by citizens as members of social groups⁴⁵. According to Ehrlich, a scientific conception of law must concern itself with the rules which live in human society, not only in state institutions.⁴⁶ Much evidence shows – Ehrlich suggests – that extremely powerful systems of normative regulation distinct from the official lawyer's law govern important areas of social life, with little or no reference to the norms of decision. The state is not the only association that exercises coercion; there is an indefinite number of associations in society that exercise it much more forcibly than the state.⁴⁷ According to Ehrlich, much of human life is lived in voluntary associations which assign to each member his or her own position within it and the rights and duties attaching to that position. It follows that the obligatory character of a norm is neither exclusively nor preponderantly

⁴⁰D. Nelken, *Law in Action or Living Law? Back to the Beginning in Sociology of Law*, Legal Studies, 1984, 4, p. 171

⁴¹R. Cotterrell, *The Sociological Concept of Law*, J. Law & Soc., 1983, 10, 2, p. 241

⁴²R. Cotterrell, *The Sociology of Law: an Introduction*, cit., p. 2

⁴³R. Cotterrell, *The Sociological Concept of Law*, cit., p. 242

⁴⁴R. Cotterrell, *The Sociology of Law: an Introduction*, cit., p. 29

⁴⁵D. Nelken, *Law in Action or Living Law? Back to the Beginning in Sociology of Law*, cit, p.168

⁴⁶J. Griffiths, *What is Legal Pluralism?*, cit., p. 24

⁴⁷J. Griffiths, *What is Legal Pluralism?*, cit., p. 26, quoting Ehrlich

determined by the courts. It is the social association that is the source of the coercive power, the sanction of all social norms, of law no more than of morality, religion, honour, etiquette, fashion⁴⁸. Relying on the concept of living law, sociological legal approaches seek to explain the character of law in terms of historical and social conditions and treat doctrinal and institutional characteristics of law emphasised in legal theory as explicable in terms of their social origins and effects. Contemporary theories of legal sociology maintain that an understanding of the nature of law requires not only the analysis of legal doctrine – in terms of concepts, principles and rules – but also the empirical knowledge of the society and the environment in which such elements acquire their meaning.⁴⁹ Living law is far wider in scope than the norms created and applied by state institutions. At the core of normative pluralism lies the idea that state or lawyer's law is only one form of law and is not necessarily to be seen in sociological terms as dominant, or at least exclusive. Legal pluralists encompass within the concept of law numerous forms of normative systems (customary, mercantile, personal, religious), whose creation, interpretation and enforcement occurs somewhat independently on state agencies' activity. According to this view, law exists in various layers or levels: it may exist in associations, institutions or other social systems of various size and nature. This broader conception of law derives from the empirical observation of social reality: sociologists supporting the legal pluralist view argue that legal ideas and the fundamental problems of legal regulation⁵⁰ with which lawyers are familiar pervade in fact almost every aspect of social life and not only the institutional activity of state agencies. Whereas the state law conception emphasises the relationship between law and the power of state, the legal pluralism conception tends to stress the pervasive social importance of legal ideas as responses to fundamental problems of social interaction occurring at every level of society⁵¹.

Santos' concept of interlegality

One of the best-known account of legal pluralism in a globalised society is constituted by Santos' notion of interlegality. The Portuguese legal theorist maintains that modernity has fostered the

⁴⁸ J. Griffiths, *What is Legal Pluralism?*, cit., p. 26 quoting Ehrlich

⁴⁹ R. Cotterrell, *The Sociology of Law: an Introduction*, p. 3

⁵⁰ Such problems include e.g. the conditions of legitimacy of legal orders, the conditions of effectiveness and enforcement of law, the interpretation, development and systemisation of the rules, the relationship between certainty and justice as legal ideals and the relationship between sources of legal authority.

⁵¹ R. Cotterrell, *The Sociological Concept of Law*, cit., p. 246

emergence of a new paradigm for understanding law⁵². Like all legal pluralists, he criticises the positivist conception of law as a fiction. In order to function adequately, state law needed to affirm itself as the only legal source within its territory and revoke all the previous formal and informal laws (behavioural codes, customary laws, etc.), which might interfere with its application. This is, according to Santos, a misreading of reality: since law and society are mutually constitutive, the previous laws, although formally revoked, have nonetheless left their imprint on the social relations they used to regulate. Though revoked, they remain present in people's memories: legal revocation is not social eradication.

In a typical legal pluralist fashion, he juxtaposes the fictitious notion of hierarchical positivist law to the new notion of interlegality. In his view, the global legal order consists in a constellation of different legal systems operating in local, national, and transnational contexts. In order to describe this situation of pluralism, he uses the neologism of "interlegality": a situation in which the different legal orders are not conceived as separate entities coexisting in the same political space, but rather as superimposed, interpenetrated, and mixed in our minds as much as in our actions⁵³. In this condition of interlegality, each normative order aspires to be exclusive, to have the monopoly of the regulation and control of social action within its territorial scope. But - Santos observes - each normative order, by representing reality according to its own code, constitutes only one of the many possible ways of imagining the real. Therefore, by claiming a monopoly, each normative order seeks to impose its own vision of reality and ends up distorting it. In particular, the code law uses to represent reality is similar to that used by maps: consequently, the distortive effects of law are similar to those produced by maps on reality.

The most important mechanism of representation/distortion of reality that laws and maps use is scale. Scale is the degree of details laws and maps choose to represent reality. Like maps are a miniaturised version of reality, like map-making involves the filtering of details, so laws represent reality by selecting a number of relevant details (i.e. social action or behaviours) they want to regulate. What makes law so useful to social regulation is its selection of what it considers legal and what illegal, the catalogue of actions which one can or cannot do. Legal orders often regulate the same kind of social action, but on a different scale (large, medium, small scale): in other words, they use different criteria to determine the meaningful details and the relevant features of the activity they intend to regulate. If we take as an example the social behaviour represented by labour conflict, we find that the factory code (that is a form of local law) regulates this behaviour in great detail, in order to settle or even prevent labour conflicts. In the wider context of the national state

⁵² B. de Sousa Santos, *Toward a New Legal Common Sense*, Northwestern University Press, 2003, p. 5

⁵³ B. de Sousa Santos, *Toward a New Legal Common Sense*, cit., p. 472-473

law, labour conflict is only a dimension, although important, of industrial relations, whereas in the widest context of world legality labour conflict becomes a small detail in international economic relations. As we can see, each of these legal orders has a different detection threshold, which determines the smallest details of the social object that will be considered for regulation. Local law regulates the labour conflict in great detail (it acts on a large-scale legality), where the national law regulates the labour conflict only in general terms (it acts on a medium-scale legality). Finally at the international or world level, labour conflict is hardly worth mentioning: the world legality operates on a large scale legality which is poor in details and features, describes behaviours and attitudes, reducing them to general types of action. In this context, labour conflict does not even reach the regulation threshold and therefore does not belong to the realm of law.

The second mechanism law and maps use to represent/distort reality is projection, that is the ideology and cultural tradition of the cartographer or legislator. In each historical period, maps are drafted according to a fixed point around which the space is organised: medieval maps used to put a religious site at the centre (Jerusalem in the European maps, Mecca in the Arab maps); modern maps usually put the European continent at the centre. Likewise, the liberal bourgeois legality is centred upon the concept of contract: not only does the contractual perspective regulate private economic law, but it is also exported in other legal fields such as constitutional, administrative and even criminal law. By contrast, some forms of local law are centred upon the idea of land: this is the case for example of the law of the squatter settlements in Rio, where any dispute is settled with connection to land concepts and terminology.

In sum, legal orders, albeit regulating the same phenomena, use different criteria to determine the relevant actions they intend to regulate: they represent reality in different ways, they create different legal realities. However, different legal orders operating on different scales do not exist in isolation, but rather interact in different ways. As a result of these interactions among legal orders, one cannot speak properly of law and legality, but rather of interlaw and interlegality. In a context of legal pluralism, legal orders are not conceived as separate entities coexisting in the same political space. Our legal life is constituted by an intersection of different legal orders mixed in our minds as much as in our actions, that is by interlegality.

Despite its vagueness and ambiguity, the concept of interlegality may provide a radical change of perspective in the study of law. Interlegality suggests that understanding a legal order requires multiple viewpoints and perspectives⁵⁴. Constructing whole views of law in the world is difficult because there are many kinds of normative orders, with different cultural and historical background, that overlap and interact in complex ways in the same geographical space. That is why, in

⁵⁴W. Twining, *Globalisation and Legal Theory*, cit. p. 235

understanding a legal order, it is not enough to concentrate only on the “state-citizen relations” perspective: for every field of social relations (the workplace, the household, the marketplace and the global setting) there are not only different branches of state law, but also different social orderings interacting at various levels. Interlegality designates the complex relations among legal, quasi-legal and social orders co-existing in a more or less independent way from official state law.

Teubner’s theory of legal pluralism and its sources

The so far most elaborated account of legal pluralism is Teubner’s theory of reflexive law. In order to understand his arguments, one has first to recall its main sources of inspiration, namely the globalist view of globalisation and the concept of autopoiesis.

The globalist view of globalization

As we have seen in section one of this chapter⁵⁵, globalists argue that one of the most powerful effects of globalisation is the re-structuring of economic relations across the world. Economic activities that previously took place between national markets, that is between distinct economic and political units, are now carried out independently of national boundaries. National economies no longer function as autonomous systems of wealth creation, since national boundaries are increasingly marginal to the conduct and organisation of economic activity⁵⁶. Capital has been liberated from national and territorial constraints, while markets have become so interconnected that domestic economies constantly have to adapt to global competitive conditions: it is global capital, rather than states, - globalists contend- that exercises decisive influence over the organisation and distribution of economic power and resources in the contemporary global economy⁵⁷. In short, globalists argue that the transnational organisation of finance, production and commerce is creating a “borderless world economy”: as the dividing line between domestic and foreign politics blurs, by the same token is the distinction between domestic economic activity and global economic activity

⁵⁵ See *supra* pp. 15 ff.

⁵⁶D. Held and A. McGrew, *World Orders, Normative Choices: Introduction*, in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, Polity Press, 2003, p. 483

⁵⁷D. Held and A. McGrew, *World Orders, Normative Choices: Introduction*, cit., p. 485

increasingly difficult to sustain⁵⁸; the transnational organisation of economic power now outstrips the regulatory capacity of states⁵⁹. One of the strongest challenges to state power is therefore represented by a gap between the state and the market: globalist emphasise the increasing discrepancy between a global market and national, discrete units of policy-making and regulation⁶⁰. There is a mismatch between market regulation, which is still state-centred, and market organisation, which no longer works on a state-centred basis. Accordingly, states are in practice no longer able to regulate this transnational organisation of production, which largely operates beyond their national boundaries. States are limited by territorial boundaries, whereas markets no longer depend on boundaries: territorially bounded governments can no longer project their power and policymaking capacity over the space within which a global industry operates⁶¹.

Teubner's theory is in line with the main argument of the globalist view of globalisation, namely the mismatch between a poorly developed international law and a highly sophisticated self-regulation at global level. Nonetheless, Teubner refuses to reduce globalisation to a mere economic phenomenon: not only the economy – he warns – but also the other sectors of an emerging world society (sport, ecology, terrorism) are organising themselves beyond regional boundaries and developing a global law of their own⁶², although he admits that it is in the global economic realm that the most developed examples of a global law without a state (*lex mercatoria*, the internal regimes of multinational enterprises, the *lex laboris internationalis*, technical standardisation of industrial products) are to be found⁶³.

Luhmann's autopoiesis

The theory of autopoiesis was elaborated in the 1990s by the German sociologist Niklas Luhmann. Autopoiesis expresses a polycentric vision of society, a society no longer governed by a single control centre, but made up of a number of autonomous – or better: “autopoietic”⁶⁴ - sub-systems.

⁵⁸D. Held and A. McGrew, *World Orders, Normative Choices: Introduction*, cit, p. 486

⁵⁹D. Held and A. McGrew, *A Global Economy?* in D. Held and A. McGrew (eds), *The Global Transformations Reader: An Introduction to the Globalization Debate*, cit., p. 299

⁶⁰I.Kaul, I. Grunberg, M. Stern, *Global Public Goods*, Oxford University Press, 1999, p. xix

⁶¹W. Reinicke, *Global Public Policy: Governing Without Government?*, Brookings Institution Press., 1998, p. 66

⁶²G. Teubner, *Societal Constitutionalism: Alternatives to State-centred Constitutional Theories*, in Christian Joerges, Inger-Johanne Sand and Gunther Teubner (eds.), *Transnational Governance and Constitutionalism*, Hart Publishing, 2004, p. 12

⁶³G. Teubner, *Breaking Frames: Globalization and the Emergence of Lex Mercatoria*, *European Journal of Social Theory*, 2002, 5, 2, p. 207

⁶⁴Luhmann criticises the « amorphous » notions of autonomy and relative autonomy. The concept of autonomy neglects the fact that systems are capable of creating their own elements and reproduce themselves through the elements they

Luhmann displays a vision of a modern society as differentiated into autonomous, self-referential sub-systems, each with its inherent logic of communication. Consequently, there is no central overarching perspective of society as a whole, but only a multiplicity of perspectives corresponding to the different sub-systems. The starting point of Luhmann's theory is its "system differentiation"⁶⁵ approach to the analysis of society. Unlike most of sociological theorists which have preceded him, Luhmann's primary unit of analysis is not the individual or groups of individuals, but social systems. And these systems consist not of people, but are conceived as systems of meanings⁶⁶. Sociologists are observers not of people, or groups, governments, states, but of society; and by society Luhmann means any social system which gives meaning to the world. The sociologist - he maintains- is an observer of observations, that is to say an observer of all theories, concepts and beliefs people use to understand events, attribute causes, make predictions: in a word, to make sense of reality⁶⁷. The underlying idea of this "second-order observation" is that one can come to see how meaning is attributed to events or objects, only by observing how they are observed. Second-order observation leads Luhmann to argue that each social system gives its own meaning to the world through its own, inherent logic of communication. A social system is a system of communication: it makes sense of reality only through its inherent logic of communication. This logic of communication functions as a sort of binary code: it interprets events by assigning them either a positive or a negative value. For example, the legal system's code classifies events in terms of lawful or unlawful, the political system in governing or governed. Through the logic of communication, the system operates therefore a distinction between what belongs to the system and what does not. According to Luhmann, it is this distinction that constitutes the system. At the same time, the logic of communication, by establishing which events belong to the system, creates a distinction between the system itself and the external environment. This particular way in which social systems work brings Luhmann to argue that each social system is an autopoietic system. An autopoietic system is a system that reproduces itself exclusively through its elements, that is its logic of communication. Each system can observe only what its own code renders visible and cannot use the codes of other systems in its logic of communication: communication occurs only within systems, not between

create. Moreover, the notion of autonomy, as being founded on causal relations of dependence and independence among systems, has a weak explanatory character. Autonomy in terms of causal relations means that each system is more or less insulated from outside interferences, whereas autopoiesis shows that the differentiation occurs not so much among systems, but rather within them. The differentiation of the various subsystems lies in their diverse logic of communication, which is an inherent characteristic thereof. Cfr N. Luhmann, *Law as a social System*, Oxford University Press, 2004, p. 137-138; N. Luhmann, *Closure and Openness: on Reality in the World of Law*, in G. Teubner (ed), *Autopoietic Law: a New Approach to Law and Society*, Walter de Gruyter Publishing, 1988, p. 345

⁶⁵ N. Luhmann, *Law as a Social System*, cit., p. 137

⁶⁶ M. King, *The Truth about Autopoiesis*, Journal of Law and Society, 1993, 20, p. 219

⁶⁷ M. King and C. Thornhill (eds), *Niklas Luhmann's Theory of Politics and Law*, Palgrave Macmillan, 2005, p.2

them⁶⁸. Moreover, the autopoiesis of the system requires the continuing production of new meanings, the continuing interpretation of new events. The next event, however, can rely on already generated meanings. The continuing autopoietic operations build upon the system's previous operations: this leads to a situation of operational closure. Each system is, in Luhmann's language, operationally close: in its continuing autopoietic reproduction, it builds upon the structure generated by its previous operations. Systems are operationally closed in the sense that the communication of meaning within the system is defined solely in terms of the system's own language. Each system is therefore a closed system of communication that can only make further communications out of existing ones⁶⁹. Each act of communication within the system is a link in a chain of communications: it refers back to earlier communications, and it can in turn trigger further communications. But this does not mean that each system is closed to other system's influence: autopoietic closure does not mean isolation⁷⁰. In Luhmann's language, each system is also cognitively open to the others. Each system combines closure and openness: it reproduces itself autopoietically, but at the same time it constantly exposes this process to the external environment⁷¹. This means that each system can register information coming from other systems, only in so far as they can be translated into its own language.

Autopoiesis has important implications for law. Autopoiesis challenges the traditional, positivist conception of law as a body of commands backed by force. Moreover, law seen as an autopoietic system no longer consists of a network of rules and decisions emerging from statutes and courts as well as the activities of legal personnel (judges, lawyers, police and so on) in interpreting and enforcing these rules and decisions. If we move to an autopoietic theory, we find another definition of law, where the threat of force or sanctions no longer represents its defining feature⁷². Here social systems consist not of individual or organised units, but of communications. In the legal system social events derive their meaning through the law's proper binary code of lawful/unlawful, legal/illegal; that is, the continuous necessity of deciding between legal right and wrong⁷³. Consequently, any classification of social acts and events according to this binary code of lawful/unlawful may be regarded as part of the legal system, no matter where it was made or who

⁶⁸ J. Arnoldi, *Niklas Luhmann*, in A. Elliott and B.S. Turner (eds), *Profiles in Contemporary Social Theory*, Sage Publications, 2001, p. 250

⁶⁹ G. Teubner, R. Nobles, D. Schiff, *The Autonomy of the Law: an Introduction to Legal Autopoiesis*, in J. Penner, D. Schiff and R. Nobles (eds) *Introduction to Jurisprudence and Legal Theory: Commentary and Materials*, Butterworths, 2003, p. 897.

⁷⁰ N. Luhmann, *Closure and Openness: on Reality in the World of Law*, cit. p. 336

⁷¹ N. Luhmann, *The Unity of the Legal System*, in G. Teubner, *Autopoietic Law: a New Approach to Law and Society*, cit. p. 26

⁷² M. J. King, *The Truth about Autopoiesis*, cit., p. 223

⁷³ N. Luhmann, *Operational Closure and Structural Coupling: The Differentiation of the Legal System*, *Cardozo Law Review*, 1992, 13, p. 1427.

made it. On this reading, the legal system is not confined to the activities of formal legal institutions: also scholarly interpretation of legal norms in law schools is for example considered law. By the same token, also social workers who investigate cases of child abuse with a view to possible court action are treated as part of the legal system. All these acts are instances of social facts and events being classified as lawful or unlawful and the communication of statements based on such classification. Conversely, not all communications made by judges, lawyers, police officers and so on are legal communications. When a judge, for example, discusses with a lawyer in a courtroom on the possibility of costs being saved by a negotiated settlement, he or she may well do so without any reference to the respective claims of legality of the competing parties. This form of communication can thus be regarded as economic rather than legal. It will only become part of the legal system if the judge makes reference to the classification of events as lawful or unlawful, for example if he or she adds that one or other of the parties would be likely to lose the case if no compromise solution is agreed upon.

Global law without a state

The concept of autopoiesis has been further explored by Teubner with regard to law. In particular, he has focused on those forms of self-regulation existing independently of state authority, which he has grouped under the label of “emerging global law without a state”. The starting point of Teubner’s thought is that the “official” legal system is in close relationship with the other social systems: it is a semi-autonomous social field⁷⁴. Various sectors of world society are developing global rules of their own (which Teubner emphatically calls “global law without a state”), in relative insulation from the state, official international politics and international public law. Examples of this emerging sectors of a global law without a state are constituted by the internal regimes of multinational companies, non-governmental organisations drawing up human rights codes addressed to multinational firms, and, last but not least, the *lex mercatoria*.⁷⁵ This global law without a state has its own peculiar characteristics distinguishing it from the traditional law of the nation states. Such

⁷⁴ The term semi-autonomous social field was used by the legal anthropologist Sally Falk Moore to explain the relationship between law and society. She argued that on the one hand the official state legal system has rule-making capacities and the means to induce or coerce compliance, but on the other hand it is vulnerable to the rules stemming from other normative systems in society. The state legal system can generate norms internally, but it is simultaneously set in a larger social environment, which can, and does, affect and invade it. See S.F. Moore, *Law and Social change: The Semi-Autonomous Social Field as an Appropriate Subject for Study*, Law and Society Review, 1972/73, pp. 719-746 .

⁷⁵ On this concept see *infra* pp. 85 ff.

different characteristics are rooted in the particular features of the globalisation process. According to Teubner, globalisation does not entail the emergence of a world society under the leadership of inter-state politics; on the contrary, globalisation is occurring in an institutional vacuum, where politics and positive law are particularly weak. It is just the difference between a highly globalized economy and a weakly globalized politics which fosters the emergence of a global law with no legislation, no political constitution, no politically ordered hierarchy of norms⁷⁶. Legislation on a world scale is a cumbersome process. A global administration scarcely exists, and there are few signs of a strong, independent, large scale, global development of genuine legal institutions. In this regulation vacuum, civil society is self-organising at the global level: global law grows mainly from the social peripheries (i.e. the various sectors of society), not from the political centres of nation states and international institutions. Global law is also highly fragmented and contradictory, because such is the development of the global civil society. Not only the economy, but also science, culture, technology, health systems, social services, the military sector, transport, communication, media, etc are nowadays autonomous social systems developing their own self-regulation at global level. Such social systems are starting to form an authentic global society, or rather, a fragmented multitude of diverse global societies.

Globalization breaks the hierarchical structure of the law: at the global level there is no supranational authority, but a vacuum of authority, a regulatory anarchy. In this context, legislation moves away from its privileged place at the top of the norm hierarchy and is placed on a equal footing with other types of social law making⁷⁷. Accordingly, it makes no longer sense to define law as a chain of hierarchically ordered acts, because there is no overarching authority which can legitimate such chain. The traditional view of law as an exclusive product of the state is inadequate to understand self-regulation phenomena occurring at global level, a context in which the state has lost its law-making monopoly. The emergence of private regimes at global level is challenging the traditional basic principles of the positivist order, such as the derivation of validity of legal norms in a hierarchy of sources of law, the legitimation of law through a political constitution, the making of law by parliamentary bodies⁷⁸. It is therefore necessary to conceive of the law in a different, "heterarchical" way. A new terminology, a "linguistic turn" is needed, which presupposes a new perspective on law. The traditional terminology of legal doctrine is in itself inadequate, since it has developed exclusively with reference to state law. And indeed, these global private regimes do not fit into the traditional category of customary law. Although both customary law and new global

⁷⁶ G. Teubner, *Breaking Frames*, cit., p. 211

⁷⁷ G. Teubner, *Breaking Frames*, cit., p. 205

⁷⁸ G. Teubner, *Global Private Regimes: Neo-spontaneous Law and Dual Constitution of Autonomous Sectors in World Society ?* in Karl-Heinz Ladeur (ed.), *Globalization and Public Governance*, Ashgate Publishing, 2004, p. 75

private regimes have in common the origin in society's spontaneous regulation, the latter do not simply result from repeated interactions among individuals: they are the product of formal and complex law-making processes occurring in specialised organisations which mirror the law-making process in national parliaments.⁷⁹

According to the new concept of law proposed by Teubner, sanctions and rules are no longer essential elements. Law is no longer conceived as a system of rules endowed with state sanctions: law turns from a system of rules to a system of communication, which makes sense of the world through the binary code legal/illegal. In other words, whenever we can identify in civil society a system of communicative events and acts which operate according to the legal logic, we have a legal system. At global level, we have a situation of legal pluralism, whereby state law has to coexist with other forms of law-making processes using the same language, the same binary code which law uses. By looking at the law as a system of communications, global legal pluralism is no longer considered as a situation of conflicting social norms, but as a multiplicity of diverse communicative processes in a given social field that observe social action under the same binary code legal/illegal⁸⁰. Each normative order, being based on the same universal code of legality, does not function in isolation, but on the contrary can easily be connected, and is actually interconnected in many ways, with the others. Teubner juxtaposes to the old hierarchical legal order the distinction between centre/periphery in legal law making. Globalization shows that positivism is too rigid in defining the boundaries of law. The boundaries of law are not so tightly closed as positivism outlines them, because there is a continuous interchange between law and society. The frontiers of law are fluid because there are some areas thereof which lie at the border between law and other social systems. At the centre of the legal system lies the official law as applied by the courts (law in the narrow sense), whereas at the periphery lie a wide range of normative orders of a hybrid or quasi legal nature. These normative orders, which are the product of society's self-regulation, are made up of both legal and social norms and lie at the periphery in the sense that they constitute a sort of grey zones between the legal and the other social realms : in Teubner's words, <<they are produced in the periphery of the legal systems in structural coupling with external social processes of rule-formation>>⁸¹

Lex mercatoria is the most important example of these hybrid normative orders lying at the periphery of the legal system. It was originally (and in part still is) a product of the *societas mercatorum*, that is a set of customs and usages merchants had developed to regulate their economic transactions. As an expression of self-regulation, *lex mercatoria* belongs more to the

⁷⁹ G. Teubner, *Global Private Regimes*, cit., p. 76

⁸⁰ G. Teubner, *Legal Pluralism in the World Society*, cit., p. 14

⁸¹ G. Teubner, *Breaking Frames*, cit., p. 205

socio-economic realm than to the legal system. But especially through its application in international arbitration – Teubner observes – *lex mercatoria* is moving from the periphery to the centre of the legal system. Lawyers are transforming *lex mercatoria* into proper law by translating its socio- economic rules into legal language. They have <<constructively distorted economic realities by reading legal rules into them>> and therefore they <<have actually enacted a new positive law which is unambiguously law and nothing else>>⁸². Accordingly, the language, the code *lex mercatoria* uses to interpret reality resembles now more and more that of the official court's law.

Arbitration is also providing *lex mercatoria* with an autopoietical structure through the introduction of the practice of precedents⁸³. In solving commercial disputes, arbitrators are claiming that old previous cases constitute precedents for them and begin to distinguish and to overrule. Accordingly, *lex mercatoria* is given its recursive structure characterising the legal realm as a system. What is more, quasi-legislative institutions are emerging (formulating agencies such as UNCITRAL, the ICC, the ILA) which produce ad hoc rules for transnational commercial transactions. In conclusion, exploiting the vacuum of authority at global level, private autonomy is creating an “institutional triangle”, a set of private institutions which reflect the traditional forms of regulation in the national context: “adjudication”, “legislation” and “contracting” (that is private autonomy).⁸⁴

In conclusion, *lex mercatoria*'s very existence and application in international practice breaks the taboo about the necessary connections between law and state.⁸⁵ It demonstrates that valid law may spontaneously emerge on a global scale without the authority of the state, without its sanctioning power, without its political control and without the legitimacy of democratic processes. Nonetheless, Teubner acknowledges that a main problem with this non-positivist notion of law is its legitimation. In the absence of an overarching political authority and global legal institutions, who establishes the binary code? who decides what is legal and what is not? According to Teubner, the answer lies in the concept of self-legitimation. As seen above, the global context is somewhat an uncharted territory, characterised by a vacuum of authority. This vacuum is so to say colonised by private autonomy through self-regulation. In a context where no pre-existing legal order can be said to be the source of validity of global contracts, contracting itself becomes a source of law, which stands on equal footing with judge made law and with legislation. According to Teubner, we are faced with a self-legitimizing situation comparable only to the authentic revolution imposing a new

⁸² G. Teubner, *Breaking Frames*, cit ,p. 207

⁸³ On this point see in more detail *infra* pp. 185 ff.

⁸⁴ G. Teubner, *Breaking Frames*, cit, p. 210

⁸⁵ G. Teubner, *Legal Pluralism in the World Society*, p. 10

regime with the use of force, with the sole difference that in this case *lex mercatoria* is self-imposing in a peaceful, silent way⁸⁶.

New developments in the autopoiesis theory

Luhmann's and Teubner's discourse has been further developed in a recent paper by G. P. Calliess and M. Renner "From Soft Law to Hard Code: the Juridification of Global Governance"⁸⁷. In particular, they have tried to draw a distinction between legal and social norms in the context of globalisation. Relying on Luhmann's thought, they distinguish between performance and function of law in modern societies. The former, which essentially consists in providing behavioural control and dispute resolution devices, is carried out by the legal system in competition with the other social systems⁸⁸ (for instance, the behaviour of economic actors can often be better regulated by social, self-regulation norms rather than legal norms and mediation and conciliation practices are good examples of resolution of social conflicts outside the legal system). The latter, which consists in the stabilization of normative expectations, is carried out by the legal system alone and therefore distinguishes it from the other social systems⁸⁹. Moreover, this function constitutes the mechanism by which the legal system operates as an autopoietic system: in order to stabilize normative expectations, the legal system has to select those social expectations which are worth protecting⁹⁰, i.e. those which are deemed to acquire the status of legal norms; this selection is carried out through an autopoietic process, that is a network of legal communications perpetually referring to previous legal communications⁹¹ (for example, in common law systems the selection of legal norms is guaranteed by reliance on judicial precedents and the doctrine of *stare decisis* which acts as the invisible hand of the system by making sure that adjudication orients itself along the lines of a few leading cases that act as points of reference for later decisions).

⁸⁶ On the issue of the legitimacy of international commercial arbitration see in more detail *infra* pp. 200 ff.

⁸⁷ G. P. Calliess and M. Renner, *From Soft Law to Hard Code: the Juridification of Global Governance*, Ratio Juris, 2009, available on the internet at http://papers.ssrn.com/sol3/papers.cfm?abstract_id=1030526 (July 2009)

⁸⁸ G. P. Calliess and M. Renner, *op. cit.*, p. 8; N. Luhmann, *Law as a Social System*, cit., pp. 167-172

⁸⁹ Law allows to know which expectations will meet with social approval and which not, so that it is possible to anticipate whether a conduct will be legal or illegal, subject to law or not subject to law. The expectations generated by law exist, therefore, as fixed signposts pointing in the direction of the way things ought to be. Expectations remain stable in spite of disappointments, i.e. even if norms may have little or no validity as reliable indicators of future events, because not complied with in practice. Given this certainty of expectations, one can take on the disappointments of everyday life with a higher degree of composure: at least one knows that one will not be discredited for one's expectations. (cfr N. Luhmann, *Law as a Social System*, cit., p. 148; M. King and C. Thornhill, *Niklas Luhmann's Theory of Politics and Law*, Palgrave, 2005, pp. 53-55).

⁹⁰ N. Luhmann, *Law as a Social System*, cit., p. 152

⁹¹ G. P. Calliess and M. Renner, *op. cit.*, p. 9

Callies and Renner argue that a number of global governance regimes are crossing the line from non-legal to legal forms of regulation, by developing two devices which allow for the autopoietic generation of legal communications, namely an impartial dispute-resolution procedure allowing for the verbalisation of conflicts (i.e. the communication of a social conflict in terms of legal/illegal and vis à vis a third party) and the publication of past decisions, so that earlier legal communications can serve as reference point for later ones⁹². This is the case of arbitration and ADR related to international trade disputes (which they call *lex mercatoria*) and, to a larger extent, the Uniform Domain Name Dispute Resolution Policy (UDRP) of the Internet Corporation for Assigned Names and Numbers (ICANN), an online dispute resolution procedure for domain name issues. In the former, the development of an autonomous legal system proceeds at slower pace, given the inchoate practice of precedents, the scarce, albeit increasing, publication of arbitral decisions and the lack of any institutionalised court hierarchy⁹³. In the latter the enabling conditions for the development of an autonomous legal system are fully met: not only is an impartial arbitral panel set up, but also panel decisions are published on the internet; although the UDRP Rules do not envisage the binding nature of precedent, in practice the UDRP Panel decisions often refer to earlier cases employing the well known common law techniques of analogical reasoning⁹⁴.

Legal pluralism in US Scholarship: the New Haven School of transnational legal process

The New Haven School at Yale University is developing a particular version of legal pluralism, which, starting from analogous premises as the European counterparts, finds its originality in the application of the legal process approach to the globalization context.

The starting point of the New Haven discourse is the classical legal pluralism refrain: the most important effect globalisation has exerted on the legal realm is the marked decline of national sovereignty and the concomitant proliferation of international regimes, institutions, and non- state

⁹²G. P Calliess and M. Renner, *op. cit.*, pp. 11-13

⁹³G. P Calliess and M. Renner, *op. cit.*, p. 24; G. Teubner, , *Global Bukowina: Legal Pluralism in the World Society*, in G Teubner (ed), *Global Law Without a State* , Aldershot Publishing, 1997, p. 18.

⁹⁴G. P Calliess and M. Renner, *op. cit.*, p. 23

actors⁹⁵. These two trends have radically restructured the context in which law is produced and have inaugurated the era of transnational relations, that is the regular interactions across national boundaries arising when at least one actor is a non-state actor or does not operate on behalf of a national government or an intergovernmental organisation⁹⁶. Transnational relations are increasingly regulated by a new form of law which cannot be encompassed in none of the traditional categories of national and international law. On this reading, transnational law embraces all law which regulates actions or events which transcend national frontiers, including both public and private international law and other rules which do not wholly fit into such standard categories⁹⁷. Transnational law-making process, they argue, is characterised by a high degree of hybridism: public and private actors, including nation states, international organisations, multinational enterprises, non-governmental organisations, and private individuals, interact in a variety of public and private fora, to make, interpret, internalise and enforce rules of transnational law⁹⁸.

The post-Cold War era has witnessed a wide expansion of transnational relations and transnational law, so that the latter concept appears somewhat substituting the old international law, which is no longer able to explain the changed scenario of international relations. As sovereignty has declined in importance, global decision-making functions are now executed by a complex network of nation states, intergovernmental organisations, and informal regimes. It follows that the divide between national, international and transnational law wears thinner and thinner: not only does public international law now comprise a complex blend of customary, positive, and soft law, but the whole international legal order is becoming “neomonistic”, with new channels opening for the interpenetration of international and domestic law⁹⁹.

In this changed scenario, American theorists of legal process study how the transnational legal process is carried out in the various areas of international society: international human rights,

⁹⁵ H. Koh, *Review Essay: Why do Nations Obey Law?* Yale Law J. 1997, 106, p. 2604

⁹⁶ T. Risse-Kappen, *Bringing Transnational Relations Back In: Introduction* in ID (ed), *Bringing Transnational Relations Back In: Non-State Actors, Domestic Structures and International Institutions*, Cambridge University Press, 1995, p. 3

⁹⁷ P. C. Jessup, *Transnational Law*, Yale University Press, 1956, p. 2

⁹⁸ H. Koh, *Review Essay: Why do Nations Obey Law?* cit. p. 2626

⁹⁹ H. Koh, *Review Essay: Why do Nations Obey Law?* cit p. 2631. The clash between the monist and the dualist theory is the most disputed issue in international law. The monist theory argues that international law and national law are simply two components of a single body of knowledge called 'law'. 'Law' is seen as a single entity of which 'national' and 'international' versions are merely particular manifestation. In case of conflicts between the two systems, international law is said to prevail. According to the dualist theory, international and national laws are two different and separate systems, which are based not only upon different jurisdictions and sanction bodies, but also upon different sources and different subject-matters: international law governs relationship between states, whereas national law deals with rights and obligations of individuals within the state. The neomonism of the legal pluralist theorists can be considered as new essentially because it denies the hierarchical structure of the monist global order: whereas the classical monist theory sees international law and national law as part of the same hierarchical legal order, with international law at the top of it, neo-monists emphasise the heterarchical structure of the global order, its high degree of interpenetration, overlapping among jurisdictions.

international trade, international organisations, arms control and use of force¹⁰⁰. Central to this approach is the criticism against the traditional positivist notion of law as a set of sovereign commands reflecting the unitary interests of nation states¹⁰¹. Instead of looking at the law as a rigid set of rules unilaterally reflecting state will onto social behaviour, these authors argue that it is necessary to focus on the interplay between rules and social process in enunciating the law. The analysis of the law-making process at transnational level shows that a large variety of actors beyond simply unitary sovereign states is involved in this process. In particular, they emphasise the emergence of a large number of non-state communities with a “juris-generative” power (multi-national corporations and industry groups, NGOs, religious organisations, private regulatory bodies, networks of activists, and so on), that is to say the power of generating norms in relative autonomy with respect to state control. Although such norms are not bestowed with coercive power, they nonetheless exert a significative influence in the transnational and even national law-making process. Such juris-generative communities seek to inculcate their norms at transnational and national level through a number of persuasive techniques, such as political lobbying, industry standard setting, soft law¹⁰². Law-making both at national and transnational level becomes like a “dialectical dance” of multiple communities, each assessing jurisdiction over the same activities¹⁰³. The “transnational legal process” approach to law consists therefore in the study of how public and private actors, including nation-states, international organisations, multinational enterprises, non-governmental organisations, and private individuals interact in a variety of public and private, domestic and international fora to make, interpret, internalise, and enforce rules of transnational law.¹⁰⁴

In this respect, many examples may be provided in order to show how the transnational process works. One is represented by the Spanish extradition orders issued in 2003 in an attempt to prosecute dozens of Argentine citizens for human rights abuses committed under the military dictatorship of the 1970s. Spanish extradition requests were illegitimate from the sovereign Argentine legal order’s standpoint: Argentina had previously conferred amnesty to those who had been involved in the military regime. Therefore, although such measure was vividly contested within the country, any prosecution in Spain would infringe on Argentina sovereign’s choice to grant amnesty. Nonetheless, Spanish extradition requests gave the Argentinian President more leverage in his struggle against amnesty laws: he could use Spain’s extradition requests to increase pressure both on Argentina’s Parliament and Supreme Court to officially overturn amnesty laws.

¹⁰⁰ See bibliography mentioned in H. Koh, *Review Essay: Why do Nations Obey Law?* cit. p. 2620

¹⁰¹ P. Schiff Berman, *A Pluralist Approach to International Law*, Yale L.J. 2007, 301, 32, p. 307

¹⁰² P. Schiff Berman, *A Pluralist Approach to International Law*, cit., p. 304.

¹⁰³ P. Schiff Berman, *A Pluralist Approach to International Law*, cit., p. 327

¹⁰⁴ H. Koh, *Review Essay: Why do Nations Obey Law?* cit. p. 2626

And indeed, just one month after Spain's request, the Argentine Congress voted by large majority to annul the amnesty laws; in 2005 the Supreme Court stroke down the amnesty laws, thus clearing the way for domestic human rights prosecutions.

Another example is constituted by the efforts of US individual plaintiffs to hold multi-national corporations responsible for violations of international law in front of national courts¹⁰⁵. By pleading such cases in front of national courts, private individuals seek to "seed" domestic institutions with international legal principles¹⁰⁶. As the United States appears increasingly indifferent to the development of international legal norms¹⁰⁷, private citizens are becoming the agents for internalizing international law in the domestic legal system. By so doing, private actors are also focusing international law on private actors (i.e. the multi-national corporations): international law is becoming privatised in the sense that increasingly individuals are both agents and addressees of international law¹⁰⁸. Accordingly, the application of public international law to multi-national corporations blurs the traditional distinctions of public versus private international law and municipal versus international law¹⁰⁹.

A third example, which also shows how in the transnational legal process normative orders are overlapping since each claims exclusive jurisdiction over the same range of activities, is constituted by the Yahoo! case¹¹⁰. In 2000 France tried to prosecute the internet multinational enterprise "Yahoo.com" for allowing French citizens to buy Nazi memorabilia and download Holocaust denial material from sites accessible through the US search engine. Nazi-related materials were not available on Yahoo.fr (Yahoo.com's French subsidiary), because French Law prohibited Nazi propaganda. But French citizens could easily circumvent this ban by accessing, Yahoo's American site Yahoo.com. According to Yahoo. com, in order to comply with the injunction, it would need to remove the pages from its servers altogether and not just for the French audience. This would amount to denying such material also to non-French citizens, many of whom had the right to access the materials under the laws of their countries (in particular under the freedom of speech and the freedom of press principles enshrined in the First amendment of the U.S. Constitution). Thus the

¹⁰⁵ J. R. Paul, *Holding Multinational Corporations Responsible Under International Law*, Hastings Intl & Comp. l. Rev., 2001, 24, p. 289. This has happened especially with regard to violations of human rights, exploitation of workers and environmental issues.

¹⁰⁶ *Ibidem*

¹⁰⁷ The US' most famous act of indifference towards new developments of international law is the non ratification of the Kyoto Protocol, but other examples may be provided: failure to ratify the International Covenant on Economic, Social and Cultural Rights, the Convention on the elimination of all Forms of Discrimination against Women, the Convention on the Rights of the Child, and the Convention on the Prohibition of the Use, Stockpiling, Production and Transfer of anti-Personnel Mines. Cfr p. 287-288

¹⁰⁸ J. R. Paul, *Holding Multinational Corporations Responsible Under International Law*, cit. p. 290

¹⁰⁹ J. R. Paul, *Holding Multinational Corporations Responsible Under International Law*, cit, pp. 290-291

¹¹⁰ Cfr J. Reidenberg, *The Yahoo Case and the International Democratization of the Internet*, Fordham Law and Economics Research Paper n. 11, April 2001 available on papers.ssrn.com/sol3/papers.cfm?abstract_id=267148 (July 2009)

U.S.-based “Yahoo. Com” argued that the French assertion of jurisdiction was an impermissible attempt by France to impose global rules for internet expression. But “Yahoo.com” argument implied in turn an extraterritoriality claim: if France was not able to prevent the access of French citizens to prohibited material, then the national orders with more permissible rules (in particular the US law) were able to impose their rules to French legal system, thereby displaying an extraterritorial effect.

In this changed context, coercive sanctions can no longer constitute the distinguishing element of the law. At the transnational level an overarching authority is lacking, and therefore compliance cannot be ensured through coercive sanctions. The analysis of the transnational legal process shows that the enforcement model based on coercion is usually doomed to failure: a sanctioning authority is rarely granted by a treaty, rarely used when granted, and likely to be ineffective when used.¹¹¹ As a result, an alternative model explaining compliance is proposed, which is founded on the repeated participation of the various actors to the transnational legal process. Transnational actors obey transnational law not because they fear the threat of a coercive sanction, but as a result of repeated interaction with other actors in the transnational legal process. According to this model, reciprocal interactions among transnational actors lead to the enunciation or the interpretation of a global norm applicable to a particular situation. In the course of this interaction, each party seeks to inculcate the new norm (or its new interpretation) so created into the other party’s normative system. In so doing, the aim is to persuade the other party to obey the norm as part of its internal value set. Such new norm will then guide future transnational interactions between the parties and future transactions will further internalise these norms. Eventually, repeated participation in the process will help to shape the interests and identities of the participants in the process¹¹². In particular, three forms of internalisation are distinguished. Social internalisation occurs where a norm acquires so much public legitimacy, that there is a widespread general obedience to it. Political internalisation occurs where political elites accept a norm and adopt it as a matter of government policy. Legal internalisation occurs where a transnational norm is incorporated into the domestic legal system through executive action, judicial interpretation, legislative action, or some combination of the three¹¹³.

Transnational legal process leads to a shift in the meaning of the term “jurisdiction” which appears closer to the original Latin meaning “to speak the law”. Jurisdiction is no longer meant as the power to enforce legal norms, but as the ability to articulate them.¹¹⁴ Embedded in the notion of

¹¹¹ A. Chayes and A. Handler Chayes, *The New Sovereignty: Compliance with International Regulatory Agreements*, Harvard University Press, 1998, pp. 2-3

¹¹² H. Koh, *Review Essay: Why do Nations Obey Law?* cit. p. 2646

¹¹³ H.. Koh, *Review Essay: Why do Nations Obey Law?* cit. p. 2656-2657

¹¹⁴ P. Schiff Berman, *From International Law*, cit, p. 534

transnational legal process is the idea that the state does not hold the monopoly on normative assertions, but rather a variety of non-state communities are articulating alternative norms which, by force of persuasion, may take hold over time¹¹⁵. From this perspective, jurisdiction becomes the way a community manages to persuade the other communities to adopt a given set of rules

The downsides with legal pluralism

The literature on legal pluralism has been severely criticised by many commentators. Much of the debate has centered around the defects of legal pluralism as a scientific concept. Its broad notion of law, it has been argued, makes it difficult to draw the line between legal and non-legal phenomena, between legal orders, traditions and cultures. As Klaus Günther and Ralph Michaels put it: “when the distinction between law and other social norms disappears, when every social actor who is creating social norms and who has the power to execute them is treated as a legislator, when the validity of positive law goes side by side with other types of social acceptance (e.g. persuasion or factual acceptance by a majority)”¹¹⁶, then “where do we stop speaking of law and find ourselves simply describing social life?”¹¹⁷

Another criticism is that legal pluralism fails to reconstruct the complex interactions among coexisting normative and legal orders. According to a legal pluralist view, law is concerned with relations among agents or persons at a variety of levels, not just relations within a single nation state or society. Any conception of law that is restricted to the domestic law of nation states and classical public international law is extremely narrow and inadequate to cope with the complexity of social reality. But how are we to account for the interactions among these different levels? Terms such as interpenetrating, intertwined, superposed, overlapping, mutually constructive, dialectical, undoubtedly offer only a vague answer to the complicated connections between the social and the legal fields¹¹⁸.

Finally, it is often suggested that legal pluralism concerns more anthropologists and sociologists than jurists and also that it is only marginally relevant to the practicing lawyer's interests, being a pure academic discourse. Nonetheless, all lawyers dealing with transnational transactions and alternative dispute resolution are operating in contexts of normative pluralism, involving non-state law as well as official state law. Moreover, with the growing consciousness of issues such as

¹¹⁵P. Schiff Berman, *From International Law*, cit, p. 538

¹¹⁶K. Günther, *Legal Pluralism and the Universal Code of Legality*, cit., p. 12

¹¹⁷ R. Michaels, *The Re-statement of Non-state law : the State Choice of Law, and the Challenge of Global Legal Pluralism*, Wayne Law Review, 2005, 51, p. 1225

¹¹⁸ G. Teubner, *The Two Faces of Janus: Rethinking Legal Pluralism*, Cardozo Law Review, 1992, 13, p. 1443-1444

minority rights and refugees' protection, lawyers are increasingly involved with complex problems of interlegality.

In conclusion, despite theoretical difficulties as well as emphatic claims embedded in legal pluralism, its main idea - the emphasis on the coexistence of multiple normative and legal orders within the same social space - remains an important caveat to the jurist.

SECTION III: THE CONCEPT OF LEGITIMACY IN GLOBAL GOVERNANCE

The concept of legitimacy in social sciences

Legitimacy may be defined in general terms as a state of appropriateness ascribed to an actor, object, system, structure, process, or action resulting from its integration with institutionalized norms, values, and beliefs¹. Referred to the normative field, legitimacy is commonly conceived as a facilitator of rule compliance²: it presupposes a consensus among the addressees of a given system of governance in the rightfulness of authority, which facilitates the exercise of power over them. Legitimacy makes commands, rules, and decisions acceptable to individuals and motivates them to comply with them.³

Legitimacy is a crucial but often vexing concept in social sciences⁴. It is crucial, because it explains one of the most important issues in social sciences, namely how social order can be maintained; it is vexing because, although it has always been the object of extensive debate and discussion, no common acceptable definition thereof exists⁵. Despite this uncertainty, it is possible to identify in the literature two different approaches to this concept: a normative and a descriptive one⁶. The first is used in order to identify the standards by which a regime, an institution or an action can be considered as legitimate. Following this approach, scholars have analysed the conditions under which the domination of human beings over others should be called legitimate: legitimacy in this context is a normative quality that is attributed by theorists to certain political systems and does not

¹L. Troyer, "Legitimacy", in G. Ritzer (ed), *The Blackwell Encyclopedia of Sociology*, vol VI, Blackwell, 2007, p. 2584

²J. Steffek, *Legitimacy in International Relations: from State Compliance to Citizen Consensus*, in A. Hurrelmann, S. Schneider and J. Steffek (eds), *Legitimacy in an Age of Global Politics*, Palgrave Macmillan, 2007, p. 179

³J. Steffek, *Legitimacy in International Relations*, cit, p. 178

⁴*Legitimacy: Political*, in N.J. Smelsen, P.B. Baltes (eds), *International Encyclopedia of the Social and Behavioral Sciences*, Elsevier, 2001, p. 8704

⁵Cfr J. Steffek, *The Legitimation of International Governance: A Discourse Approach*, *European Journal of International Relations*, 2003, 9, 2, p. 252: << this debate, as viewed as a whole, is a mix of voices speaking to different audiences and addressing the same topic in quite different terminologies >>.

⁶Cfr e.g. M. Zurn, *Global Governance and Legitimacy Problems*, *Government and Opposition*, 2004, 39, 2, p. 260

explain why people accept a social order in fact⁷. This is the approach followed by IR theorists in the debate on the legitimacy of global governance: in this context scholars often prefer to use the term “accountability”, rather than legitimacy. The second approach attempts to explain why or when people obey or accept a given regime or institution. This reading of legitimacy investigates the specific empirical motives for obedience: it does not attempt to evaluate political regimes, but rather to provide reasons for a particular social action, namely obedience to a regime or institution. The starting point of this approach is the identification of three categories of reasons of rule acceptance⁸: coercion, self-interest and legitimacy. In the first situation, acceptance is motivated by the fear of punishment from a stronger power⁹; in the second it is the result of an instrumental and calculated assessment of the net benefits of compliance versus non-compliance, whereby individuals find compliance the most rationally attractive option, which can best satisfy their egoistic interests¹⁰. Both mechanisms of compliance are “situation-bound”: they can trigger the acceptance of a rule only in the presence of a threat or incentive and a tight system of compliance control¹¹. As soon as the threat or material incentive for compliance disappears, the level of compliance decreases. Accordingly, these two mechanisms are not suitable for maintaining order in the long run. Although it may be immediately effective, coercion reduces the likelihood that the individuals will comply without coercion in the future: since it operates against their will, it may create resentment and resistance. Self-interest devices imply that actors are constantly recalculating the expected pay-off to remaining in the system and are ready to abandon it immediately should some alternative provide greater utility. Accordingly, self-interest devices are by definition inclined to revisionism rather than to the status quo.

The third motive for compliance is legitimacy, that is to say the obedience to a norm because it is believed by individuals as valid and just. Legitimacy is a mechanism of compliance which is based on an inner reason for an actor to follow a rule. When an actor believes a rule is legitimate, compliance is no longer determined by an external factor, such as fear of punishment or expectation of a benefit. Compliance derives from an internal sense of moral obligation: the rule is perceived as legitimate to the extent that it is approved or regarded as right, that the behaviour provided for in the rule is felt as desirable, proper, or appropriate¹². Legitimacy is commonly considered as a powerful device of social order, having long-run efficiency advantages over coercion and self-interest.

⁷J. Steffek, *The Legitimation of International Governance*, cit., p. 253

⁸I. Hurd, *Legitimacy and Authority in International Politics*, IO, 1999, 53, 2, p. 383

⁹I. Hurd, *Legitimacy and Authority in International Politics*, cit., p. 383

¹⁰I. Hurd, *Legitimacy and Authority in International Politics*, cit., p. 385

¹¹J. Steffek, *The Legitimation of International Governance*, cit., p. 254

¹²M. Suchman, *Managing Legitimacy: Strategic and Institutional Approaches*, *The Academy of Management Review*, 1995, 20, 3, p. 574

Firstly, because the actor internalises the rule, so that compliance becomes habitual to him, and it is non-compliance that requires a special consideration and a psychic effort. Secondly, since individuals obey not because they are forced to, but because they believe it to be just, legitimacy makes compliance a sort of spontaneous act, increasing the freedom of subordinates. But why and when is a given rule considered as legitimate? Why and when do individuals consider a given rule as valid, right or just? The classical answer to this problem is provided by Max Weber in his treatise “Economy and Society”. Weber lists three sources of legitimization used to justify the power of command¹³. The first is traditional authority, which rests on an established belief in the sanctity of immemorial traditions and the legitimacy of those exercising authority under them; the second is charismatic authority, which rests on devotion to the exceptional sanctity, heroism or exemplary character of an individual person, and of the normative patterns or order revealed or ordained by him; the third is rational-legal authority, which rests on the belief of enacted rules and the right of those elevated to authority under such rules to issue commands. According to this mechanism of compliance, a rationally constructed system of legal rules is used to produce legitimacy. A rational legal system is made up of inter-related neutral and abstract rules which specify what must, may, or may not be done. Legal rules are applied by an impartial bureaucracy working according to formal procedural rules. Rules also specify the tasks of each official, in particular his right and duty to issue any valid command. Finally, rules state how authority positions in the bureaucratic hierarchy can be occupied. In sum, under conditions of rational-legal authority, authorities are subject to the rules just as are the people they control. Weber emphasises an evolutionary concept of legitimacy: he argues that the emergence of modernity in the West entails that the traditional and charismatic authority is progressively replaced by rational-legal authority. Rational-legal authority is considered superior to the other grounds for legitimacy on account of its universal orientation: when people rely on the rational-legal authority of a rule, they obey the law rather than the person. In order to be considered as legitimate, the command must be in accordance with the legal system and those who hold power get their authority from their institutional role. As such, they are also subject to rules which determine their competence¹⁴. The superiority of rational-legal authority is premised on the fact that the law is supposed to be equal for everybody and is clearly differentiated from the person: rational legal authority expresses the absolute predominance of valid law, safeguarding citizens against arbitrary exercise of power and requires the equal subjection of all, including officials¹⁵.

¹³M. Weber, *Economy and Society*, University of California Press, 1978 (1914), pp. 215-216

¹⁴M. Weber, *The Three Pure Types of Legitimate Rule* in S. Whimster (Ed), *The Essential Weber: a Reader*, Routledge, 2004, p. 133

¹⁵A.V. Dicey, *Introduction to the Study of the Law of the Constitution*, Macmillan, 1939, p. 188

Moreover, it tends to a homogeneous vision of legitimacy throughout the world, transcending cultural pluralism.

Weber's theory is commonly considered as a value-free, formal theory of legitimation: the rational authority of law implies no causal relation between socio-cultural values and legitimacy¹⁶. Rules will be regarded as legitimate as long as they are in accordance with the formal procedures of the existing legal system¹⁷. The precise content of law is largely irrelevant: what matters is its consistency (similar cases are treated alike, and there are largely predictable consequences arising from breaking the law) and workability (law must be effectively be enforceable). Accordingly, any legal norm can be created and changed without endangering the legitimacy of the legal system by a procedurally correct enactment. This is because it is the logical structure of the law which provides it with the legitimacy it needs: law frees itself from the sources that could change its legitimacy¹⁸.

Building on Weber, other authors have attempted to provide an updated conception of rational-legal authority, with a view to bringing it more in line with the changed circumstances of social reality. The most important account of legitimacy based on Weber's formal theory has been developed by Luhmann, whose concept of legitimacy is strictly connected to his autopoiesis theory which has been examined in the previous section¹⁹. As we have seen, autopoiesis, in conceiving society as essentially composed by systems, admits the disappearance of modern human subjects in contemporary social conditions²⁰. It follows that law, as a social system, is independent of the concrete conditions and values embodied in a given political or ethical system²¹. A key element of autopoiesis is the normative closure of the different sub-systems of which society is made up: they function self-referentially, according to their own internal logic, reproducing their constituent elements by referring to themselves. Consequently, normatively closed sub-systems do not allow external interference in their internal normative operations; they do not refer to norms of procedure outside their own system when they are functioning. Law, as a social sub-system, is normatively closed and enjoys total autonomy with respect to other sub-systems, not only in relation to its functioning, but also to its legitimacy. The legal sub-system is therefore self-legitimizing: it does not depend on political, social or ethical forces for authority; its rules are accepted simply because they are legal²². Luhmann rejects any psychological or moral explanation in the question of legitimacy of law: the sources of legitimacy of law can be sought only within the framework of law

¹⁶R. Cotterrell, *Law's Community: Legal Theory in Sociological Perspective*, Clarendon Press, 1995, p. 134

¹⁷M. Weber, *The Three Pure Types of Legitimate Rule*, cit., p. 133

¹⁸R. Cotterrell, *The Sociology of Law: An Introduction*, Butterworths, 1992, p. 152

¹⁹See *supra* pp. 39ff.

²⁰J. Priban, *Beyond Procedural Legitimation: : Legality and its "Inflexions"*, J. Law and Society, 1997, 24, 3, p. 335

²¹J. Priban, *Beyond Procedural Legitimation*, cit., p. 336

²²R. Lempert and A. Arbor, *The Autonomy of Law: Two Visions Compared*, in G. Teubner (ed), *Autopoietic Law: a New Approach to Law and Society*, Walter de Gruyter, 1987, p. 157

itself.²³ Individuals cannot make their own judgements about every legal case or problem by relying on extra-legal benchmarks such as truth, charisma, tradition: legitimacy is a general readiness to accept decisions which are still without content. All law is valid law and law which is not valid is not law reads a very much quoted statement of Luhmann's²⁴. By these words he means that validity is a value that is constituted by the recursive performance of the system's own operations²⁵: validity rests on the system's internal coherence that is its capability of delimiting its own boundaries, differentiating itself from the other systems and ultimately functioning autopoietically²⁶.

In contrast to Luhmann's value-free account of legitimacy, Habermas develops a theory of legitimacy based on the idea of a universal morality determined by the universal binding validity of argumentation and rational discourse, which must be implemented in political and legal systems.²⁷

Habermas develops further an aspect which was already present in Weber's account of rational-legal legitimacy: the idea that a rational rule-making not only must be based on reason; what is more, these reasons must also be rationally debatable²⁸. According to Habermas, modern legitimacy is derived from the authority of reason: law is legitimate if it can be backed by a rational justification²⁹. On this reading, legitimacy means that there are good arguments for a legal order's claim to be recognised as right and just. Legitimacy means a legal order's worthiness to be recognised³⁰: it does not imply a mere acceptance of the law, but rather the possibility of rationally justifying it³¹. Therefore, norms are legitimate when they are accepted by the individuals who are potentially affected by these norms³², and if this acceptance is based upon rational discourse, i.e. a decision-making process guaranteeing <<a non-partisan formation of opinion>>³³ through an open

²³N. Luhmann, *The Coding of the Legal System*, in A. Febbraio and G. Teubner (eds), *State, Law, Economy as Autopoietic Systems*, Giuffrè, 1992, p. 145

²⁴N. Luhmann, *Law as a Social System*, Oxford University Press, 2004, p. 125

²⁵*Ibidem*

²⁶N. Luhmann, *A Sociological Theory of Law*, Routledge, 1985, p. 201

²⁷J. Priban, *Beyond Procedural Legitimation: Legality and its "Inflexions"*, cit., p. 333

²⁸J. Steffek, *The Legitimation of International Governance*, cit., p. 262. cfr Weber, *Economy and Society*, cit., p. 979 <<the only decisive point for us is that in principle a system of rationally debatable reasons stand behind every act of bureaucratic administration, namely either subsumption under norms or a weighing of ends and means>>.

²⁹A. Edgar, *Habermas: The Key Concepts*, Routledge, 2006, p. 86

³⁰J. Habermas, *Communication and the Evolution of Society*, Heinemann, 1979, p. 178

³¹A. Edgar, *Habermas: The Key Concepts*, cit., p. 81; cfr J. Habermas, *La Crisi della Razionalità nel Capitalismo Maturo*, Laterza, 1975, p. 112: <<questa validità normativa si fonda sul presupposto che all'occasione la norma possa essere giustificata e difesa contro la critica>>

³²J. Habermas, *Fatti e Norme: Contributi per una Teoria Discorsiva del Diritto e della Democrazia*, Guerini e Associati, 1996, p. 131; cfr also J. Habermas, *La Crisi della Razionalità*, cit., p. 116: <<il modello adeguato [di validità delle norme] è piuttosto una comunità di comunicazione degli interessati, che in quanto partecipi di un discorso pratico, verificano la pretesa di validità delle norme e, nella misura in cui l'accettano con dei motivi, prevengono alla convinzione che, nelle circostanze date, le norme sono giuste. La pretesa di validità delle norme non si fonda sugli atti di volontà irrazionali dei contraenti, ma sull'accettazione razionalmente motivata di norme che può venir problematizzata in ogni istante>>.

³³D.M. Rasmussen, *How is Valid Law Possible?*, in D.M. Rasmussen & J. Swindal, Jürgen Habermas, Sage, 2002, p. 146.

and free debate, where agreement depends on the strength of the better argument³⁴. The public debate in which citizens rationally discuss their interests, values and identities occurs in what Habermas calls the “public sphere”. The latter consists in the range of social institutions that allow for open and rational debate among citizens in order to form public opinion³⁵. The public sphere is not conceived as a fixed institution, an identifiable assembly of autonomous citizens, but rather as a network of subject-less communication circuits of fora and associations in which the flows of communication are filtered and synthesized in such a way that they condense into public opinions clustered according to themes³⁶. Formal institutions and informal forums and circuits in the public sphere represent the channels (the “sluices” in Habermas' language³⁷) through which public opinion is transformed into communicative power, that is to say the influence that citizens may exert upon the State.

Normative approaches: the concept of accountability

Following a normative approach to legitimacy, part of the literature in IR theory has discussed the issue of the accountability of global governance, i.e. the characteristics which make a given institution or regime responsible to the people subject to it³⁸. The common feature of these approaches is the emphasis on the need for appropriate procedural requirements to ensure the accountability of international institutions to the communities concerned, through the inclusion of a

³⁴A. Edgar, *Habermas: The Key Concepts*, cit., p. 84. J. Habermas, *Fatti e Norme*, cit, p. 148-149 also lists a number of basic rights which the law should guarantee in order to allow citizens to exert their communicative power i.e. the power they exert in processes of debate and political participation. The first is the greatest possible measure of equal subjective freedoms so that every citizen is free to do what he likes, until his freedom of action does not undermine the freedom and well-being of others; the second is the right to membership in a free association of citizens, the third is the due process of the law, so that all citizens have legal recourse, should their rights be violated; the fourth, which is the most distinctive as far as the aspect of legitimation of the legal system is concerned, is the right of participation in the political debate. Only where every citizen has equal access to processes of public opinion and will-formation can legitimate legal rules be enacted. The fifth is the right to achieve minimum conditions of life (right to pension, education, minimum wage and so on), which represent the basic premise to exert the previously mentioned rights.

³⁵A. Edgar, *Habermas: The Key Concepts*, cit., p. 124

³⁶J. Habermas, *Fatti e Norme*, cit., p. 427

³⁷J. Habermas, *Fatti e Norme*, cit, p. 355

³⁸More precisely, Keohane (R.O.Keohane, *The Concept of Accountability in World Politics and the Use of Force*, Michigan Journal of International Law, 2003, 24, p. 1124) defines accountability as a relational term, denoting a relation between a power wielder and the accountability holders to which the former is held accountable. As far as the content of the definition of accountability is concerned, Keohane identifies two essential elements: information and sanctions. For a relationship to be one of accountability, there must be some provision for interrogation and provision for information, and some means by which the accountability-holder can impose costly sanctions on the power-wielder. To be accountable means to be compelled to answer or give explanations for one's action or inaction and, depending on the explanation, to be exposed to potential sanctions, both positive and negative.

transnational society in the global decision-making process. The purpose of this debate is to conceive of models of accountability which are different from the traditional democratic or electoral accountability typical of the nation state. In the absence of a “demos”, i.e. a global political community – it is argued – it makes no sense to hold global institutions to domestic democratic standards³⁹. According to Keohane and Nye accountability has different features depending on the model of global governance employed. In particular, they identify three ideal types of global governance which are alternative to the westphalian model of independent states. The first is the international organisation model, according to which global governance occurs essentially through the action of international organisations. Here, accountability is ensured through the instrument of delegation: states delegate a number of tasks to international organisations, but retain at the same time the power of supervising their behaviour and instructing their representatives⁴⁰. The second is the transnational actors model, which is centred on the activity of non-state actors, such as multinational corporations or industry organisations. Within this model, accountability principally takes the form of market and reputational accountability. For example, international firms rely for their success on their reputations with a variety of constituencies, including financial analysts, customers, and their own employees⁴¹; rating agencies help to consolidate and publicize. The third is the policy-networks model of governance. This model is characterised by spontaneous networks outside formal inter-governmental agreements: members tend to operate with a minimum of physical and legal infrastructure and according to few agreed objectives and by-laws; nothing they do purports to be legally binding and there are few mechanisms for formal enforcement⁴². In this model, there is no defined centre of authority like in the previous two (international organisations or non-state actors): decisions are taken through a continuous interaction among members of the network involving subjects belonging to the three categories of international actors (states, international organisations, non-state actors). Here, accountability is more problematic, since authority is dispersed through the network members: policy is the responsibility of no one institution but emerges from the interaction among network members.⁴³ In the absence of a hierarchical structure, reputational accountability becomes crucial: without credibility, actors cannot become accepted as participants and cannot maintain their position in the network. In particular,

³⁹R.O. Keohane and J. S. Nye Jr, *Redefining Accountability for Global Governance*, in M. Kahler and D. A. Lake (eds), *Governance in a Global Economy*, Princeton University Press, 2003, p. 386

⁴⁰R.O. Keohane and J. S. Nye Jr, *Redefining Accountability*, cit., pp. 399-400

⁴¹R.O. Keohane and J. S. Nye Jr, *Redefining Accountability*, cit., p. 400

⁴²A.M. Slaughter, *Global Government Networks, Global Information Agencies and Disaggregated Democracy*, Michigan Journal of International Law, 2003, 24, 4, pp. 1052-1053

⁴³R.A.W. Rhodes, *Understanding Governance*, Open University Press, 1997, p. 21

reputational accountability takes the form of compliance with professional or scientific standards, epistemic communities⁴⁴, criticism and judgements, media inquiries.

Two variants of the network model of governance are represented by the “international organisation-based clubs” and “contested issue networks”. The difference between these two models rests on the degree of informational transparency and openness to new members. The first model involves a closed, selected group of actors (units of states, international organisations and transnational actors) focused around an international regime: a set of rules, standards and procedures established to govern a set of issues. In this model of governance, cabinet ministers, heads of state or the like negotiate in secret a given set of rules, which is then reported to national legislatures and publics as a *fait accompli*⁴⁵. By contrast, contested issue networks are open to new members, whether the established participants welcome them or not. Contested issue networks are likely to be more transparent to non-participants through the media⁴⁶. In IO-based clubs lack of transparency to outsiders is a key to political efficiency: membership is closed, activities take place largely in secret, agents in these networks cannot easily be removed or sanctioned through democratic processes; accordingly, protected by this lack of transparency, members of the network are able to establish very quickly complex sets of rules which are difficult to disaggregate or even to understand.⁴⁷ The strongest lines of accountability within IO-based clubs are to interest clubs within issue-areas, and only indirectly to national law-makers influenced by a broad range of interest groups⁴⁸. Public opinion is rationally ignorant about many issues and does not expect or even desire to be consulted in these issues. Contested issue networks represent a development of IO-based clubs in the context of globalisation. The former are much more transparent than the latter: new members are able to “ambush” negotiations by attracting media attention on network processes which would otherwise be kept secret. An example is represented by the proposed OECD Multilateral Agreement on Investment (MAI), which illustrates the shift from an IO-based club to a contested issue network model of governance. In 1998, more than 600 organisations in nearly 70 countries formed an internet-based network of opposition to this agreement, which had been negotiated secretly within OECD. These new participants broke into the decision-making process all of a sudden, they “ambushed” negotiations, so that the agreement became known to the public and remained dead letter. They helped to create a contested issue network where earlier there was

⁴⁴On this concept see *infra* pp. 75ff

⁴⁵R.O. Keohane and J. S. Nye Jr, *The Club Model of Multilateral Cooperation and the World Trade Organization: Problems of Democratic Legitimacy*, Working Paper n. 4, The John F. Kennedy School of Government, Visions of Governance in the 21st Century, p. 3 available at www.hks.harvard.edu/visions/publication/keohane_nye.pdf (July 2009)

⁴⁶R.O. Keohane and J. S. Nye Jr, *Redefining Accountability*, cit., p. 403

⁴⁷R.O. Keohane and J. S. Nye Jr, *Redefining Accountability*, cit, p. 404

⁴⁸R.O. Keohane and J. S. Nye Jr, *Redefining Accountability*, cit, p. 405

only a closed IO-based club⁴⁹. Yet, the accountability which is emerging in contested issue networks is not devoid of criticism. What makes accountability problematic in both IO-based clubs and contested issue networks is their disaggregated structure: they lack a focal set of institutions in which interests are aggregated, bargains are struck and authoritative decisions are taken. What is more, they lack actors able to intermediate between network members and constituencies in civil society. Intermediating politicians should aggregate interests, articulate policy themes and select relevant issues in ways that are attractive to domestic and transnational constituencies. This would strengthen the accountability of such networks, because it would ensure an indirect influence of constituencies over its members. A further drawback in contested issue networks is that their wider transparency and openness may easily lead to a deadlock in cooperation, since these networks mainly arise in order to contest a given set of rules and institutions. Accordingly, governments and international organizations may be held accountable for their actions, but may not be held equally accountable for inaction⁵⁰. In conclusion, IO- based clubs and contested issue networks appear two complementary modes of governance: the former represent a very effective and rapid decision-making process occurring at the expenses of accountability and transparency; the latter are relatively more transparent and accountable, but lack frequently capacity for decision. That is why a combination of these two modes of governance seem to be auspicious, in order to merge openness and contestability with the capacity to make decisions.⁵¹

Another suggested way of increasing transparency and accountability of policy networks is the establishment of a global equivalent of EU “information agencies”.⁵² Information agencies are governance structure whose decision-making process relies on the so-called “regulation by information”. Unlike direct regulation, which relies on a variety of command and control techniques, such as orders and prohibitions, regulation by information operates by attempting to change behaviour indirectly, essentially by supplying the different policy actors with suitable information: access to credible information can change the calculations, choices and interests that different actors make⁵³ within the context of European governance. Information agencies such as the European Environmental Agency, the European Agency for Health and Safety at Work and the Lisbon Drug Monitoring Centre represent quintessential examples of regulation by information. Their purpose is to collect, coordinate, and spread information needed by policy-makers. They lack

⁴⁹ R.O. Keohane and J. S. Nye Jr, *Redefining Accountability*, cit, pp. 406-407

⁵⁰ R.O. Keohane and J. S. Nye Jr, *Redefining Accountability*, cit, p. 407

⁵¹ R.O. Keohane and J. S. Nye Jr, *Redefining Accountability*, cit, p. 411

⁵² A.M. Slaughter, *Global Government Networks*, cit, p. 1057

⁵³ G. Majone, *The New European Agencies: Regulation by Information*, J. Eur. Pub. Pol., 1997, 4, pp. 262-265. As we can see, the regulation- by- information model bears resemblance to the process of national interest shaping performed by epistemic communities as described by Haas (see *infra* pp. 75ff).

decision-making authority, let alone coercive enforcement power. Their power rests solely on their ability to exercise influence through knowledge and persuasion. They set up a permanent technical and administrative secretariat, which tries not only to collect and disseminate necessary information, but also to encourage horizontal cross-fertilisation (i.e. exchange of best practices) among counterpart national officials⁵⁴. Relying on the European pattern, it has been suggested to create global information agencies for every relevant issue of global governance, made up of independent experts providing necessary information to national officials and helping to coordinate relations among them.⁵⁵ These global information agencies would facilitate the functioning of transgovernmental networks and help to legitimise them, by highlighting their existence and their importance in global governance and, ultimately, their degree of transparency. Furthermore, they may become important vehicles of expansion of the network to private non-state actors and mobilise public participation to check and improve global governance performance⁵⁶.

In conclusion, legitimacy in global governance seems to possess a fluid or evolutionary character⁵⁷, in the sense that it is highly contextual, based on historical understandings of legitimacy and the shared norms of the particular community granting authority. As globalization grows more and more complex, global regulation has been required to penetrate more deeply into national societies⁵⁸. The more intrusive this has become, the greater call for accountability: the old, traditional model of accountability through participation of states in international organisations is no longer sufficient to meet contemporary world's society needs.⁵⁹ World society, which comprises the non-state world of people (individuals, transnational movements, advocacy networks, international non-governmental organisation), has brought the new issues of consent, representation, accountability transparency and reponsability into the legitimacy agenda. These ideas have little in common with the legitimacy test which have developed within the traditional international society of states⁶⁰. The particular features of legitimacy result from the interaction between world society, which sets new legitimacy objectives and the international society of states

⁵⁴R. Dehousse, *Regulation by Networks in the European Community: The Role of European Agencies*, J. Eur. Pub. Pol., 1997, 4, p. 260

⁵⁵A.M. Slaughter, *Global Government Networks*, cit, p. 1063

⁵⁶A.M. Slaughter, *Global Government Networks*, cit, p. 1065. In this sense, the former UN Secretary General Kofi Annan has recognised the importance of the United Nations as a convener of global policy networks designed to bring together all public and private actors on issues critical to the global public interest (see K. A. Annan, *We The Peoples: The Role of the United Nations in the 21st Century*, UN Doc DPI/2103 (2000), p. 70).

⁵⁷ I. Clark, *Legitimacy in International or World Society?*, in A. Hurrelmann, S. Schneider and J. Steffek (eds), *Legitimacy in an Age of Global Politics*, Palgrave Macmillan, 2008, p. 197

⁵⁸ M. Zurn, *Global Governance and Legitimacy Problems*, *Government and Opposition*, 2004, 39, 2, p. 266

⁵⁹ I. Clark, *Legitimacy in International or World Society?*, cit, p. 207

⁶⁰ I. Clark, *Legitimacy in International or World Society?*, cit, p. 197

which serves as the principal instrument of realisation of the newly-defined world-society objectives.⁶¹

Descriptive approaches

The second approach to legitimacy focuses on the issue of what mechanisms motivate states and other actors in the international arena to follow international norms, rules and commitments⁶². Legitimacy is conceived essentially as a product of consensus among all actors involved in international affairs, both the old “statist ” and the “new” private actors.⁶³ Consensus is understood here as the fundamental belief of the members of the international society to be bound to its rules⁶⁴. Accordingly, descriptive accounts of legitimacy in global governance investigate on the most fundamental rules on which international political practice relies, as well as on the mechanisms which make such norms legitimate. A common idea in these accounts is that mainstream realist and liberalist views are not always satisfying in explaining compliance with international norms. In particular, these mainstream views are unable to solve the so-called Henkin's puzzle⁶⁵, whereby, even in the absence of an overarching authority in the international system, <<almost all nations observe almost all principles of international law and almost all of their obligations almost all of the time>>⁶⁶. This is particularly evident with respect to the sovereignty principle, which is undoubtedly the most fundamental of international rules and has been regarded by many as an important evidence of denial of international authority and the quintessence of the “self-help” international system⁶⁷. The realist model, according to which states respect other state's sovereignty merely on grounds of fear of physical coercion, may explain the situation with regard only to some of the world's international borders⁶⁸. But this view cannot explain why most of them are largely

⁶¹ I. Clark, *Legitimacy in International or World Society?* cit, p. 195

⁶² I. Hurd, *Legitimacy and Authority in International Politics*, cit, p. 379

⁶³ I. Clark, *Legitimacy in a Global Order*, Review of International Studies, 2003, 29, 1, p. 94-95

⁶⁴ I. Clark, *Legitimacy in International Society*, Oxford University Press, 2005, p. 24-25.

⁶⁵ J. Steffek, *Legitimacy in International Relations*, cit, p. 181

⁶⁶ L. Henkin, *How Nations Behave*, Columbia University Press , 1979, p. 47

⁶⁷ I. Hurd, *Legitimacy and Authority in International Politics*, cit, p. 382

⁶⁸ For example, the boundary between Iran and Iraq through the 1970s and 1980s and that between Serbia and Bosnia in the 1990s actually wavered according to the balance of forces between the two states.

undefended⁶⁹ or indefensible⁷⁰ and notwithstanding not threatened. The liberalist account of sovereignty, according to which states would respect this principle only where its violation is not in their self-interest, implies a constant, instrumental calculation of the costs and benefits of respecting and ignoring the sovereignty of other states. But, again, international practice contradicts this view: instrumentalism still reigns over many state choices, but not over all.⁷¹ International practice shows that it is extremely rare for a state's foreign office to consider whether or not to reject the institution of sovereignty. On the contrary, there is a heavy bias in favour of the status quo. Given the inadequacy of these models, a strong indication exists that the institution of sovereignty exhibits the stability that it does because it is widely accepted among states as a legitimate, internalized norm⁷². The internalization of the sovereignty principle helps to explain the reason why many borders are not threatened, even if they are not defended or indefensible. It can also explain why we generally do not see states calculating at every turn the self-interested pay-off to invading their neighbours. If some authoritative institutions and rules exist, which are accepted by states as legitimate, the idea of an international system as entirely dominated by anarchy can be called into question: the Henkin's puzzle can hardly be explained without assuming that international institutions and norms are perceived as legitimate by the rule addressees⁷³. Following this rationale, the debate on international norms has attempted to explain in much detail how the process of internalization of a norm occurs. In this context, particular importance has been attached to the concept of "socialization", i.e. the spread of beliefs about correct or appropriate behaviour in the international society. Socialization is achieved through a process of arguing, reasoning and persuasion which leads the actors of the international arena to adopt key values and principles and therefore adopt a common course of political action⁷⁴. Relying on the idea of socialization, some scholars have attempted to provide an alternative account of international relations, by relying on a combination between Weber's and Habermas' concepts of legitimacy. They argue that citizens are the ultimate addressees of international rules and judges of their legitimacy⁷⁵. Accordingly, legitimacy of global governance must rely essentially on the persistence of a transnational societal consensus⁷⁶. In the absence of democratic forms of participation and control beyond the state this consensus may be reached only by subjecting international relations to justificatory discourse⁷⁷: people will accept

⁶⁹These presently include many of the once most fought-over borders in history, such as those of Western Europe.

⁷⁰For example, even the most ambitious Canadian defense program would be easily swept aside by a U.S. invasion

⁷¹I. Hurd, *Legitimacy and Authority in International Politics*, cit, p. 397

⁷²I. Hurd, *Legitimacy and Authority in International Politics*, cit, p. 397

⁷³J. Steffek, *Legitimacy in International Relations*, cit., p. 182

⁷⁴J. Steffek, *Legitimacy in International Relations*, cit, p. 185

⁷⁵J. Steffek, *Legitimacy in International Relations*, cit., p. 190

⁷⁶J. Steffek, *Legitimacy in International Relations*, cit, p. 187

⁷⁷J. Steffek, *Legitimacy in International Relations*, cit, p. 188

rules and institutions of global governance only in so far as they accept the aims and the principles according to which they function.⁷⁸ On this reading, legitimacy becomes the people's belief in the validity of the procedure by which a rule has been worked out⁷⁹. Habermasian communicative action⁸⁰ is regarded as a significant tool for non-hierarchical steering in global governance, which may improve both its legitimacy problems by providing voice opportunities to various stakeholders and the problem-solving capacity of its institutions through deliberation.⁸¹ Legitimacy in international affairs is a process transcending intergovernmental settings and involves also the transnational public sphere: citizens, not only as individual activists, but especially as people organized in non-governmental actors and social movements, play a decisive role in debating and challenging the legitimacy of international governance⁸². Global governance is thus conceived as a decision-making process aimed at reaching a reasoned consensus among actors. Actors' interests and preferences are no longer fixed, but subject to discursive challenges: participants in this global discursive process are open to be persuaded by the better argument. Accordingly, relationship of power and social hierarchies recede in the background⁸³. An example of how this discursive process of legitimation of global governance takes place in practice is represented by the developments occurred within the GATT and WTO trade regimes. The original GATT regime based its legitimacy on the consensus that international economic exchange could lead to economic growth and world peace⁸⁴. Therefore, it was very narrow in its scope, focusing almost exclusively on the liberalisation of international commercial exchange through the reduction of tariffs and the abolition of non-tariff barriers to trade⁸⁵. Starting from the late 1950s, a group of developing countries embarked on a deligitimation campaign against GATT. Their main argument was that GATT's narrow focus on trade liberalisation neglected the development of Third World countries and ended up promoting a de facto uneven development in the various regions of the planet. This delegitimation campaign led to the creation of the United Nations Conference on Trade and Development (UNCTAD), which was conceived as a forum devoted explicitly to development issues, thus filling a lacuna in the GATT agenda. The current criticism against GATT's successor – the WTO – mirrors the arguments of the late 1950s' wave of criticism: it is argued that WTO leads to an uneven promotion of global welfare and that its scope is too narrow, since it does not encompass important issues, such as the establishment of minimum environmental or labour

⁷⁸J. Steffek, *Legitimacy and Authority in International Politics*, cit., p. 250

⁷⁹T. Risse, *Global Governance and Communicative Action*, Government and Opposition, 2004, 39, 2, p. 293

⁸⁰ On this concept see *infra* pp. 77 ff.

⁸¹T. Risse, *Global Governance and Communicative Action*, pp. 288-289

⁸²J. Steffek, *Legitimacy in International Relations*, cit, p. 188-189

⁸³T. Risse, *Global Governance and Communicative Action*, cit, p. 294. On this point see in more detail *infra* pp 77 ff.

⁸⁴J. Steffek, *Legitimacy in International Relations*, cit p. 268

⁸⁵*Ibidem*

standards.⁸⁶ What is new is that the criticism does not stem from within, but from without the organisation: NGOs and unorganized protesters use demonstrations as channels to attract media coverage and bring their claims directly onto the public agenda. Accordingly, they engage the WTO in a justificatory discourse with civil society⁸⁷. In conclusion, the case of GATT/WTO shows that both critics and international organisations seek to persuade the public of the validity of their arguments for or against global governance and this is because in political practice the rational justification of international governance is its most important legitimacy resource.⁸⁸

On the other hand, communicative action patterns as instruments enhancing the legitimacy of global governance have raised some concerns⁸⁹. Involving the public sphere in international decision-making processes is easier said than done, because it is often unclear what the public sphere is, which its constituencies are and to whom they are accountable. Whom to include, whom to exclude and who actually decides about inclusion and exclusion represent major hurdles to the development of a legitimate global governance enlarged to the public sphere. Moreover, once stakeholders representing the public sphere are admitted to international law-making processes, a further problem is to determine efficient decision-making procedures allowing the logic of arguing to work properly. International practice has shown that arguing and persuasion work particularly well behind closed doors, i.e. outside the public sphere. But when actors are required to justify their change of position in front of critical audiences, they may not be ready to do so and prefer to stick to their own stances. Finally, it must be considered that often actors in international negotiations have a mandate from their principals – be it states, international organisations or NGOs – and thus they are accountable to them for the decisions taken during negotiations. Accordingly, a sea change during negotiations may sometimes go beyond the mandate they have been given. This may entail a process of “two level arguing”, by which negotiators persuaded to change their position seek in turn to persuade their principals that they should change their preferences too⁹⁰.

Other descriptive approaches conceive legitimacy as a number of inherent characteristics that norms should exhibit in order to exert a strong pull on states to comply with their commands⁹¹. These

⁸⁶J. Steffek, *Legitimacy in International Relations*, cit, p. 269

⁸⁷Since the unprecedented protests of the late 1990s, the WTO has directed its efforts towards a more effective communication strategy of pro-trade arguments. It has for example published a number of booklets, such as “10 Common Misunderstandings about the WTO”, or “10 Benefits of the WTO Trading System”; it has enhanced the amount of information on the organisation on its website and has organised, in 1992, a civil society symposium involving some 500 organisations. See also A.M. Slaughter (*Global Government Networks*, cit, p. 1055), who argues that in the wake of public doubts and suspicion about their activities, organisations such as the WTO, the UN and the OECD have instituted a raft of “outreach effort” to global civil society, enhancing transparency, hosting NGO meetings, and acknowledging and promoting global policy networks.

⁸⁸J. Steffek, *Legitimacy in International Relations*, cit, p. 270

⁸⁹T. Risse, *Global Governance and Communicative Action*, cit, p. 311-313

⁹⁰T. Risse, *Global Governance and Communicative Action*, cit, p. 312. This has happened for example in the case of the reception of the UNCITRAL Model Law on International Commercial Arbitration in Germany: see *infra* pp. 246ff

⁹¹T.M. Frank, *Legitimacy and the International System*, Am J Intl Law, 1988, 82, 4, p. 712

indicators of legitimacy are commonly found in textual determinacy, symbolic validation and coherence. The first feature consists in the ability of the text to convey a clear message, so that one can clearly discern its meaning⁹²: the more determinate a rule, the more difficult it is to resist its pull to compliance and to justify non-compliance. Conversely, vagueness of a rule makes it harder to know what behaviour is expected and consequently makes it easier to justify non-compliance⁹³. The second feature consists in the enhancement of a rule's authority marked by the use of a given symbol or ritual⁹⁴. The singing of the national anthem is a vocal and visual signal symbolically reinforcing the citizen's relationships of rights and duties vis à vis the state. Likewise, UN's blue helmets and flag symbolize a growing body of rules applicable to peace-keeping operations. A particular form of symbolic validation rests on the emphasis of a rule's historical origins or cultural and anthropological deep-rootedness⁹⁵. For example the idea of a “new” *lex mercatoria* related to the “old” medieval one, has greatly contributed to the legitimacy of a growing body of rules governing transnational trade transactions⁹⁶. The third feature consists in the coherent application of the rule to all situations to which it may be referred and according to general and reasonable principles. The application of the rule of self-determination represents an important example of incoherence which has ended up in seriously undermining its legitimacy in international practice. Incoherent application of this rule began after World War II⁹⁷. On the one hand, self-determination allowed former colonies, such as India and Algeria to gain independence; on the other hand, such rule was denied in Eastern Europe, where territories largely inhabited by Latvians, Poles, Germans, Romanians, Hungarians and Slovaks were arbitrarily annexed by neighbouring states. Even in contemporary international practice there are no general principles that would justify the inconsistency with which, for example, Kosovo may rely on self-determination and Northern Ireland may not.

⁹²T.M. Frank, *Legitimacy and the International System*, cit, p. 713

⁹³T.M. Frank, *Legitimacy and the International System*, cit, p. 714

⁹⁴T.M. Frank, *Legitimacy and the International System*, cit, p. 725

⁹⁵T.M. Frank, *Legitimacy and the International System*, cit, p. 726

⁹⁶See *infra* pp. 85ff

⁹⁷T.M. Frank, *Legitimacy and the International System*, cit, p. 744-745

SECTION IV: THE DIFFUSION OF NORMS IN INTERNATIONAL RELATIONS THEORY

Introduction

The debate on the globalisation of the law is almost exclusively focused on the identification of a new concept of law which may overcome the old positivist definition and encompass new forms of rule-making not stemming from state authority. This agenda risks to lose sight of the most important implications of the phenomenon of the law beyond the state: what is lacking in this debate is a theory explaining how norms emerge and spread in the international system, as well as the mutual interactions between state and non-state law. International Relations theory can bring an important contribution to this discussion: both rational theories and constructivism have recently developed detailed analyses of such issues, namely the origin and diffusion of norms in the international system. However, such accounts tend to consider the states as the main addressees of norms, whereas in the field of the globalisation of the law - and especially in international commercial arbitration - also non-state actors (the parties, the counsel, the arbitrators) are important addressees. Nonetheless, International Relations analyses of norm diffusion can be adapted to the field of international commercial arbitration and therefore may represent a useful tool to better understand the diffusion of uniform rules in this realm.

The rationalist account of norm diffusion: the concept of legalization

Rational theories of international relations (realism and liberalism) are founded on three main assumptions: actors are self-interested, i.e. concerned primarily with the pursuit of their own interests; actors are rational, i.e. they seek the most effective and efficient way allowing them to maximise their interests; state interests are fixed and exogenously determined, i.e. they exist independently of the particular conditions and values characterising a given social environment¹.

¹C. Reus-Smit, *Constructivism*, in S. Burchill, A. Linklater, J. True, M. Patterson, and R. Devetak *Theories of International Relations*, Palgrave, 2001, p. 213.

Accordingly, the behavioural logic underlying rational theories of international relations is the so-called logic of consequentialism, whereby actors strategically conform to norms because norms help them to better satisfy their interests².

The most important rationalist model of norm diffusion has been developed with reference to the notion of legalization³. Legalization is a concept envisaged by a number of political scientists in order to provide an alternative to the positivist view of law which identifies the law only with norms bestowed with enforcement by a coercive sovereign⁴. This concept serves the main purposes of accounting for the importance of international norms in influencing state behaviour and interests as well as bridging the divide between the legal and political analysis of international norms⁵.

Legalization is a set of characteristics which a given set of norms may or may not possess, namely obligation (the addressees are legally bound by the given rule, in the sense that their behaviour is subject to scrutiny under the procedures and discourse of international law: challenges to such legal obligations can occur only through legal procedures and legal reasoning; a state cannot depart from such rules on the ground that they do not comply with its own interests: it must adduce reasons stemming from the interpretation of the norm justifying possible exceptions); precision (the rule specifies clearly and unambiguously the behaviour it requires, authorises or interdicts); delegation (third parties are granted authority to implement, interpret and apply the rules, as well as to solve disputes)⁶. Each characteristic is conceived as a continuum, ranging from a minimum to a maximum, so that for each set of norms it is possible to identify a higher or lower degree of obligation, precision and delegation⁷. For example, the Agreement on Trade-Related Aspects of Intellectual Property and most European Union legislation represent ideal types of full legalization, close to highly developed domestic legal systems, where all the three dimensions are present at the highest level. At the opposite end we find extremely vague rules such as “balance of power” or “spheres of influence” in the context of international politics, characterised by the lowest level in the three dimensions, which do not constitute legal institutions in any legal sense. In the middle we find soft or intermediate forms of legalization: the 1985 Vienna Convention for the Protection of the

²T. Risse, *Constructivism and International Institutions: Toward Conversations across Paradigms*, in I. Katznelson and H.V. Milner (eds), *Political Science: State of the Discipline* Palgrave, 2002, p. 600; M. Finnemore and K. Sikkink, *International Norm Dynamics and Political Change*, IO, 1998, 52,4, p. 912. By contrast, constructivists rely on the different behavioural logic of appropriateness: see *infra*

³K. W. Abbott, R.O. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, *The Concept of Legalization*, IO, 2000, 54, 3, pp. 401-419

⁴K. W. Abbott, R.O. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, *op. cit.*, p. 402. See also P. F. Diehl, C. Ku, D. Zamora, *The Dynamics of International Law: The Interaction of Normative and Operating Systems*, IO, 2003, 57,1, p. 49 <<There has also been an expansion in the forms of law. This had led to thinking about law as a continuum ranging from the traditional international legal forms to soft law instruments (...)The concept of a continuum is useful because these modes are likely not to operate in isolation, but rather to interact with and build on each other>>.

⁵K. W. Abbott, R.O. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, *op. cit.*, pp. 418-419

⁶K. W. Abbott, R.O. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, *op. cit.*, p. 401

⁷K. W. Abbott, R.O. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, *op. cit.*, p. 404

Ozone Lawyer, which imposes binding obligations but expressed in general or even hortatory terms and not connected to an implementing authority, or the Agenda 21, adopted at the 1992 Rio Conference on Environment and Development, which envisaged detailed norms on numerous issues but clearly intended not to be legally binding and whose implementation was delegated to the relatively weak UN agencies. The advantage of this conceptual framework is that there is no bright line dividing legal from non-legal norms in positivist terms: this traditional and obsolete distinction is replaced by a continuum from hard law through varied forms of soft law, each with its individual mix of characteristics, to situations of absent or very low degree of legalization. Accordingly, the concept of legalization can better capture the actual development in the notion of law in the contemporary globalization era, characterised by an ever more evident interpenetration between state and non-state norms.

In developing further the paradigm of legalization, these scholars have applied it to a number of key issues of international relations, such the establishment and development of the regimes of the World Trade Organization, the International Monetary Fund, the North American Free Trade Agreement, and the European Union, and have found that legalization is a complex phenomenon varying across time, space and issue areas⁸. If on the one hand in some areas we note a shift toward higher levels of legalization (for example, the ozone depletion regime was established in 1985 with a binding but otherwise weakly legalized convention; two years later legalization in this area increased by virtue of the more precise and highly elaborated Montreal Protocol), in others the degree of legalization seems to decrease over the years (for example the exchange-rate system under the International Monetary Fund has failed to return to the levels of obligation and precision that it enjoyed three decades ago); by the same token, regions of high legalization (Europe) coexist with other regions which have largely rejected legalized institutions.

Scholars have provided a number of different explanations for the uneven development of legalization. One account, focusing on a rational-choice approach to state behaviour, has emphasised that the choice for a higher level of legalization depends on a tradeoff between the benefits of more credible commitments and the costs of sovereign loss and future uncertainty⁹. Higher levels of legalization entail more precise and more credible commitments; delegated authority to interpret those commitments may also strengthen compliance. But, on the other hand, harder legalization entails greater “sovereign costs”, i.e. a greater loss in the state's rule-making autonomy, as well as “future uncertainty” costs, i.e. difficulties in departing from or modifying these strong commitments in case of unexpected change of circumstances or overall uncertainty

⁸M. Kahler, *Conclusion: The Causes and Consequences of Legalization*, IO, 2000, 54, 3, p. 661

⁹M. Kahler, *op cit*, pp. 663-665

within the given area. Accordingly, in issues where sovereignty costs are high, such as those related to national security, the incidence of legalization is correspondingly low: for example, in NATO delegation is moderate, in the European Union security arrangements have lagged behind and bilateral arms control arrangements lay down precise legal obligations but are only minimally institutionalized¹⁰. International trade issues are more complex: in some technical matters, such as international transportation or food standards, there are lesser conflicts of interests among states and also a strong domestic support from interest groups benefiting from legalization. Consequently, sovereign costs are low and the incidence of legalization is correspondingly high. In addition, technical complexity makes it hard to adapt agreements rapidly without some coordinating authority and therefore a significant level of delegation is also common, as in the case of the International Organization for Standardization (ISO). Other matters, such as investment policy and security-related export controls, remain sensitive and have not been legalized to the same extent. In sum, in finding the proper degree of legalization of a certain issue-area, states must strike a balance between the need to bind themselves tightly enough to avoid cheating and the need to allow the flexibility to deal with uncertainty and unexpected shocks¹¹.

In other circumstances the choice (or non-choice) of legalization is explained by power asymmetries, i.e. the fact that in the international system there are states which are more powerful than others (in terms of resources, size or bargaining power)¹². As a general rule, small states seek hard legalization, because it offers them protection from powerful states; by contrast, the latter tend to avoid hard legalization, because they have greater control over international outcomes, are less in need of protection and face higher sovereign costs in negotiating hard agreements. Yet, sometimes powerful states may agree to participate in the drafting of soft law instruments in order to show a cooperative attitude without being bound to formal compliance; on the other hand, weaker states may accept soft law on matters they deem in their interests, realistically accepting it as the best they can achieve and in the hope it might gain greater force over time¹³. Power asymmetries are particularly evident in the area of dispute resolution: agreements with high economic asymmetries among members do not have in general highly legalized dispute settlement procedures; more powerful states tend to avoid them, since they can often obtain more advantageous outcomes through ad hoc bargaining. As a consequence, such agreements generally provide for limited delegation to administrative, rather than judicial bodies, in order to allow powerful states to retain control on the implementation and interpretation of the agreement.

¹⁰K. W. Abbott and D. Snidal, *Hard and Soft law in International Governance*, IO, 2000, 54, 3, p. 440

¹¹K. W. Abbott and D. Snidal, *op. cit.*, p. 441

¹²M. Kahler, *op cit.*, pp. 665-666

¹³C. Chinkin, *Normative Development in the International Legal System*, in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in The International Legal System*, Oxford University Press, 2000, p. 34.

In other cases preferences of domestic actors play a decisive role in the choice for or against legalized institutions¹⁴. The legal profession has an overall interest in the promotion of virtually any kind of hard legalization process, since highly legalized institutions reflect the professional norms of lawyers, foster the influence of lawyers on policy and increase the demand for legal services. By the same token, business circles engaged in international trade demand a stable policy environment guaranteed by legalized commitments and prefer predictable dispute settlement procedures over intergovernmental bargaining. It is thus not surprising that these two domestic constituencies within the main trading nations have exerted a strong influence in the legalization of the General Agreement on Tariffs and Trade and the World Trade Organization.

The constructivist analysis of norm diffusion

But most accounts of norm diffusion in International Relations theory follow a constructivist approach. Constructivism is an approach to International Relations which emerged in the academic debate at the end of the 80's, after all mainstream theories (realism and liberalism) had failed to predict and account for the big transformations reshaping the world order following the end of the Cold War¹⁵.

Constructivism is founded on the idea that relations within the international system cannot be explained without reference to the agents and the way they construct and perceive reality. The system of shared norms, values and beliefs (which they collectively call “normative and ideational structures” or simply “structures”¹⁶) prevalent in the social environment in which actors find themselves defines (constructs) who they are as social beings (their social identities)¹⁷. At the same time, human agency creates and changes the social environment through daily practices: these structures would not exist if it were not for the practices of these actors who play a crucial role in maintaining and transforming them¹⁸. Consequently, whereas other mainstream international relations theories, such as realism and liberalism, are based on the assumption that international actors behave according to fixed and immutable interests (be it military or economic power, or security), constructivism is based on the assumption that actors' interests are shaped by the mutual interaction between the structure (that is the historical, cultural, political and social environment in a given time and space) and actors' social practices; by the same token, whereas in realism and liberalism society is conceived as a strategic realm in which actors come together to pursue their

¹⁴M. Kahler, *op cit*, pp. 667-670

¹⁵C. Reus-Smit, *Constructivism*, in S. Burchill, A. Linklater, J. True, M. Patterson, and R. Devetak, *Theories of International Relations*, Palgrave, 2001, p. 216

¹⁶J.T. Checkel, *The Constructivist Turn in International Relations Theory*, *World Politics*, 1998, 50, pp. 324-348; T. Hopf, *The Promise of Constructivism in International Relations Theory*, *International Security*, 1998, 23,1, pp. 171-200

¹⁷T. Risse, *Constructivism and International Institutions: Toward Conversations across Paradigms*, *cit.*, p. 599

¹⁸C. Reus-Smit, *Constructivism*, *cit.*, p. 218

pre-defined interests, constructivism sees society as a constitutive realm, the place where actors' interests are shaped but at the same time actors themselves are able to influence the formation of those identities which lie at the basis of their interests.¹⁹

In the constructivist analysis, norms have a fundamental importance: not only do they regulate or constrain behaviour, but they also constitute the identity of actors, providing them with understanding of their interests²⁰. It is thus not surprising that most accounts of norm diffusion follow this approach. In particular, constructivism has investigated three aspects of the norms: their origin (how do we know that a norm is a norm? Where do norms come from?), the mechanisms by which they exert influence on state and non-state actors' behaviour and the conditions under which norms will be influential in world politics. This analysis relies on a wider definition of the concept of norm than that generally considered by lawyers: whereas the latter deal essentially with legal norms supported by coercive sanctions, constructivists consider a norm as a standard of appropriate behaviour for actors with a given identity²¹. The essential characteristic of a norm is its prescriptive quality: it lays down the appropriate behaviour with reference to a particular situation according to the judgments of a given society or community. This definition stems from a particular philosophical view of the behaviour of human beings, which is called "logic of appropriateness": actors tend to do what society expects from them in any given situation and such social expectations are embedded in social norms which have constitutive effects; they establish what is the most appropriate behaviour in any given situation, i.e they represent collective expectations about proper behaviour in any given situation and therefore they associate particular identities to particular situations²². But, on the other hand, actors also constrain social structures: the latter would not exist without the practice of social actors who consider these norms appropriate and therefore comply with them; moreover, structures are themselves being reshaped by the activities of purposeful agents, who may lead to the emergence of new norms or to a modification of new interpretation of their contents²³.

In order to account for the influence of norms on the international system, Finnemore and Sikkink have theorised a norm "life cycle", which comprises three stages: norm emergence, norm cascade and internalization²⁴. In the first stage new norms emerge as a result of a persuasion effort carried out by "norm entrepreneurs" (also known as "epistemic communities" or "meaning managers"),

¹⁹C. Reus-Smit, *Constructivism*, cit, p. 219

²⁰J.T. Checkel, *The Constructivist Turn in International Relations Theory*, cit, p. 326; A. Wendt, *Anarchy is What States Make of it: The Social Construction of Power Politics*, IO, 1992, 6, 2, p. 398.

²¹M. Finnemore and K. Sikkink, *International Norm Dynamics and Political Change*, IO, 1998, 52,4, p. 891

²²T. Risse, *Constructivism and International Institutions: Toward Conversations across Paradigms*, cit., p. 600-601

²³J.T. Checkel, *The Constructivist Turn in International Relations Theory*, cit, p. 341

²⁴ M. Finnemore and K. Sikkink, *International Norm Dynamics and Political Change*, cit., p. 895

that is groups having strong notions about appropriate and desirable behaviour in their community²⁵. These groups challenge existing rules laying down certain standards of appropriate behaviour and try to persuade the rest of the community to replace the old standards with the new ones. If these norm entrepreneurs are successful and thus a “critical mass” of states are persuaded to adopt the new norms, the second stage consists in the norm cascade, whereby the “norm leaders” (i.e. the avant-garde of states which have adopted the new norms) try in turn to persuade the other states to become norm followers. At the far end of the norm-cascade stage, norms may become so widely accepted that they are internalized by actors and achieve a “taken-for granted” quality that makes compliance with the norm almost automatic. Consequently, internalized norms are both extremely powerful (because behaviour according to the norm is not questioned) and hard to discern (because actors do not seriously consider or discuss whether to conform)²⁶.

Epistemic communities and communicative action

Other constructivists have investigated in more detail the conditions under which new norms are more likely to emerge and become prominent and diffuse in the international system. Some have tried to do so by “bringing agency back in”, that is by emphasising the role of agents' practices in the emergence of new norms and modification of existing ones²⁷. A very influential literature in this field is that on epistemic communities and communicative action.

The concept of epistemic communities has been used in international relations theory in order to explain how states define their interests and formulate their policies in a context of growing complexity. The international scenario in which states are called upon to take their decisions is characterized by an increasing uncertainty. The main reason for this is the growing complexity of the international arena. Not only is the international agenda continuously widening, encompassing an ever broader range of issues, often of a technical nature (monetary, macroeconomic, technological, environmental, health and population issues); but also new international actors came to the fore, with a consequent growing complexity of the potential interactions in the international system. Such complexity complicates decision-making, since states are often unable to deduce preferences from circumstances or to choose between a wide array of available options. In addition, they are often uncertain about their ultimate goals and how to achieve them²⁸. Forced to deal with

²⁵ M. Finnemore and K. Sikkink, *International Norm Dynamics and Political Change*, cit., pp. 896-897

²⁶ *Ibidem*

²⁷ J.T. Checkel, *The Constructivist Turn in International Relations Theory*, cit, p. 340

²⁸ P.M. Haas, *Encyclopedia*, p. 2

this growing complexity, decision-makers have turned to specialists with a view to understanding the new international issues more thoroughly, anticipating future trends and ultimately overcoming this uncertainty²⁹. The group of experts to which decision-makers resort present a number of recurrent characteristics, which are embedded in the notion of epistemic community. An epistemic community is defined by Haas as a << network of professionals with recognised expertise and competence in a particular domain and an authoritative claim to policy relevant knowledge within that domain or issue-area>>³⁰. Decision-makers can resort to experts on a number of grounds. First, because they may help them to assess the possible approaches to a certain issue, since they can elucidate cause-effect relationships and accordingly provide advice about the likely results of various courses of action³¹. For example, experts can clarify the relationship between chlorofluorocarbon and environmental damages, and help decision-makers to decide upon the ban of this substance. Second, experts can shed light on the complex interlinkages between issues and a certain chain of events which may proceed either from a failure to take action, or from the decision to take action. This was the case of liberalisation of trade services under the framework of GATT. When the question of liberalisation of trade services first arose, most governments did not understand the implications this issue might have on the world economy as a whole and seemed contrary to liberalisation³². The epistemic community which was formed under the framework of the OECD was able to convince states that removal of non-tariff barriers could display advantageous effects both to developed and developing countries. Third, they can help formulate policies and shape interests, either by redefining preconceived interests or by identifying new ones. This may again be observed in the case of service liberalisation under GATT: by showing the importance service liberalisation had in global economy, the epistemic community redefined states' perception of the nature of services and the objectives and principles according to which they should be governed³³. The re-framing of state interests is more likely to occur in less politically

²⁹P.M. Haas, *Introduction: Epistemic Communities and International Policy Coordination*, IO, 1992, 46, 1, p. 12-13

³⁰ P.M. Haas, *Introduction: Epistemic Communities*, cit, p. 13. The concept of epistemic communities does not coincide with the broad scientific community in a given field of knowledge. At the same time, not every group of scientists or professionals can be considered an epistemic community. The essential feature of an epistemic community is its normative commitment: its members agree on a well-defined regulatory approach to a given issue. It is this normative commitment which enables the members of the epistemic community to state authoritative claims over specific issue areas. Haas identifies four essential characteristics of this normative commitment: 1) the epistemic community's approach to the issue can be traced back to a number of principles and values on which the social action of its members is based; 2) a common view as to the causes of a given problem: this is an essential component of the community's approach, because it constitutes the starting point to identify the linkages between possible policy actions and the desired outcomes; 3) a shared notion of validity, that is common criteria to assess the knowledge in the domain of their expertise; 4) a common policy enterprise, that is the commitment to direct the community's expertise to the resolution of a particular set of problems, with the belief that human welfare will be enhanced as a consequence.

³¹P.M. Haas, *Introduction: Epistemic Communities*, cit, p. 15

³²W.J. Drake and K. Nicolaidis, *Ideas, Interests, and Institutionalisation: Trade in services and the Uruguay Round*, IO, 1992, 46, 1, p. 38

³³*Ibidem*

sensitive cases, where experts have greater room of maneuver in the decision-making process, including the introduction of policy alternatives, selection of policies, and the building of national and international coalitions in support of the policies.³⁴

As a result of the rapid diffusion of ideas and the easiness with which common expertise can be shared throughout the world, the scope of epistemic communities' activities is becoming more and more transnational. In this respect, international organisations act as a sort of resonance box for the epistemic communities' influence over states: epistemic community's ideas may take root in an international organization or in various state bodies and from there they are diffused to other states via the decision-makers who have been influenced by their ideas.³⁵

Epistemic communities' scholars have used the theory of communicative action as developed by Habermas in order to explain the influence they may exert on national and international policy-makers³⁶. In an attempt to draw up the paradigm of the perfectly rational communication (the so-called "ideal speech situation"), the German philosopher Jurgen Habermas envisages a situation where all individuals discussing a given issue aim at reaching a consensus based on the better argument, i.e. which can be better justified in rational terms³⁷: this is essentially what Habermas means by communicative action³⁸. Communicative action implies that participants' view on a issue are not fixed, but are subject to discursive challenges, i.e. actors are open to being persuaded to change them in view of the better argument. Where better arguments prevail, actors do not seek to satisfy their given interests and preferences, but seek a reasoned consensus. In order to fully understand the scope of this concept, it may be useful to distinguish it from two other forms of communication, namely bargaining and rhetoric action³⁹. In bargaining, actors have fixed

³⁴P.M. Haas, *Introduction: Epistemic Communities* . cit, p. 16

³⁵P.M. Haas, *Introduction: Epistemic Communities* , cit, p. 17

³⁶E. Adler and P.M. Haas, *Conclusion: Epistemic Communities, World Order, and the Creation of a Reflective Research Program*, IO, 1992, 46, 1, p. 389

³⁷ W. Outhwaite, *Habermas: a Critical Introduction*, Polity Press, 1994, p. 40

³⁸ More specifically, Habermas defines communicative action as an interaction among individuals discussing over an issue whereby the use of language is directed towards two purposes: arriving at a shared interpretation of the issue, or more generally reaching consensus over a situation, and coordinating the action plans of the actors involved in the discussion. Habermas argues that the agreement at the basis of communicative action <<depends on rationally motivated approval of the substance of an utterance>> (J. Habermas, *Moral Consciousness and Communicative Action* , Polity Press, 1992, p. 134). Language has the ability to achieve mutual understanding and to coordinate action in a consensual or cooperative way, only when it is supported by <<the rationally motivating force of accepting a speaker's guarantee for securing claims to validity>> (J. Habermas, *The Theory of Communicative Action, vol I*, Polity Press, 1984, p. 302) i.e. when there is the possibility of raising validity claims over an opinion and supporting it if challenged. This is what Habermas calls the yes or no position toward a validity claim, i.e. the possibility to accept or reject it by challenging its validity in terms of truth (the existential presuppositions of the propositional content hold true, i.e. what is said really exists in the external world), rightness (what is said is right or appropriate in a given normative or social context and so the speaker had the right to say what he said), truthfulness (that the speaker's manifest intentions are meant in the way they are expressed, i.e. the speaker was sincere and really meant what he said) and meaning (what is said is coherent and comprehensible). Cp. J. Habermas, *Moral Consciousness and Communicative Action* , Polity Press, 1992, p. 136- 137. Cp. also S. K. White, *The Cambridge Companion to Habermas*, Cambridge University Press, 1995, p. 120-123; A. Edgar, *Habermas: The Key Concepts*, Routledge, 2006, p. 21-23; 157, 164-165.

³⁹ T. Risse, *Let's Argue!: Communicative Action in World politics*, IO, 2000, 54, 1, p. 8

preferences and interests and they engage in communication with other participants in order to maximize them as much as possible. In bargaining, actors exchange information about their preferences and make promises and threats with a view to better satisfying such preferences⁴⁰. In rhetorical action, one or more participants seek to convince the others that they should change their views or preferences, but they are not prepared to change their own beliefs or to be persuaded by the better argument⁴¹. In contrast to rhetorical action, in communicative action each participant is prepared to be persuaded to change his views, if a better argument emerges. This is because in communicative action, the goal is not to maximize fixed preferences or to make one's own view prevail, but rather the achievement of a common understanding or reasoned consensus. It follows that, in a communicative behaviour based on communicative action, interests and identities are no longer fixed, but subject to interrogation and challenges and thus to change⁴². Accordingly, relationship of power and social hierarchies recede in the background⁴³. This latter point is important because it underlines the fact that communicative action, like the opposite model of bargaining, is an ideal situation which is not found in reality in its pure form. Rather, pure arguing and pure bargaining represent opposite ends of a continuum, whereby most of the actual decision-making processes take place somewhere in between⁴⁴. We may thus find processes in which bargaining actors tend to justify their positions in terms of generally accepted norms as well as consensual knowledge, or arguing actors who are more likely to use reasons instead of force in order to persuade others of the validity and justifiability of their claims, but on the other hand are not ready to change their positions. Apart from the classification of a given decision-making process as arguing or bargaining, what empirical research is primarily concerned with, is to identify the conditions under which arguing leads to changes in actors' interests and thus influences the outcomes of negotiations⁴⁵.

An example of epistemic communities relying on communicative action in order to shape or change state interests is the mobilization of international public opinion, foreign governments and other international organizations about the violation of human rights by a given state, as carried out by international NGOs involved in human rights protection. What often happens in this situation is that human rights-violating states initially deny the validity of international human rights norms

⁴⁰ *Ibidem*. Cfr J. Habermas, *Moral Consciousness and Communicative Action*, cit., p. 133, who calls this behaviour strategic action: <<if the actors are interested solely in the success, i.e. the consequences or outcomes of their actions, they will try to reach their objectives by influencing their opponent's definition of the situation, and thus his decisions or motives, through external means by using weapons or goods, threats or enticements>>.

⁴¹ T. Risse, *Let's Argue!: Communicative Action in World Politics*, cit., p. 8-9

⁴² T. Risse, *Let's Argue!: Communicative Action in World Politics*, cit., p. 10

⁴³ T. Risse, *Global Governance and Communicative Action*, Government and Opposition, 2004, 39, 2, p. 294.

⁴⁴ T. Risse, *Global Governance and Communicative Action*, cit, p. 299

⁴⁵ *Ibidem*

and are not interested in engaging in a serious dialogue with their critics.⁴⁶ Then, under increasing international pressures, they gradually shift toward the acceptance of the validity of international norms and start engaging in a public dialogue with their critics, so that the logic of arguing incrementally takes over.⁴⁷ Sometimes the discussion focuses on whether violations constitute isolated incidents or are systematic in character; sometimes the government argues that, at the time violations occurred, it was not fully in control of its own armed forces or its police; sometimes it even recognizes that continuous human rights violations spoil the state's image as a civilized nation. But what matters is that in any case the government ceases to deny the validity of human rights norms and starts engaging with its critics in a dialogue resembling the communicative action's model: both sides accept each other as valid interlocutors and try to establish a common understanding of the human rights situation⁴⁸. The outcome of this communicative action process is that governments become convinced that human rights constitute part of their collective identities as modern members of the international community⁴⁹

The logic of communicative action exerts also influence on the membership of international organizations, by allowing weaker parties to have a say in the decision-making process: assuming that the materially more powerful actors do not necessarily monopolise the formulation of the "better arguments", we should expect materially weaker actors to increase their role the more arguing matters in a given institutional setting⁵⁰. The best-known example is represented by the so-called "trisectoral public policy networks", such as the UN Global Compact, in which States, international organisations, private firms, and international non-governmental organizations cooperate to seek common solutions in the areas of human rights, labour, environment and fight against corruption⁵¹. The Global Compact is explicitly designed to operate as a learning network, working through processes of arguing and persuasion: accordingly, within its membership we find both actors endowed with vast amounts of material resources (states, international organizations and private firms) and those whose assets consist more in intellectual resources, such as expert know-how and moral authority (international non-governmental organizations). Despite their status as inter-governmental bodies, formulating agencies in the field of international trade law usually follow a decision-making process based on consensus, which closely resembles the logic of

⁴⁶ T. Risse, *Let's Argue!: Communicative Action in World Politics*, cit., p. 29

⁴⁷ T. Risse, *Let's Argue!: Communicative Action in World Politics*, cit., p. 29-30

⁴⁸ T. Risse, *Let's Argue!: Communicative Action in World Politics*, cit., p. 32. The main difference with the model of the ideal speech situation is that governments do not enter a process of arguing voluntarily, but are forced into a dialogue by the pressure of mobilization carried out by transnational networks of NGOs and by the threat of economic or political sanctions by the international community.

⁴⁹ T. Risse, *Let's Argue!: Communicative Action in World Politics*, cit., p. 34

⁵⁰ T. Risse, *Global Governance and Communicative Action*, cit, p. 303

⁵¹ Cp. Overview of the UN Global Compact on the website <http://www.unglobalcompact.org/AboutTheGC/index.html>

communicative action. As a result, it is very frequent that also non-state actors take part to deliberations, albeit not as members but as observers. The reports of UNCITRAL's last working sessions show a steep increase in the participation of non-state actors as observers: for instance, at the 12th Session in 1979 only four non-governmental organisations attended (Baltic and International Maritime Conference, International Bar Association, International Chamber of Commerce), whereas at the latest 41st Session in 2008 their number was 28 (inter alia Institute of International Banking Law and Practice, Instituto Iberoamericano de Derecho Marítimo, International Association of Ports and Harbors, International Bar Association, International Chamber of Shipping, International Council for Commercial Arbitration, International Federation of Freight Forwarders Associations).

The combined notions of epistemic communities and communicative action are very useful to explain the diffusion of uniform rules in international commercial arbitration, especially as far as the diffusion of the UNCITRAL Model Law is concerned. As we will see in the following chapters, this harmonisation tool can be considered as the product of a transnational epistemic community, whose drafting process has mainly followed the logic of arguing rather than that of bargaining. Moreover, its large success can be accounted for only in terms of its persuasive force as a rational and systematic set of rules reflecting current arbitration practice and therefore able to modernize outdated national arbitration laws. Finally, it may be observed that the large success of the UNCITRAL Model Law has “entrapped” into the logic of arguing even those states which have decided not to adapt their legislation to this harmonisation instrument. This is the case for example of Great Britain, which will be analysed in more detail in the following pages⁵². This country decided not to enact the Model Law essentially on grounds of self-interest, i.e. for fear that departure from its traditional legislation would have undermined its ability to attract arbitral disputes into its territory. Yet, the large success of the Model law forced Great Britain to justify on rational grounds the validity of its self-interest, by publishing in 1989 a detailed report – the Mustill Report – in which the Model Law was thoroughly analysed and reasons were given why English arbitration law should not conform to this harmonisation tool.

Which norm characteristics foster diffusion?

⁵² See *infra* pp. 279 ff.

Other authors have focused on the identification of the inherent characteristics of a norm fostering its diffusion in the international system. This literature partly overlaps with that on legitimacy and compliance of international norms which has been analysed above. As seen in the previous session, Frank predicts a “compliance pull” of international norms, the more these norms have acquired a consensual status of appropriate and legitimate behaviour in international society⁵³.

Another way of explaining norm diffusion relies on an analogy between norms and genes⁵⁴. Both norms and genes are instructional units, in the sense that they contain information directing the behaviour of their respective organisms (animals and human beings in the case of genes, individuals and any type of social groupings in the case of norms)⁵⁵. Both are transmitted from one individual to another through a mechanism of inheritance: norms are part of the set of beliefs and values which are culturally transmitted from one generation to the next; this cultural transmission is a kind of inheritance, an inheritance of pieces of information (namely behavioural standards) from one mind or social organism to another, just as genes are units of genetic information passed through reproduction from one biological organism to another. Both are contested, that is they are in competition with other norms or genes carrying incompatible instructions. Both are subject to selection forces determining which of the contested norms will prevail or disappear. In particular, three factors account for the successful diffusion of a contested norm, each being a necessary but not *per se* sufficient condition: initial prominence (any norm, independently of its inherent effectiveness, needs the effort of some actors fostering its diffusion: such actors may be either individuals and organizations acting as “moral entrepreneurs” or power and prestigious states directly or indirectly persuading other states to comply with their behavioural standards⁵⁶); coherence (any new norm must fit with other prevailing norms with which it is not in competition, since its legitimacy largely depends on its coherence with other norms and its coherence in turn engenders its legitimacy⁵⁷) and favourable environmental conditions (the norm needs to find an hospitable environment, that is favourable environmental conditions for its diffusion: for example Iraq's attempts after the Gulf War to develop an arsenal of weapons of mass destruction was an important factor leading to the conclusion of the Chemical Weapons Convention, with its extraordinarily intrusive verification provisions⁵⁸).

⁵³See *supra* p. 67

⁵⁴A. Florini, *The Evolution of International Norms*, International Studies Quarterly, 1996, 40, 3, pp. 363-389

⁵⁵A. Florini, *op. cit.*, p. 367

⁵⁶A. Florini, *op. cit.* pp. 374-375

⁵⁷A. Florini, *op. cit.*, pp. 376-377

⁵⁸A. Florini, *op. cit.*, pp. 384-385

CHAPTER TWO: UNIFORMITY IN INTERNATIONAL TRADE LAW

From international trade law to transnational commercial law

In 1966 UNCITRAL¹ Secretariat prepared a report entitled “Progressive Development of the Law of International Trade”² (the so –called Schmitthoff’s Report), which synthesised the most important achievements and underlined the greatest hurdles in the field of harmonisation of international trade law in the first half of the twentieth century. The report started with a definition of international trade law which was subsequently adopted in most UNCITRAL documents and in many doctrinal writings. According to the report, international trade law is “the body of rules governing commercial relationships of a private nature involving different countries”³.

Forty years after the publication of the Schmitthoff’s report, a large number of scholars tends to replace the notion of international trade law with that of transnational commercial law. This latter concept may be defined as “the set of private principles and rules, from whatever source, which governs international commercial transactions and is common to legal systems generally or to a significant number of legal systems”⁴. The shift from international trade law to transnational commercial law is the result of the new ideas emerged from the law and globalisation debate and in particular from the various theories of legal pluralism⁵. Transnational commercial law represents a challenging category within interdisciplinary research on globalization and law, since it breaks the

¹For an outline of the United Nations Commission on International Trade Law (UNCITRAL) see *infra* pp. 132ff

²UN Doc A/6396 (1966). On this Report see *infra* pp. 134ff

³UN Doc A/6396 (1966), par. 10. The report attempts to clarify the scope of this definition. First, it provides examples of topics falling within its scope, such as the international sale of goods, insurance, carriage of goods by sea, air, road and rail, industrial property and copyright (nowadays we would say intellectual property), commercial arbitration. Thereafter, it explains that its scope does not extend to international commercial relations pertaining to public law, such as those relating to the exercise of state sovereignty in regulating the conduct of trade affecting their territories (e. g. GATT Treaties and the Rome Treaty establishing the European Economic Community). Finally, it points out that international commercial relations on the level of private law entered into by governmental bodies, as well as international conventions whose object is the regulation of a topic of international trade law, fall within the scope of the definition (cfr par. 10-13).

⁴R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, Oxford University Press, 2007, p. 4

⁵See *supra* pp. 31ff

frames of traditional thinking about inter-state relationships by pointing to the myriad forms of border-crossing relations among state and non-state actors⁶.

Scholars have interpreted this broad definition of transnational commercial law essentially in three ways⁷, each reflecting a particular view of the concept of law and its role in contemporary society:

1) as the legal regime generally applicable to transnational commercial transactions, that is transactions transcending national borders⁸

2) as a label pointing out the similarity among the various national laws applicable to international commercial transactions

3) as a term denoting an autonomous body of rules applicable to international commercial transactions somewhat independently of national legal systems.

Scholars using the term transnational commercial law in the first sense merely stress the complexity of legal sources applicable to international commercial transactions: not only the *lex contractus*, but at least two and often more national legal systems have an impact on the contract.

The first definition reflects the “sceptical” and “positivist” view of the law and globalisation debate⁹: globalisation has not substantially affected the role and functions of the state in the international arena and accordingly is still perfectly able to master all the events occurring within its territory; law is only what derives from state's sovereignty. What we call globalisation is but an increase in international transactions which implies a wider variety of applicable national legal systems. The second definition is the essential idea of Schmitthoff's doctrine of *lex mercatoria*¹⁰: if we screen the norms of international trade belonging to the various national laws, we can single out a number of principles which are internationally used or recognised in a uniform or similar way, although they may stem from different legal systems¹¹. This is because these common principles were once an autonomous body of universally accepted rules (the *lex mercatoria*) which was subsequently embodied in national laws during the codification era. One of the most outstanding features of the legal development of the twentieth century is the re-emergence of international trade law as a separate body of rules applicable to international business transactions. Schmitthoff's doctrine does not break with the positivist dogma, although it recognises that modernity has led to

⁶ P. Zumbansen, *Transnational Law*, in Jan Smits (ed.), *Encyclopedia of Comparative Law*, Edward Elgar Publishing: 2006, p. 738, available also on the internet at http://osgoode.yorku.ca/osgmedia.nsf/research/zumbansen_peer (July 2009)

⁷ N. Horn, *Uniformity and Diversity in the Law of International Commercial Contracts*, in N. Horn, C. Schmitthoff and J. Barrigan Marcantonio (eds), *The Transnational Law of International Commercial Transactions*, Kluwer, 1982, p. 4

⁸ Cfr Jessup's famous definition of transnational law: all law which regulates actions or events that transcend national frontiers” (P. C. Jessup, *Transnational Law*, Yale University Press, 1950, p. 2).

⁹ See *supra* pp. 14 ff.

¹⁰ Cfr C.M. Schmitthoff, *Commercial Law in a Changing Economic Climate*, Sweet and Maxwell, 1981, ch 2

¹¹ C.M. Schmitthoff, *The Law of International Trade: its growth, formulation and operation*, in ID (ed) *The sources of the Law of international trade with specific reference to East-west trade*, Steven and Sons Publishing, 1964, p. 3

an important change in the law regulating international transactions¹². When he referred to the autonomous law of international trade law, he meant only that, under the authority given by states, parties were free to subject themselves by contract to sources of law other than national laws.¹³

According to the third interpretation, the term transnational commercial law is meant as a body of rules of universal application stemming from different sources (international conventions, international customary law, standard contract terms, rules drafted by formulating agencies¹⁴) and produced, interpreted and applied somewhat independently of national legal systems. This definition reflects the so-called globalist view of international relations. As explained earlier¹⁵, the most important effect of globalisation on international policy is the states' loss of their formerly dominant position in international relations. State sovereignty's decreased significance, especially in the field of rule-making, entails a reconsideration of the traditional positivist theory of legal sources. The traditional view of legal sources centred upon the notion of state sovereignty is being replaced by <<legal pluralism which accepts that society's ability for self-organisation and coordination is more than a mere factual pattern without independent legal significance>>.¹⁶ In other words, those social rules which once were a mere product of the principle of party autonomy, in this new context of legal pluralism have a normative quality of their own. *Lex mercatoria*, the transnational law of business transactions, is the most important example of this phenomenon.

The concept of *lex mercatoria*

The concept of transnational commercial law is closely related to that of *lex mercatoria*, so much that some authors equate the latter with the former¹⁷.

¹²Cfr L. Mistelis, *Is Harmonisation a Necessary Evil? The future of harmonisation and new sources of international trade law*, in I. Fletcher, L. Mistelis, M. Cremona (eds), *Foundations and Perspectives of international trade law*, Sweet and Maxwell, 2001, p. 9

¹³R. Goode, *Rule, Practice and Pragmatism in Transnational Commercial Law*, ICLQ, 2005, 54, p. 548

¹⁴ The term "formulating agencies" was invented by Clive Schmitthoff who used it for the first time in the first edition of his well-known book, *Commercial Law in a Changing Economic Climate* (1977). With this term he referred to the wide range of international organisations and institutions of various legal status (private, public, intergovernmental, non-governmental, subsidised or non-subsidised by the governments of the member states) and scope (national, regional or international), which are entrusted, delegated with or merely involved in the formulation of trade policy or rules for the conduct of international commercial transactions. See also C. M. Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, in N. Horn, C. Schmitthoff and J. Barrigan Marcantonio (eds), *The Transnational Law of International Commercial Transactions*, Kluwer, 1982, p. 27-29 and L. Mistelis, *Is Harmonisation a Necessary Evil?*, cit, p. 15

¹⁵See *supra* pp. 15ff

¹⁶K. P. Berger, *The New Law Merchant and the Global Market Place*, in Id (ed) *The Practice of Transnational Law*, Kluwer, 2001, p. 17

¹⁷R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, cit, p. 6

Lex mercatoria is one of the most disputed concepts in legal science, which emerged in the literature some thirty years ago. After more than three decades, opinions are still divergent as to its definition, sources, and contents.

The concept of *lex mercatoria* has been moulded on the idea of the old *lex mercatoria*, the customary law which regulated trade transactions between merchants in the Middle Ages. According to the *lex mercatoria* supporters, this body of law applied to a special class of people (merchants) in special places (fairs, markets, seaports) and was neatly separated from other systems of law in medieval Europe such as local, feudal royal and ecclesiastical law¹⁸. It was endowed with special characteristics (transnational in character, based on a faithful reflection of mercantile customs, developed and applied directly by mercantile corporations and courts, involving speedy and informal procedures), which made it perfectly apt to reflect the commercial need to promote free trade and recognize the capacity of merchants to regulate their own affairs through their customs, usages and practices¹⁹.

Although the concept of the medieval *lex mercatoria* has been largely “romanticised”²⁰, the new *lex mercatoria* supporters relied initially on the authority of the old law merchant to claim the emergence of a growing body of uniform and non-national rules consisting of customs of international trade, principles and concepts which are common to all or most of the states engaged in international trade, which are somewhat replacing national laws in the regulation of international commerce²¹.

The main assumption of this theory was that national laws did not reflect the realities of international business life and therefore a new system of rules was emerging in business practice which, like the medieval *lex mercatoria*, found its origins outside domestic legal systems and was essentially composed of international sources of law, customs and self-regulatory rules²².

Originally, the debate on *lex mercatoria* was essentially a dispute between “mercatorists” and “anti-mercatorists” arguing on its very existence and its qualification as a legal concept.

Among the mercatorists, three main views could be identified. According to the first, *lex mercatoria* was an autonomous body of law, created by the international business community, and disembodied from the legal system of any given country. On this reading, *lex mercatoria*

¹⁸H.J. Berman and C. Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, Harv. Int. L.J., 1978, 19, p. 225

¹⁹L. Trakman, *The Law Merchant: The Evolution of Commercial Law*, Wm. S. Hein Publishing, 1983, p. 8

²⁰ Cfr R. Goode, *Usage and its Reception in Transnational Commercial Law*, ICLQ, 1997, 46, p. 35 <<there is a tendency to romanticise the law merchant and to treat it as an integrated corpus of universally applied law akin to any local law and usage, when in truth it was never an organised body of rules at all>>

²¹ The most important supporter of the new *lex mercatoria* was professor Berthold Goldman. Cfr B. Goldman, *La Lex Mercatoria dans les Contrats et l'Arbitrage International: Réalité et Perspectives*, Journal du droit International, 1979, 106, p. 475

²²F. de Ly, *Uniform Commercial Law and International Self-Regulation*, Dir. Comm. Int. , 1997, pp. 519-547

constituted a neutral, third legal system alongside domestic and public international law, applicable to international transactions²³. Such a transnational legal order had its own sources and rules and found in arbitration the preferred means of solving disputes.

According to a less extreme view, *lex mercatoria* was not an autonomous legal order, but a special process followed by the judge or the arbitrator when he is called upon to judge international trade disputes. When parties to an international transaction have not made – neither explicitly nor implicitly – any choice about the applicable national law, or have subjected it to the international customs and usages of international trade, the interpreter considers all the legal systems connected to the matter of the dispute and selects those rules which appear to him the most appropriate and equitable to solve the controversy. This judicial process, which is partly an application of rules and partly a selective and creative process, is called the application of the *lex mercatoria*²⁴.

Another view regarded *lex mercatoria* neither as an autonomous legal order, nor as a judicial process, but as a body of principles founded on common sense, equity and reasonableness, that the judge or the arbitrator may use as a source of interpretation of obscure provisions or contractual clauses²⁵. A similar view considered *lex mercatoria* as the part of transnational commercial law consisting of the unwritten customs and practice of merchants.²⁶ On this reading, *lex mercatoria* should be kept separated from written codifications of customs and practice: when previously unwritten rules are incorporated into, say, a contract or a convention, they change their nature, since they derive their force from the contract or the convention and cease to be the product of the spontaneous activity of merchants.²⁷

²³ Cfr e.g. K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, Kluwer Law International, 1999

²⁴ O. Lando, *Some Features of the Law of Contract in the Third Millennium*, *Pace International Law Review*, 13, Fall 2001, p. 368

²⁵ K. Highet, *The Enigma of the Lex Mercatoria*, *Tulane Law Review*, 1989, 63, p. 613

²⁶ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, .cit, p. 38

²⁷ *Ibidem*. The relationship between *lex mercatoria* and codification has been fully explored by Berger in his book *The Creeping Codification of the Lex Mercatoria*. He points out the existence of a codification dilemma: on the one hand, codification gives *lex mercatoria* more certainty and thus overcomes one of its major criticism; on the other hand, it introduces a static element into this legal system which would contravene its character as law in action, that is as the product of the spontaneous activity of merchants. In order to solve this dilemma, he proposes a new technique of codification, the creeping codification. This system consists in drafting an open list of principles of *lex mercatoria*, whose updating does not require formalised procedures as in the case of a code or a restatement. The updating of the list is based on a continuous comparison of the rules stemming from the various sources of the *lex mercatoria*: public international law, uniform laws, general principles of the law, rules developed by formulating agencies, uncoded customs and usages, standard contract terms, published awards. The purpose of this comparison is to distil from this raw material the general rules which become part of the *lex mercatoria* as an autonomous legal system. Once a generally accepted rule is found, it is included in a publicly accessible database. Each rule can then be modified with no particular formal procedure, whenever it is felt that the transnational business practice has changed. According to the creeping codification method, the restatements of *lex mercatoria* such as the UNIDROIT Principles and the PECL are not considered sources of *lex mercatoria* in the proper sense, since they provide a first indication of the existence of certain legal principles on the transnational plane. Accordingly, the creeping codification method is aimed at testing the restatements' effectivity, that is to say it aims at verifying whether their rules effectively reflect transnational business practice.

Anti-mercatorists denied the legal nature of *lex mercatoria* and even its very existence, by pointing out essentially two streams of criticism. The first was that it lacked any state authority from which it could derive its binding force. Hence, a contract intended to be subject to *lex mercatoria* would be a stateless and lawless contract floating in a vacuum, a logical impossibility, and an intellectual solecism²⁸. Consequently, *lex mercatoria* could at best be considered as a reference to generally accepted usages in international trade, which could acquire legal character only to the extent that they were incorporated into a national legal system, either expressly or tacitly. The fact that they were available as a source of interpretation or amplification of contractual clauses could not in itself make them law²⁹.

The second argument against *lex mercatoria* was its inherent incompleteness, vagueness and incoherence. *Lex mercatoria* encompassed such a great variety of constituent elements (public international law, rules of international organisations, standard contract terms, arbitral awards, model laws, international customs and usages), that they ended up undermining the certainty and predictability of its content. Obviously, the larger the number of sources encompassed in the notion of *lex mercatoria*, the more difficult for arbitrators and judges to apply it and to determine its contents. In addition, there was no code, statute or at least reference text helping the interpreter to ascertain the rules of *lex mercatoria*, and only very few decisions applying *lex mercatoria* were known: consequently, lawyers fell short of concrete examples in which this concept has been applied and were often unable to predict whether a tribunal will decide the dispute according to *lex mercatoria* and what kind of *lex mercatoria* (as an autonomous legal order, as a judicial process as a set of interpretation principles) will apply.

In conclusion, *lex mercatoria* failed to provide the businessman with a set of rules which was sufficiently accessible and certain to permit the efficient conduct of his transactions. The notion lacked the essential requirements to be considered as a legal phenomenon, namely certainty and predictability, so that it has frequently been labelled as a “mere sociological phenomenon”, “trip into legal weightlessness”, “disguise for the marketing of own solutions”³⁰.

Lex mercatoria supporters in turn criticised anti-mercatorists views, by arguing that they all stemmed from an old-fashioned, positivist mentality, according to which all law is derived from the will of the sovereign state³¹. In contrast to this idea, mercatorists maintained that the binding force of *lex mercatoria* did not depend on the fact that it was made and promulgated by state authorities, but that it was de facto recognised as an autonomous legal system by the business

²⁸ K. Highet, *The Enigma of the Lex Mercatoria*, Tulane Law Review, 1989, 63, p. 613

²⁹ Cfr F. Galgano, *Diritto Civile e Commerciale*, vol. I, CEDAM, 1993, pp. 89-90.

³⁰ All these expressions are reported by K.P. Berger, *The Creeping Codification*, cit. p. 32

³¹ Cfr e.g. F. K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, Va. J Trans. L., 1995, 28, p. 498

community and state authorities³². Moreover, they argued that also national legal systems were incomplete and required gap-filling. Every decision based on law bears a certain degree of openness and unpredictability. As such, *lex mercatoria* was much in line with the national legal systems³³. On the other hand, with time and application these principles could become more refined, complete and better defined³⁴. Hence, the temporary incompleteness of *lex mercatoria* could not be taken as an argument against its status as law and its applicability in international trade.

Why do we need a *lex mercatoria*?

Despite all the uncertainties surrounding this concept, in recent years there has been an ever increasing application of *lex mercatoria* in international arbitration. Moreover, it nowadays enjoys increasing recognition in the academic literature. As de Ly has put it, <<the most important development in the 1990s is that the debate is to a certain extent not reduced to a religion with believers and non-believers, but that the debate acknowledges somewhat more that the *lex mercatoria* is here to stay as a fact of life and that question is more about the conditions and circumstances under which it should be applied>>³⁵.

Parties often refer to *lex mercatoria* or analogous expressions as the law governing their transaction, and, even in the absence of an explicit or implicit reference, a growing number of international disputes has been and is being decided according to this notion.

Why do parties often opt for *lex mercatoria*? The most common explanation is that they want to avoid the inadequacy of national legal systems, or rules which are unfit for their international transaction. Furthermore, they want to plead and argue on an equal footing, so that nobody has the advantage of having a case pleaded and decided by his own law and nobody has the handicap of seeing it governed by foreign law³⁶. In order to overcome the uncertainties and inadequacies caused by the application of domestic laws to international transactions, a large number of scholars and business practitioners have called for the elaboration of a system of neutral rules, not directly derived from any national body of substantive law, and specifically tailored to the needs of international trade. The concept of *lex mercatoria* represents an answer to these claims. Despite the remarkable differences in terms of definition, sources and contents, all the theories on *lex*

³²O. Lando, *The Lex Mercatoria and International Commercial Arbitration*, ICLQ, 1985, 34, 4, p. 752

³³A. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, in T. Carbonneau (Ed.), *Lex Mercatoria and Arbitration*, Juris Publishing, 1990, p. 41

³⁴K. P. Berger, *International Economic Arbitration*, Kluwer, 1993, p. 554

³⁵F. de Ly, *Uniform Commercial Law and International Self-Regulation*, cit, p. 570

³⁶K. Highet, *The Enigma of the Lex Mercatoria*, Tulane Law Review, 1989, 63, p. 615

mercatoria stem from a common desire: the desire to elaborate a uniform body of rules applicable to international transactions and able to overcome the uncertainties and unpredictable effects caused by the application of domestic rules, which are frequently inadequate to solve the manifold legal problems of international commercial law³⁷. As we will see in the following paragraphs, the arguments in favor of the adoption and development of *lex mercatoria* in international trade overlap with those supporting harmonisation of international trade law³⁸.

The most important problem with *lex mercatoria* today is not related to its existence or definition as “law”. Rather, it is whether parties may select *lex mercatoria* as the applicable law of the contract, thus excluding the relevant national laws and especially the mandatory rules thereof³⁹. A related question is whether the judge may select and interpret *lex mercatoria* as an independent, non-national body of rules with its own criteria of ascertainment and interpretation⁴⁰. The choice of *lex mercatoria* as the applicable law will be ineffective in those jurisdictions whose conflict of laws rules require the selection of a national legal system. This is for example the situation in the member states of the European Union, where choice of law in contract matters is regulated by the Rome Convention on the law applicable to contractual obligations, which expressly provides for the selection of a national law⁴¹. Under this regime, the choice of *lex mercatoria* amounts to contractual incorporation: these rules will enjoy contractual status only and therefore will be subject to domestic mandatory rules of the applicable national law⁴². In the field of international commercial arbitration the situation is different. Generally speaking, arbitral laws provide arbitral tribunals with wider powers than national courts. In particular, arbitral tribunals are less constrained in their use of legal sources and enjoy a greater freedom in determining the applicable law in the absence of party

³⁷K.P. Berger, *The Creeping Codification*, cit., p. 7

³⁸ See *infra* pp. 94 ff

³⁹On this point see in more detail *infra* pp. 361ff.

⁴⁰R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, cit, p. 24

⁴¹On July, 4 2008 the so-called Rome I Regulation has been published in the Official Journal of the European Union. This Regulation, which supersedes the previous regime under the 1980 Rome convention will apply to contracts concluded after 17 december 2009. During the drafting process the question whether selection as the applicable law of non-national rules should be permitted was raised but has encountered strong criticism. The final text has attempted to reach a middle-ground position on this very controversial issue. On the one hand, the provision envisaged in the draft, which allowed parties to choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community has been eliminated. This provision would not have authorised the parties to choose non-national rules as such, but only those non-national rules enjoying a wide international recognition. In practice, as it had been expressly stated in the *travaux*, this provision had been designed in order to allow parties to apply to their contract the PECL or the UNIDROIT Principles. But on the other hand, the possibility for the parties to select non-national rules remains, albeit not as the sole applicable law of the contract: the 13th recital provides that the Regulation does not prevent parties from incorporating into their contract a non-state body of law or an international convention. This means that non-state rules may be selected by the parties only within the framework of an applicable national law and only in so far as they do not contravene the latter’s mandatory provisions. Cfr O. Lando and P. A. Nielsen, *The Rome I Proposal*, JPIL, 2007, 3, 1, p. 30-34; R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, cit, p. 27

⁴²R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, .cit, p. 27

choice⁴³. In the wake of this laissez faire approach to the regulation of arbitration, a number of legal systems allow arbitrators to apply non-national rules, where so empowered by the parties. In this cases, the arbitral tribunal may apply *lex mercatoria* as an autonomous system with no reference to the mandatory provisions of the relevant national law. Nonetheless, it is still bound to the *lex arbitri* rules of public policy⁴⁴.

The concept of international unification of the law: unification v harmonisation

The notion of international unification of the law encompasses all the attempts aimed at overcoming the differences among a plurality of national legal systems through the elaboration of a single system of rules which is due to replace the existing national laws in the regulation of a given subject matter.⁴⁵

This process is clearly different from the national unification of the law. The latter consists in an internal unification aimed at overcoming the differences among the various local laws within the realm of a single state. National unification is a typical 19th century phenomenon related to the idea of codification. Unlike the 19th century unification, whose aim was to impose the authority of national law as far as the national boundaries extended by the means of codification, the 20th and 21st century unification is directed towards a contrary purpose: reducing the impact of national boundaries⁴⁶.

At present, the term unification of the law is most frequently used in an international context⁴⁷, with particular reference to the field on international trade law. This is the branch of law in which unification is more urgently necessary and more easily attainable⁴⁸.

Comparative lawyers tend to distinguish the term “unification” from the term “harmonisation”. The former refers to the process whereby two or more different legal provisions or systems are replaced with a single provision or a single body of norms⁴⁹. The latter refers to the process of making the

⁴³ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, cit, p. 27

⁴⁴ On this point see in more detail *infra* pp. 319 ff.

⁴⁵ M.J. Bonell, *Unificazione Internazionale del Diritto*, Enciclopedia del Diritto, Giuffrè, 1992, p. 720

⁴⁶ R. Goode, *Reflections on the harmonisation of commercial law*, in R. Goode & G. Cranston, *Commercial and Consumer Law*, Clarendon Press, 1993, p.1

⁴⁷ H. Kotz, *Unification and Harmonization of Laws*, Encyclopedia of Public International Law, North-Holland, 2000, p. 1013

⁴⁸ R. David, *The Legal Systems of the World: Their Comparison and Unification*, International Encyclopedia of Comparative Law, vol II, ch 5, 1971, p. 45

⁴⁹ W.J. Kamba, *Comparative Law: a Theoretical Framework*, ICLQ, 1974, 23, p. 501

legal rules of two or more legal systems more alike⁵⁰, or, in a more articulated way, the process whereby the effects of a type of transaction in one legal system are brought as close as possible to the effects of similar transactions under the laws of other countries⁵¹.

Whatever the definition, the term harmonisation denotes a process implying a lesser degree of convergence among legal systems: unlike unification, which aims at replacing various legal systems with one single discipline so that the same problem receives the same solution in every country⁵², harmonisation aims at minimising the differences among the laws of individual nations. Accordingly, the harmonisation process does not replace domestic systems, but renders the various national laws of the world more similar to one another. Harmonisation presupposes and preserves the diversity of the various legal systems to be harmonised.⁵³

However, when the practical results produced by these allegedly different approaches in terms of degree of uniformity are looked at, it is difficult to draw a line between them. An international convention allegedly aimed at the unification of the law may provide contracting states with such a wide range of exemption clauses that the text which is ultimately introduced into the various national systems ends in fact being affected by sensible differences. On the other hand, a model law (which is in theory aimed at the harmonisation of the law) may, on account of its inherent value, be spontaneously adopted by a number of states without any modifications.⁵⁴

In more recent times comparatists have attempted to provide a more accurate definition of the term “unification”, by introducing the distinction between uniformity in rules (or textual uniformity) and uniformity in outcomes (or applied uniformity)⁵⁵. The drafting of uniform rules does not always create uniformity of outcome, that is uniformity in the application and interpretation of common rules. This is because legal rules operate in a very particular social and political setting⁵⁶: unless there is a shared meaning and a common set of values, unification is unlikely to lead to uniformity

⁵⁰ M. Bogdan *Comparative Law*, Kluwer, 1994, p. 30

⁵¹ J. Goldring, *Unification and Harmonization of the Rules of Law*, *Federal Law Review*, 1978, 9, p. 289

⁵² *ibidem*

⁵³ M. Boodman, *The Myth of Harmonisation of Laws*, *Am J Comp L*, 1991, 39, p. 699

⁵⁴ M.J. Bonell, *Unificazione Internazionale del Diritto*, cit., pp. 720-721

⁵⁵ C. Baasch Andersen, *Defining Uniform Law*, *ULR*, 2007, 1, p. 7. The author also distinguishes the concept of uniformity from those of “convergence” and “diffusion”. Convergence is a very broad term, encompassing all processes by which legal systems become similar, regardless of the way in which this similarity is attained (whether voluntarily or not). Diffusion is the process of legal convergence brought about by the influence of a legal system on another, but not based on a deliberate aim and a shared instrument which is supposed to create similar effects or results. By contrast, unification is convergence resulting from specific shared instruments which deliberately aim to create similar effects. As far as the concept of “harmonisation” is concerned, the author recognises the difficulty of distinguishing it from the term “uniformity”, since in the literature these two terms have been often used with a certain arbitrariness. Nonetheless, she considers uniformity as a sub-category of harmonisation in the sense that those harmonised laws which reach a high degree of similarity in the effect they produce on their respective scope of application could be considered uniform.

⁵⁶ A. Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, *Am J Comp L*, 40, 1992, p. 687

of results⁵⁷. Accordingly, some authors argue that the proper unification process should be considered only that which is able to bridge the gap between uniform rules and uniform results. On this reading, unification is defined as “the intentional substitution of two or more jurisdictions by a single, international-based, body of norms, which is interpreted and applied uniformly so that, in any dispute, the same solutions are achieved”⁵⁸. This complex definition is based on three elements: (i) the creation of a single law or text; (ii) the uniform application of the given law, and consequently (iii) the production of uniform results. By contrast, uniformity of result does not belong to the concept of harmonisation⁵⁹. Harmonisation tolerates diversity among individual laws to be harmonised, not only in terms of rules but also in terms of different interpretation and application of the harmonising measure. So, variable results are entirely compatible with the process sought to be created. Whereas harmonisation is a flexible concept, requiring a degree of similarity in the substantive law and its interpretation and application, unification is an absolute one, requiring that the substantive law of states be made the same and that it be interpreted and applied in a uniform manner in order to achieve uniform results.

The focus on uniformity of results poses an important problem of meaning. What is to be meant by uniformity? In the common language, this term is related to something which is unchanging or identical and which produces always the same result everywhere. But if we adopt this definition in the legal realm, unification risks to become an ideal concept, <<something to be desired, rather than achieved>>⁶⁰. Totally identical legal application with no variation whatsoever is an absurdity⁶¹. There will always be differences in the application of the law, even within the same country or jurisdiction, let alone the global context. Different courts of the same country may take different views of the law; it is also extremely doubtful whether the same judge on different days, in different moods and hearing slightly different arguments from counsel, will reach the same result in applying the law⁶². Accordingly, it is necessary to soften the term and understand it as something which creates similarity. On this reading, a uniform text is a text which produces similar effects or results in its application and interpretation. The degree of similarity will vary from instrument to

⁵⁷ A. Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, cit., p. 688

⁵⁸ P.J. Osborne, *Unification or Harmonisation: A Critical Analysis of the United Nations Convention on Contracts for the International Sale of Goods 1980*, LLM Dissertation, University of Hull, 2006, available at <http://www.cisg.law.pace.edu/cisg/biblio/osborne.html> (July 2009)

⁵⁹ P. Glenn, *Unification of Law, Harmonization of Law and Private International Law*, in Liber Memorialis François Laurent, 1989, p.783 quoted in M. Boodman, *The Myth of Harmonisation of Laws*, cit, p. 706

⁶⁰ A.L. Diamond, *Conventions and Their Revision*, in Liber Amicorum J.G. Sauveplanne, Kluwer, 1984, p. 45

⁶¹ C. Baasch Andersen, *Defining Uniform Law*, cit, p. 7

⁶² *Ibidem*

instrument depending on a number of factors such as the scope (national, regional, global), its object, the goals it is aimed at, the characteristics of the drafting body.⁶³

A slightly different approach is that founded on the distinction between unification of rules and unification of concepts. This approach starts from the premise that in many cases national laws diverge not so much in terms of results or rules, but in terms of explanations, that is concepts elaborated to explain common rules or results⁶⁴. What divides legal systems most deeply is not diversity of the rules which they comprise, but rather the concepts on which they rely, the methods which their lawyers use and the standards of conduct to which they refer⁶⁵. Accordingly, the purpose of unification is neither exclusively nor essentially that of unifying the rules of law. Unification must lead to a common understanding about the significance of certain concepts, on certain modes of rule formulation and on the recognition of authoritative sources⁶⁶.

These two approaches may appear at first sight different, if not opposite, in the different value they assign to the unification of results. But in truth they both stem from a common concern: unifying the rules is merely one step of a larger process⁶⁷. Unification of rules is useless if not supported by a doctrinal work which, by elaborating a uniform terminology and uniform concepts, makes common rules understandable by lawyers of all nations⁶⁸. This common concern is related to one of the most important issues of the harmonisation process, the problem of uniform interpretation, which will be dealt with later.

Why do we need harmonisation of international trade law?

International trade law is the branch of law on which the greatest efforts towards unification are currently being focussing. As a general rule, international unification of the law becomes urgent when international relations occur frequently and national laws fail to provide an appropriate solution. The astonishing development of globalisation⁶⁹ over the past decades has certainly contributed to render harmonisation of international trade law an absolute necessity which can no

⁶³ C. Baasch Andersen, *Defining Uniform Law*, cit., p. 53. But if uniformity of results means essentially similarity of results, it is then difficult to distinguish uniformity from harmonisation. As said before, aware of this difficulty, the author considers uniformity as a sub-category of harmonisation, implying a high degree of similarity of results.

⁶⁴ R. Sacco, *Diversity and Uniformity in the Law*, Am J Comp L, 2001, 49, p. 182

⁶⁵ R. David, *Methods of Unification*, Am J Comp Law, 1969-69., p. 15

⁶⁶ *Ibidem*

⁶⁷ *Ibidem*

⁶⁸ R. David, *Methods of Unification*, cit., p. 17

⁶⁹ On the definition of the term globalisation, see *supra* pp. 14ff

longer be overlooked. Globalisation has rendered international transactions more frequent and has also shown the inadequacy of national laws as a regulatory instrument thereof. The new ease of communication and transportation has supported the creation of world markets for many kinds of goods and services. These commercial changes have fostered the convergence of legal practice in trade transactions.⁷⁰ Harmonisation of international trade law has thus become one of the most important challenges globalisation poses to the international lawyer.

The growing interconnectedness among world markets, by reducing obstacles to the exchange of goods, capital, and services across national boundaries, has fostered the emergence of an increasing range of international and transnational transactions covering a great part of the world. This is the case for example of transactions related to satellites and aircraft that move daily from one country to another, or multi national corporations' industrial production systems which tend to allocate the various stages of production in various places across the globe regardless of national boundaries, but only according to the greatest advantages in terms of costs, taxes, and suitable labour⁷¹. Despite the unprecedented development of integrated markets at the global level, international transactions continue to a large extent to be regulated by domestic laws, which are often ill-suited for the special needs of international trade⁷².

The various national legal systems were conceived to be applied to domestic relationships only. National codes were modelled on internal relations and were not enacted for the purpose of governing international relations: state legislator is the defender par excellence of national interest and particularism and cannot be expected to draft a legal system taking into account the particular features of international trade⁷³. Accordingly, there should be different rules for internal and international trade, because international transactions have different characteristics from domestic ones. For instance, distances between parties and the period of time necessary for the conclusion of the contract may not be identical in the internal and international contexts. But most of all, international trade requires special rules providing against specific events, such as the need to obtain a licence to import or export goods or capital, the effect of a prohibition of imports or exports, of devaluation of currency and so on.⁷⁴ Therefore, in view of the special nature of international legal relations, it is necessary to devise appropriate rules tailored to their special characteristics.

⁷⁰ A. Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, cit., p. 685

⁷¹ Cfr R. W. Cox and T.J. Sinclair, *Approaches to World Order*, Cambridge University Press, 1995, ch 10, pp. 192-193

⁷² M.J. Bonell, *Why an International Restatement?*, in ID, *An International Restatement of Contracts*, Transnational Publishers, 1997, p. 9

⁷³ R. David, *Methods of Unification*, cit., pp 25-27

⁷⁴ R. David, *The Legal Systems of the World*, cit., p. 12

Besides, the coexistence of domestic laws governing international transactions raises a problem of conflict of laws, i.e. the problem of establishing which of the various legal systems having contacts with a given transaction will eventually govern it⁷⁵. The choice of the applicable national law, in the absence of a specific choice made by the parties, is left to the device of choice-of-law rules, which generally adopt criteria such as <<the proper law of the transaction>>, or <<the national law with which the transaction has its closest link>>. Yet, there is no common understanding as what “proper law” or “closest link” means: consequently, the application of the same conflict-of-laws criterion may often lead to different results in terms of applicable law, according to the interpreter’s discretion. This is of course detrimental to the uniformity and predictability of the decision concerning the applicable law to the transaction⁷⁶. Not surprisingly, the application of conflict-of-laws-rules has long since been criticized as a “jump in the dark”.⁷⁷ What is more, conflict of laws rules always entail the application of a national law to international transactions, without any regard to the actual result which the selected law will produce in that case⁷⁸. Conflict of laws rules require the interpreter to apply national law regardless of its content and the specific interests involved in the international transaction⁷⁹. The domestic character of these rules stands in sharp contrast to the international character of the relations which are subject to them⁸⁰: choice-of-law rules require the application of the law of a particular nation state not designed for the resolution of international disputes⁸¹.

Finally, once the applicable national law has been identified, it may well happen that at least one party to the transaction will be at a disadvantage, since he or she will have to bear a cost which the party whose national law is applied will not: the cost of dealing with foreign law. This represents a cost, because the process of ascertaining foreign law is normally difficult and time-consuming,

⁷⁵For the problem of conflict of laws rules in international arbitration see *infra* pp. 320ff

⁷⁶ R.B. Schlesinger & H.J. Gundisch, *I Principi Generali del Diritto come Norme Oggettive nei Procedimenti Arbitrali. Un Contributo alla Teoria della Denazionalizzazione dei Contratti*, Riv. Dir. Civ., 1997, 3, I, pp. 311-355, at p. 313.

⁷⁷ K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, cit., p. 10

⁷⁸ L. L. McDougal, *Private International Law : Jus Gentium versus Choice of Law Rules or Approaches*, Am J Comp L, 38, 1990, p. 522

⁷⁹ The British case *Boys v. Chaplin* (1971 AC 356) constitutes a clear example of the inadequacy of conflict of laws rules. The parties were both British servicemen who had been temporary stationed in Malta. One negligently injured the other in a road accident in Malta. English law permitted the award of damages for pain and suffering; Maltese law did not. The application of the traditional criterion of the *locus commissi delicti* would have led to an unsatisfactory result according to the policies of the *lex fori*, i.e. the English common law. This is the reason why, according to Lord Hodson, the *lex fori* should be applied instead of the *lex commissi delicti*: <<although in general, in actions for a personal injury, the *lex loci delicti* determined the rights and liabilities of the parties, where with respect to the particular issue some other state had a more significant relationship with the occurrence and the parties, the local law of the state would be applied>>. In this case, the place of occurrence was overshadowed by the identity and circumstances of the parties, both British citizens temporarily resident in Malta.

⁸⁰K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, Kluwer Law International, 1999, p. 9

⁸¹ L. L. McDougal, *Private International Law : Jus Gentium versus Choice of Law Rules or Approaches*, cit., p. 533

especially where the law in question is expressed in an unknown language, let alone where it is also uncertain, obscure and contradictory⁸².

Given these difficulties, it is no surprise that courts are often very reluctant to apply foreign law. In many cases courts would have to apply a system which they do not know, is very difficult to find out and would even seem sometimes contrary to their sense of equity and justice. As a result, when they are called upon to judge an international lawsuit, courts frequently pay lip service to the application of foreign rules and end up in fact preferring the rules of the forum⁸³.

In some cases, lawyers have tried to overcome these problems through the elaboration of international conventions laying down uniform conflict-of-laws rules. Although this initiative may to some extent help the interpreter, since he is at least guided by uniform rules in determining which national law is to be applied, the problem still remains of ascertaining the substantive content of the applicable national law⁸⁴: when considering choice-of-law conventions, the interpreter knows which nation state's law is to be applied, but not the content of the law and how the case will actually be resolved.⁸⁵

In sum, divergences among national laws applicable to international transactions represent a serious obstacle to the development of an ever more intertwined and globalised economy. Each state, relying on the dogma of sovereignty, has so far behaved as though it were in isolation from the others and without realising the differences between internal and international transactions. Everything would go much better in international trade, if, instead of applying differing national laws to international commercial relations, judges in each state had to apply a truly international law, whose principles would be the same in every country⁸⁶.

Obstacles to harmonisation

Any harmonisation process is torn between two contradictory principles. On the one hand, harmonisation serves what is the purpose of law itself, that is to guarantee certainty in relations among human beings. Each unifying process aims at avoiding that a legal relationship is regulated in a contradictory way in different parts of the world. It also aims at avoiding the injustice

⁸² O. Lando, *Some Features of the Law of Contract in the Third Millennium*, *Pace International Law Review*, Fall 2001, 13, p. 347

⁸³ *Ibidem*, pp. 348- 349

⁸⁴ H. Kotz, *Unification and Harmonization of Laws*, cit.

⁸⁵ L. L. McDougal, *Private International Law : Jus Gentium versus Choice of Law Rules or Approaches*, cit, p. 535

⁸⁶ R. David, *The Legal Systems of the World*, cit., p.12

stemming from disparity of treatment and the uncertainties connected with conflicts of laws arising when a transnational legal relationship is involved⁸⁷. But on the other hand, law is undoubtedly rooted in society: it is not independent, nor separated from other social phenomena⁸⁸. And social reality is undoubtedly characterised by a high degree of diversity. There are differences not only in law, but also in languages customs, values and knowledge. These differences constitute the distinctive features of the world's cultural heritages.

The obstacles related to a large number of harmonisation projects can be traced back to the clash between the two principles of certainty and diversity. On the one hand it is commonly suggested that harmonisation has the potential of bringing more certainty in international transactions, on the other hand this alleged certainty risks to jeopardise the value of diversity inherent in every legal system and culture of the world. That is why uniformity in law has been defined a mixed blessing⁸⁹: even if it is in theory a praiseworthy objective, the risks it entails may in practice represent a serious barrier to its achievement. There are at least four risks in subjecting transactions to a single set of legal rules. First, a uniform law can increase the impact of inefficient rules in so far as it replaces the various national laws which may foster a process of regulatory competition. The idea of diversity is generally connected with that of evolution: the possibility of embarking on more than one path is the key to wealth and quality of life in the real world⁹⁰. On this reading, where a thousand different laws are in force in hundreds of different countries, there are different models from which to choose the best solution and also wide possibilities for experimentation, imitation and transplants among legal systems⁹¹. Once a single set of rules has replaced this variety of rules, the chances for effective innovation are greatly reduced⁹². Second, in the absence of a supranational organ capable of ensuring its uniform interpretation, there is always the risk that the uniform law may be interpreted differently in each state⁹³. Likewise, new uniform rules may bring more uncertainty than the national laws they are meant to replace, since they lack an adequate background of case law on which the interpreter may rely. Uniform law represents an unknown entity, while national law is more familiar to its addressees, since it has accumulated a considerable array of case law over the years. Thirdly, reservation clauses and the different techniques employed by states to translate uniform law into domestic law may end up significantly distorting the

⁸⁷ R. Sacco, *Diversity and Uniformity in the Law*, cit., p. 179

⁸⁸ R. Sacco, *Diversity and Uniformity in the Law*, cit, p. 172

⁸⁹ S. Walt, *Novelty and Risks of Uniform Sales Law*, Va J. Int L, 1999, 39, p. 672

⁹⁰ R. Sacco, *Diversity and Uniformity in the Law*, cit, p. 174

⁹¹ R. Sacco, *Diversity and Uniformity in the Law*, cit, p. 178

⁹² R. Sacco, *Diversity and Uniformity in the Law*, cit, p. 180

⁹³ M.J. Bonell, *International Uniform Law in Practice – Or Where the Real Trouble Begins*, Am J Comp L., 1990, 38, 4, p. 867

uniformity achieved with such effort at the international level⁹⁴. Lastly, it may often happen that, once a great amount of energies, time and money has been spent to work out rules which best meet the practical needs of the time, the uniform law remains dead letter in practice, since those to whom and for whose benefit it is principally directed (i.e. the businessmen) take no notice of it or, when it is brought to their attention, do everything to escape its application.⁹⁵ This is partly due to the lack of involvement of business circles in the harmonisation process, partly to the business class' inherent conservatism and partly to the bad drafting of uniform rules⁹⁶. Practice has shown that, generally speaking, the more or less favourable impact of uniform law on the business world depends on the extent to which the latter participates in the preparation of the particular uniform law in question.⁹⁷ But business circles involvement may not always be an easy task. Where the harmonisation project concerns a specific sector of the law such as transport law, the interested parties (carriers, insurers or bankers) have their own national or international representative bodies and so it is easy to get them involved. But where the instrument is concerned with a more general area of the law, such as the sale of goods, it is difficult to identify a related professional category (anyone in trade can be at the same time "buyer" and "seller" of goods), let alone a representative organisation⁹⁸. In these cases, all becomes more difficult, if not impossible and the flaws related to the lack of involvement of business parties appear insurmountable. But the principal difficulty in the adoption of new uniform rules rests undoubtedly in the strength of inertia and routine⁹⁹. It is traditional to point out lawyer and businessmen's traditional attitude to the established rules, on which they have been trained and with which they are familiar. They view all reforms with suspicion, seeing primarily the troubles it will cause rather than the beneficial effects¹⁰⁰. In particular, they are reluctant to adopt new rules, because this entails constant updating and adaptation to legal texts drafted in a style and with a terminology often unfamiliar and whose

⁹⁴ M.J. Bonell, *International Uniform Law in Practice – Or Where the Real Trouble Begins*, cit., p. 867 and 873

⁹⁵ M.J. Bonell, *International Uniform Law in Practice – Or Where the Real Trouble Begins*, cit., p. 868

⁹⁶ Cfr J. Carver, *Uniform Law and Its Impact on Business Circles: The Experience of the Legal Profession*, in. UNIDROIT (ed), *Uniform Law in Practice* (3rd Congress Rome 7-10.9.87), Oceana Publishing, 1988, p. 411

⁹⁷ M.J. Bonell, *International Uniform Law in Practice – Or Where the Real Trouble Begins*, cit., p. 882. This is for example what happened in the field of the harmonisation of international transport law. The most important conventions drafted in the first half of the 20th century (e.g. the 1924 Brussels Convention on Carriage of Goods by Sea or the 1929 Warsaw Convention on the International Carriage by Air) were prepared with the direct involvement of interested business circles and met with considerable success in practice, as shown by the large number of states which adopted them. Conversely, when the initiative for unification in this sector passed in the 1970s from the interested business associations to the intergovernmental formulating agencies meanwhile established within the United Nations (e.g. the 1980 Geneva Convention on International Multimodal Transport, drafted under the auspices of UNCTAD, the 1978 Hamburg Convention on the Carriage of Goods by Sea, prepared by UNCITRAL in collaboration with UNCTAD), the new rules had much less application in practice. Cfr K. Grönfors, *Transport Law*, p. 376

⁹⁸ M.J. Bonell, *International Uniform Law in Practice – Or Where the Real Trouble Begins*, cit., p. 887

⁹⁹ R. David, *The Legal Systems of the World: Their Comparison and Unification*, cit., p. 24

¹⁰⁰ R. David, *The Legal Systems of the World: Their Comparison and Unification*, cit, p. 25

practical effects are not yet clear¹⁰¹. It follows that a badly drafted text, whose provision are unclear and give rise to frequent interpretation disputes, will have almost no chance to be adopted in practice. Legal operators may bear the sacrifice of habits, only if they are convinced that the new rules will provide for a better solution¹⁰². The success of a harmonisation measure is therefore connected to its promotion: it is of crucial importance to emphasise the practical advantages of the new uniform law as against the old national law, in order to win the business circles' traditional skepticism¹⁰³.

The problem of interpretation of uniform law

Interpretation of uniform law is the phase of the harmonisation process in which the above-mentioned contrast between the principle of certainty and that of diversity is most evident. On the one hand, the mere adoption of a uniform legal text represents only a middle-ground step along the path leading to unification of the law in a given field.¹⁰⁴ It is only when a uniform law is widely and uniformly applied and interpreted that the main objective of the harmonisation process is ultimately achieved, i.e. providing certainty in a given area of the law at the international level. On the other hand, certainty is severely undermined by the lack of internationally uniform rules of interpretation and of institutions ensuring uniform interpretation at the transnational level. Accordingly, in interpreting uniform legal texts, there is a strong pressure to resort to national rules or methods, which vary from jurisdiction to jurisdiction, with the risk of a creeping re-nationalisation of transnational texts.

The international community has drafted a number of international instruments which attempt to overcome the problem of divergent interpretations of uniform legal texts. The most important one is the 1969 Vienna Convention on the Law of Treaties, which in articles 31 and 32 provides general rules of interpretation representing a codification of customary international law¹⁰⁵. In particular, these articles lay down three essential criteria for the interpretation of international legal texts. The

¹⁰¹ J. Carver, , *Uniform Law and Its Impact on Business Circles: The Experience of the Legal Profession*, cit., p. 411

¹⁰² R. David, *The Legal Systems of the World: Their Comparison and Unification*, op.cit, p. 24

¹⁰³ On the issue of promotion of harmonisation instruments, see *infra* pp. 130ff

¹⁰⁴ Z. Yuqing, *Principles of interpretation of a uniform law and functions of travaux préparatoires, commentaries and case collections for the interpretation of a uniform law*, in UNCITRAL(ed), *Uniform Commercial Law in the Twenty-First Century*, United Nations Publication, 1995, p. 41

¹⁰⁵ Cfr I. Brownlie, *Principles of Public International law*, Oxford University Press, 1973, p. 624

first is literal interpretation: a treaty shall be interpreted in good faith in accordance with the ordinary meaning of the words used in the text and also with reference to the whole context of the treaty. The second is teleological interpretation: interpretation of the words should be consistent with the treaty's object and purpose, both the general purpose of the treaty as a whole and the specific purposes of the individual provisions to be applied¹⁰⁶. The application of this criterion entails the important consequence that, since the general purpose of any treaty is to promote the unification of law, courts should give preference to the interpretation which has been or is most likely to be applied by the greatest number of countries, even if this interpretation is in contrast with national or local criteria.¹⁰⁷ The third is constituted by the supplementary means of interpretation, that is recourse to the *travaux préparatoires* and the circumstances in which the treaty was concluded. Recourse to this means of interpretation is possible only in the exceptional cases where interpretation according to ordinary means would lead to ambiguous, obscure or manifestly absurd results. It may also be used to confirm the meaning resulting from the application of the ordinary criteria. Notwithstanding the unanimous recognition of the Vienna Convention's customary status, national courts have not always been consistent with its interpretative framework.¹⁰⁸ If judges adopting an internationalist approach apply the Vienna Convention in order to promote uniformity, judges following the opposite nationalist approach subordinate its international character to prevailing national preferences¹⁰⁹. Moreover, there is no agreement on the Vienna Convention's scope of application. In particular, it is not clear whether its interpretation provisions should be applied also to international instruments dealing with private law. Technically, as a "treaty on treaties", its provisions should be applied only to international treaties regulating relations among states, but some authors have implied from its status of customary law the possibility of applying it also to the interpretation of private law conventions¹¹⁰. In any case, the most recent instruments concerning the private domain have provided specific interpretation rules drafted on the pattern of those envisaged by the Convention on the Law of Treaties.

The most important example is represented by another Vienna Convention, the 1980 Vienna Convention on the International Sale of Goods (CISG), which in article 7 provides a set of important principles and methods for interpreting uniform laws in the field of private law. These

¹⁰⁶ Cfr F. A. Mann, *Uniform Statutes in English Law*, Law Quarterly Review, 1983, 99, p. 378

¹⁰⁷ *Ibidem*

¹⁰⁸ E. Criddle, *The Vienna Convention on the Law of Treaties in U.S. Treaty Interpretation*, Va J Int L, 2004, 44, 2, p. 449

¹⁰⁹ In US case law cfr e.g. *United States v Lui Kin-Hong* 110 F.3d 103 (1st Cir. 1997); *United States v Alvarez-Machain* 504 U.S. 1992 at 655; *Sale v Haitian Centres Council* 509 U.S. 155 (1993).

¹¹⁰ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, Oxford University Press, 2007, p. 708. National and international courts tend to apply the Vienna Treaty Convention's interpretation provisions also to private law conventions: see case-law reported by J. Basedow, in *Uniform Private Law Conventions and the Law of Treaties*, ULR, 2006, 4, p. 743-744.

principles may be considered as a development of the general principles provided in the Convention on the Law of Treaties. Paragraph 1 of article 7 states the principle of autonomous interpretation: in interpreting the convention the courts must have due regard to its international character. The convention should not be regarded as a piece of domestic legislation and consequently its articles and concepts should not be interpreted by reference to the corresponding meaning in the domestic legislation of any country or legal system¹¹¹. The convention's terms and concepts are to be interpreted in the context of the convention itself and with reference to the convention's own objectives.¹¹² On this reading, the principle of autonomous interpretation overlaps with that of teleological interpretation laid down in the Vienna Convention on the Law of Treaties. The second principle envisaged by paragraph 1 of article 7 is the principle of uniformity: in the interpretation of the CISG one must have regard to the need to promote uniformity in its application. Uniformity and international character are closely related: uniformity is achieved when, in interpreting the Convention, one has due regard to the international character of its provisions¹¹³; by contrast, "un-autonomous" or "domestically tainted" interpretation leads to the re-nationalisation of international uniform rules¹¹⁴. It follows that in order to achieve uniformity courts of different countries should reciprocally take into account their decisions on uniform law. Foreign court decisions may have a persuasive effect in finding the proper solution to an open interpretative question and accordingly enhance uniform interpretation¹¹⁵. Paragraph 1 of article 7 also states the principle of interpretation according to good faith: <<in the interpretation of this Convention regard is to be had to the need to promote the observance of good faith in international trade>>. There is still much debate as to the scope and content of this provision, which is one of the most controversial of the whole treaty. Some argue that good faith is nothing more than an additional criterion to be used in the interpretation of the convention. On this reading, good faith is a harmless expression¹¹⁶, <consigned to the ghetto of article 7 in which it has found an honourable burial¹¹⁷>>. Others argue that good faith constitutes a general principle and therefore should necessarily be directed to the parties to each individual contract of sales¹¹⁸. On this reading the principle should be construed in light of the

¹¹¹ Z. Yuqing, *Principles of interpretation*, cit, p. 43

¹¹² M. Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, ULR, 2000, 5, p. 684

¹¹³ Z. Yuqing, *Principles of interpretation*, cit, p. 43

¹¹⁴ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial law*, cit, p. 712

¹¹⁵ M. Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, cit, p. 670

¹¹⁶ Cfr E. A. Farnsworth, *Problems of the Unification of Sales Law from the Standpoint of the Common Law Countries*, in International association for Legal Science (ed), *Problems of Unification of International Sales Law: Working Papers Submitted to the Colloquium of the International Association of Legal Science- Potsdam: August 1979*, Oceana Publications, 1980, p. 18.

¹¹⁷ G.Eorsi, *A Propos the 1980 Vienna Convention on Contracts for the International Sales of Goods*, Am J Comp L, 1983, 31, p. 349

¹¹⁸ C.M. Bianca and M.J. Bonell, *Commentary on the International Sales Law: The 1980 Sales Convention*, Giuffrè', 1987, p. 84

Convention's manifold references to the standard of reasonableness¹¹⁹ and the special conditions and requirements of international trade¹²⁰. Paragraph 2 of art 7 CISG provides an important principle to be applied in case of gap-filling: questions concerning matters governed by the Convention, but which are not expressly regulated by it, are to be settled in conformity with the general principles on which the Convention is based. National law may be applied only as a last resort, i.e. where no solution can be found either by analogical interpretation of specific provisions of the Convention or by the application of the general principles underlying it¹²¹. Also the interpretation according to general principles is a specification of the principle of autonomous interpretation: where the Convention has left some gaps, interpretation according to general principles aims at avoiding that the gap is filled by resorting to domestic law and encourages courts to find a solution within the Convention framework. The most important issue related to this provision is what should be meant by general principles. In particular, it is disputed whether the so-called "external principles" may be used in filling the Convention's gaps. Paragraph 2 of article 7 literally refers to the internal principles, that is the principles on which the Convention is based. But some authors have argued that also external principles taken from other uniform law instruments may come to the fore, as long as it is proved these form with the Convention a coherent body of rules and use the same concepts for similar purposes¹²². The most important case is represented by the UNIDROIT Principles, which have sometimes been used by courts and arbitral tribunals as means of interpreting and supplementing the CISG¹²³. External principles are however applied with extreme caution, since each concept and rule should generally be understood in its own context. Moreover, in case of conflict between external and internal principles, the latter are to be preferred, because they are based on the system and aims of the uniform law in question. Nonetheless, recourse to external principles may be helpful, especially in avoiding recourse to national law.

Although most commentators agree that the CISG succeeded in bringing uniformity in the law of international sales¹²⁴, a number of them have shown concerns on that. In particular, a variety of sources of non uniformity has been identified. First, the existence of six official language versions of the Convention entails that there is no single uniform text, but rather a dizzying variety of

¹¹⁹P. Schlechtriem, *Uniform Sales Law The UN-Convention on Contracts for the International Sale of Goods*, Manzsche Verlags- und Universitätsbuchhandlung Wien, 1986, p. 39

¹²⁰ C.M. Bianca and M.J. Bonell, *Commentary on the International Sales Law: The 1980 Sales Convention*, 1987, Giuffrè, p. 87

¹²¹ C.M. Bianca and M.J. Bonell, *Commentary on the International Sales Law: The 1980 Sales Convention*, cit., p. 83

¹²² M. Gebauer, *Uniform Law, General Principles and Autonomous Interpretation*, cit, p. 71

¹²³ On this point see *infra* pp. 373ff.

¹²⁴ J.E. Bailey, *Facing the Truth: Seeing the Convention on Contracts for the International sales of goods as an Obstacle to a Uniform Law of International Sales*, Cornell International Law Journal, 1999, 32, 2, p. 275 and bibliography therein reported

texts¹²⁵. Accordingly, the literal meaning of the words comprising the Convention's rules will rarely be exactly the same in the various languages¹²⁶; different official language versions of the same CISG provisions constitute substantially different texts. Second, reservations permitted under the Convention introduce further significant variations in the text of the CISG in force in contracting states¹²⁷. Third, the scope of the Convention is limited and does not cover every legal issue that can arise in international sales. Consequently, issues falling outside the scope of the Convention must be regulated by national laws and this inevitably ends up adding non-uniformity to the international sales regime. Fourth, the treaty provisions on interpretation are in many respects¹²⁸ so vague that they often fail to promote uniformity¹²⁹. Without explicit guidelines as to how to implement such interpretative principles, national courts have often preferred to follow their natural tendency to read the international rules in light of national criteria of interpretation¹³⁰.

¹²⁵H. M. Flechtner, *The Several Texts of the CISG in a Decentralized System: Observations on Translations, Reservations and other Challenges to the Uniformity Principle in Article 7(1)*, Journal of Law and Commerce, 1998, 17, p. 189, available at <http://www.cisg.law.pace.edu/cisg/biblio/flecht1.html>. *Contra* C.M. Bianca and M.J. Bonell, *Commentary on the International Sales Law: The 1980 Sales Convention*, cit, p. 90, arguing that the existence of several authentic language versions of the convention permits, in case of ambiguities in one language, to look at the others in order to ascertain whether there are the same difficulties in the comprehension of the text.

¹²⁶ H. M. Flechtner, *The Several Texts of the CISG in a Decentralized System*, cit, p. 190. The author compares, by way of example, the English and French versions of art. 71 and art. 72. In the English version of art. 71 avoidance of the contract is allowed in case of "non-performance of a substantial part of the contractual obligation", whereas the English version of art. 72 allows avoidance in case of a "fundamental breach" of the contract. From this linguistic difference, one may argue that art. 72 requires a more serious breach than art. 71: the drafters would not have used two different adjectives describing the seriousness of the breach ("fundamental" as opposed to "substantial"), had they not intended to distinguish the degree of infringement that would satisfy the standards of the respective articles. But in the French version of articles 71 and 72 this distinction disappears: both articles use the same adjective (*essentielle*) to describe the seriousness of the breach. Therefore, the argument which could be made according to the English version has no longer a textual support in the French one.

¹²⁷H. M. Flechtner, *The Several Texts of the CISG*, cit, Of the fifty-one contracting states (at the time this article was written i.e. 1998), twenty-one (over 40%) have made reservations, and in several cases, multiple reservations.

¹²⁸For example, art. 7 does not specify or indicate the general principles on which it is based, leaving national courts alone and with no guidance in the task of identifying them. General principles must be "divined" by national courts by scrutinizing the Convention's provisions. This severely undermines the convention's goal of achieving uniformity. Moreover, the most effective means of ensuring uniformity in the application of the Convention consists in the introduction of the international precedent in CISG case-law. But the CISG does not indicate the degree to which courts should defer to that precedent: should previous decisions constitute binding precedent in the sense of the common law principle of *stare decisis*? Or should they merely be bestowed with persuasive force? Without a clear indication of how much weight should be attributed to a foreign decision, the principle of uniformity ends up being applied with a degree of flexibility which is left to the national courts' discretion. But the most obscure principle of art. 7 is undoubtedly the principle of good faith: there is no agreement as to what this principle means or in what situation it is to be applied. It is thus not surprising that the appropriateness of including such principle in the Convention was repeatedly questioned by the drafters and eventually it was decided to include it into the treaty << more out of a sense that it could do no harm rather than out of any conviction it would do specific good>> (J. .E. Bailey, *Facing the Truth*, cit, p. 296).

¹²⁹ J. .E. Bailey, *Facing the Truth*, cit, p. 276

¹³⁰ J. Honnold, *Documentary History of the Uniform Law for International Sales*, Kluwer, 1989, p. 1. The *Delchi* case (*Delchi Carrier SPA v Rotorex Corp* 71 F.3d 1024 2d Cir 1995) in US case law constitutes an excellent example of the "homeward trend" followed by national courts in interpreting CISG provisions. In the *Delchi* case, the court argued that, since there was no case law referring to the Convention in the United States, it would look to its language and the general principles on which it is based. The rationale followed by the court in this statement is precisely contrary to that intended by the drafters of the CISG, since article 7 (1) requires to examine all CISG case law without restriction to any one nation's court. Moreover, the court stated that analogous provisions of article 2 of the Uniform Commercial code

The combination of these elements has turned out to be, according to some, a severe obstacle preventing uniformity in both interpretation and application of the CISG¹³¹. According to others, it is a signal that uniformity in the context of the CISG must not be meant in absolute terms, in the sense of promoting identical results everywhere, but in a more flexible way, in the sense of promoting similarity of results¹³², accommodating the extraordinarily diverse types and conditions of international sales transactions and excluding those interpretations which are not tailored to the needs of international trade¹³³.

Apart from uniform rules, a measure which is frequently invoked by scholars in order to achieve uniform interpretation in the private law domain is the establishment of an international tribunal with the task of interpreting a number of uniform law instruments. This is perceived as the most effective remedy against the re-nationalisation of uniform law. In the absence of a centralised judging authority, the various national courts tend to provide their own interpretation of the uniform text, with the risk that its uniformity diminishes and the laborious effort to reach agreement on its content goes thus in vain.¹³⁴ Already in 1911 the establishment of an international tribunal for private matters was proposed, which would deal, *inter alia*, with disputes on appeal from national courts relating to private claims based on international treaties. The idea was raised again in 1920, in relation to the establishment of the Permanent Court of International Justice, the predecessor of the International Court of Justice. It was suggested that the Court should be given jurisdiction with regard to conflicts between private persons relating to the interpretation of conventions concerning private international law, as well as conventions concerning industrial property, commercial law and maritime law. After the Second World War similar proposals were made with respect to the establishment of a tribunal which would provide uniform interpretation of private transport law conventions¹³⁵. More recently, in 1985 UNCITRAL prepared a study¹³⁶ in which it mentioned the possibility for the UNCITRAL Commission of expressing its opinion on the proper interpretation of UNCITRAL uniform texts in case of conflict between decisions of national courts and arbitral tribunals; responding to questions referred by a national court or arbitral tribunal on the

may also inform a court where the language of the relevant CISG provisions track that of the UCC. This argument constitutes a blatant breach of the interpretation according to the international character of the convention, which imposes to resort to national law only after interpretation of the Convention's specific provisions and of its general principles has led to no results.

¹³¹J. E. Bailey, *Facing the Truth*, .cit, p. 276

¹³²C. Baasch Andersen, *Defining Uniform Law*, cit., p. 23

¹³³H. M. Flechtner, *The Several Texts of the CISG in a Decentralized System*, .cit, p. 200.

¹³⁴L.B. Sohn, *Uniform Laws require uniform interpretation: proposals for an international tribunal to interpret uniform legal texts*, in UNCITRAL, *Uniform Commercial Law in the Twenty-First Century*, cit, p. 51

¹³⁵The 1956 Convention on the Contract for the International Carriage of Goods by Road provided the possibility of having the International Court of Justice rule on disputes between contracting states on the interpretation or application of the convention. Yet, this remedy was resorted to only once in fifty years of the convention's history.

¹³⁶A/CN.9/267 *Dissemination of decisions concerning UNCITRAL legal texts and uniform interpretation of such texts: note by the Secretariat*

interpretation of UNCITRAL texts; replying to abstract questions of interpretation by private parties. However, none of these projects went beyond the mere stage of proposal. This is mainly due to the fact that the establishment of an international tribunal dealing with international commercial law disputes is perceived by governments as an intolerable loss of sovereignty: states are not prepared to treat disputes between private parties at the level of states disputes¹³⁷.

Given the impossibility of establishing a supranational jurisdictional authority to ensure uniform interpretation of uniform law, some authors have proposed the development of a “jurisconsultorium”, i.e. a system allowing the sharing of scholarly and case-law-based sources of legal understanding and interpretation of uniform law¹³⁸. Not only does this proposal entail a wider circulation of case-law and doctrinal works across jurisdictions, but also and more importantly a profound shift in legal thinking and teaching. It is necessary to accustom jurists and especially students to the existence of a uniform law of a global reach, which is different from national law. As Goode has put it, <<it is necessary for law schools to reduce their preoccupation with national law and their assumption of its superiority over other legal systems and to revert at least in some degree to the internationalism of medieval law teaching>>¹³⁹. It is essential for a uniform interpretation of uniform law to develop a greater awareness among legal practitioners of the three basic concepts on which this development is founded: 1) law-making is not only a prerogative of the state; 2) uniform law has an autonomous character, i.e. it must be free from any influences (case law or legal theory) which are purely domestic¹⁴⁰ and must develop its own interpretation criteria; 3) uniform law has a shared character, i.e. domestic courts must interpret uniform law not merely as a part of their own law, but also as a text that is shared by an international community, so that the results to which its interpretation leads must be acceptable to all who take part in its application¹⁴¹. If we share uniform laws, we need also to share the way we use them if they are supposed to reach similar results¹⁴².

¹³⁷R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit, p. 721

¹³⁸C. Baasch Andersen, *Defining Uniform Law*, cit., p. 6

¹³⁹R. Goode, *Reflections on the Harmonisation of Commercial Law*, cit, p. 24

¹⁴⁰C. Baasch Andersen, *The Uniform International Sales Law and the Global Jurisconsultorium*, *Journal of law and Commerce*, 2005, 24, p. 170 available at <http://cisgw3.law.pace.edu/cisg/biblio/andersen3.html> (July 2009).

¹⁴¹A.H. Kastley, *Unification and Community: a Rethorical analysis of the United Nations Convention*, *Northwestern Journal of International Law and Business*, 1988, 8, p. 602

¹⁴²C. Baasch Andersen, *Defining Uniform Law*, cit, p. 49

The unification of international trade law

Legislative means of harmonisation

It is precisely to overcome the uncertainties and inadequacies caused by the application of domestic laws to international transactions that a large number of scholars and business practitioners have claimed the emergence of a new system of uniform, or at least harmonised rules, specifically tailored to the needs of international trade. But opinions are still divergent on the way this very broad objective may be reached.

Paradoxically, the movement for the international unification of the law did not develop until the second half of the 19th century, when national codifications reached their apex in Europe. At that time, the dominant belief of legal positivism implied that the sovereign state was the only possible source of law and the law was considered as essentially national in character and bound to the idea of the nation state. Consequently, the success of the codification processes constituted both a catalyst and a model for the international unification of the law. The early enthusiasts of international unification believed that it could be possible to unify the law of the whole world, and that unification would be brought about solely by way of legislation emanating from the states, from regional group of states, or even from a world political organisation¹⁴³. On this reading, many advocated a body of uniform legislation – a sort of global commercial code¹⁴⁴ – which states should agree upon at the international level and introduce into their domestic legal systems¹⁴⁵. Accordingly,

¹⁴³ H. Kotz, *Unification and Harmonization of Laws*, cit,

¹⁴⁴ In the 60s René David presented a proposal for a *Code Modèle de Base*, a collection of general principles of commercial law to be drafted in the form of an international convention with a direct binding effect upon all ratifying states. This project would not undermine state sovereignty because, always according to David's ideas, by ratifying this convention, states would voluntarily transfer their law-making power for international commercial matters to the international organisation in charge of drafting the *Code Modèle*; besides, his proposal envisaged a number of "opting-out provisions" allowing domestic legislatures the right of declaring restrictions, modifications and rejections of certain principles of the convention. Cfr R. David, *Le Droit du Commerce International: Une Nouvelle Tache pour les Législateurs Nationaux ou une Nouvelle Lex Mercatoria?* In UNIDROIT, *New directions in international trade law : Acts and proceedings of the 2nd. Congress on private law : Rome, 9-15 september 1976 / held by the International Institute for Unification of private law Unidroit.* - New York : Oceana : Dobbs Ferry, 1977, pp. 5 ff; K.P. Berger, *The Creeping Codification*, cit, p. 135-136.

¹⁴⁵ Cfr M.J. Bonell, *Do We Need a Global Commercial Code?*, 106 Dickinson Law Review, 2001, p. 87 << The International Institute for the Unification of Private Law (UNIDROIT) first launched the idea of preparing a code of international trade law. In 1970, the Secretariat of UNIDROIT submitted a note to the newly established United Nations Commission on International Trade Law (UNCITRAL) in justification of such an initiative and indicated some of the salient features of the project. What was proposed was a veritable code in the continental sense. The proposed code

this global code should have entailed a cleavage within each national system: on the one hand, nationally drafted laws and codes applicable to domestic transactions, on the other hand the internationally drafted global code, applicable exclusively to international transactions.

This utopian view of unification¹⁴⁶ was conceivable only within the context of the late 19th century's international society, dominated by a small number of developed countries which were experiencing the passage from a rural to an industrial and mass-production based economy.

In this context, divergences among national legal systems appeared as an obstacle to the further development of international relations; on the other hand, the relatively small number and size of these relations led many to believe that legislative unification of the main aspects of international law was indeed the best solution to serve the new needs of the international society. At its inception, the goal of the unification movement was the standardisation of legislation by means of uniform codes or statutes, which would be adopted and applied by sovereign states¹⁴⁷

The most important results were achieved in the field of international trade, because international trade transactions were the kind of relations more urgently in need of some sort of uniform discipline .

The most successful attempt towards the unification of international trade law through legislative means is unanimously considered the Vienna Convention on the International Sales of Goods (CISG). This international treaty, which entered into force in 1980, is the result of some fifty years' work, started back in the early 1930's. The CISG is a convention of substantive uniform law: it provides uniform rules related to the main aspects of one of the most important contracts in international trade: the sale of goods. When contracting parties reside in CISG contracting states, national courts and international arbitrators need no longer choose among the various rules on sale¹⁴⁸. Nonetheless, the Convention does not preclude all conflicts of laws related to international sale, since its scope is restricted only to a particular type of contract of sale¹⁴⁹ (the sale of goods); besides, it does not cover all the issues involved in the contract of sale, important aspects thereof¹⁵⁰ falling outwith its sphere of application.

included two parts: part one dealing with the law of obligations generally, and part two relating to specific kinds of commercial transactions>>

¹⁴⁶ The utopian character of the idea of a codification of international trade law is well exemplified by the failure of UNIDROIT's far-reaching, initial plans of "a progressive codification of the law of international trade" (see *infra* pp. 324 ff.). This project was soon diluted to the drafting of general principles for international contract law without direct binding effect. This shift in the drafting approach is doubtlessly due to the general weakening of the unification euphoria of that time. K.P. Berger, *the Creeping Codification*, cit., p. 138.

¹⁴⁷ M. Boodman, *The Myth of Harmonization of Laws*, Am J Comp L, 39, 1991, p. 707-708

¹⁴⁸ J. Lookosfsky, *Loose Ends and Contorts in International Sales. Problems in the Harmonisation of Private Law Rules*, Am J Comp Law, 39, 1991, p. 404

¹⁴⁹ <<Thus, some categories of sale – among which are also transactions of considerable importance in international trade practice, such as sales of shares and other securities, of negotiable instruments and money, of ships and aircraft – are expressly excluded from its scope>> M.J. Bonell, *The UNIDROIT Principles and CISG*, in ID, *An International Restatement of Contracts*, cit., ch 4, p. 63-64.

This is why, by the time the CISG reached completion, it was recognised that many problems affecting international trade were left unsolved.

In particular, the CISG has raised skepticism about the possibility of collecting in a fully-inclusive and coherent legal text all the rules related to international trade law. As the CISG's limited scope shows, unification by means of international conventions has turned out to be a fragmentary process, providing uniform rules only for certain types of transactions (e.g. agency, leasing, factoring, contracts) or certain aspects related to particular types of transactions (e.g. the liability regime in the carriage of goods contract). Since international conventions are essentially fragmentary in nature and none constitutes an overall codification of a whole area of the law, reference to a supplementary national legal system and to the choice of law device cannot be completely excluded.¹⁵¹ Besides, too often has the lengthy and cumbersome process of drafting international conventions ended up in a Sisyphean labour: many conventions have remained a dead letter due to the lack of required ratifications¹⁵² or have been eschewed by the major trading states¹⁵³. Finally, international conventions have shown a limited capacity for adaptation to the needs of international trade. In the context of globalised markets, characterised by rapid and continuous changes, the need to revise the law arises continuously and therefore the lengthy and cumbersome process of emendation of international conventions slows the necessary reforms to an unacceptable extent. In the context of global trade, characterised by hectic and rapid changes, any legal instrument which does not build a process for prompt adaptation becomes part of the problem, rather than part of the solution.¹⁵⁴

In conclusion, unification of trade law through international conventions has in many cases led to the contradictory result of enhancing divergences, rather than producing convergence among national laws.

A first attempt to mitigate the flaws connected with legislative unification of international trade law is represented by the elaboration of model laws¹⁵⁵. In this case, the uniform rules are drafted by a group of state representatives or expert lawyers, but are only recommended to state governments for

¹⁵⁰ For example, as art 4(a) of the CISG expressly states, the Convention has no bearing on validity issues, which must be solved by local law

¹⁵¹ J. Basedow, *Germany Report*, in M.J. Bonell (Ed.) *A New Approach to International Commercial Contracts*, Kluwer Law, 1999, p. 126

¹⁵² See for example the case of the 1980 Convention on International Multimodal Transport of Goods and the 1983 Geneva Convention on Agency in the International Sale of Goods, neither of which has to date been ratified by a sufficient number of states to enter into force

¹⁵³ This is the case for example of the 1974 Convention on the Limitation Period in the International Sale of Goods which entered into force only in 1988 among no more than 12 States.

¹⁵⁴ A. Rosett, *Unification, Harmonization, Restatement, Codification, and Reform in International Commercial Law*, cit, p. 688

¹⁵⁵ One of the most successful model law is the 1985 UNCITRAL Model law on International Commercial arbitration. On this point see *infra* pp. 164ff.

adoption.¹⁵⁶ Model laws have no binding force and their introduction into the various national systems is left entirely to the discretion of states.¹⁵⁷ The advantage of this method is that it may be easier to reach an agreement on the rules. Moreover, as it is for the authorities in each state to decide if and to what extent they will give effect to the model law, its adoption may appear more attractive to them¹⁵⁸. On the other hand, the model law quite often runs the risk of having only a theoretical value, because states are entirely free to disregard it and may always, even if they adopt it, modify it. This obviously undermines the uniformity the model law is aimed at¹⁵⁹. Despite these drawbacks, a model law has the advantage of fostering some degree of uniformity without compromising state sovereignty¹⁶⁰. Yet, if one looks at international practice, the difference between these two techniques of unification may appear slight. In many cases, it may well happen that a number of reservation clauses are included into a treaty, in an attempt to facilitate ratification or accession, under which states are entitled to declare that the uniform rules shall apply only in part or under certain circumstances¹⁶¹. As a consequence, the obligations imposed on states by such a treaty are limited and, on the other hand, generous provision is generally made for termination or withdrawal¹⁶². What is more, the supposed uniform law text is frequently subject to considerable distortions, on account of the different methods employed to translate the treaty into the various domestic legal systems. Accordingly, it cannot always be considered identical to the text which is applied by the judges in their respective countries. For all these reasons, the difference between an international convention and a model law is often subtle.

Non-legislative means of harmonisation

¹⁵⁶H. Kotz, *Unification and Harmonization of Laws*, cit., p. 1015; R. David *The Legal Systems of the World: Their Comparison and Unification*, cit., p. 78

¹⁵⁷M.J. Bonell, *International Uniform Law in Practice*, cit., p. 865

¹⁵⁸H. Kotz, *Unification and Harmonization of Laws*, cit.

¹⁵⁹ The international organisation which has drafted the model law may adopt some measures in order to ensure uniformity in the adoption of the text by the states. This is the case for example of the UNCITRAL Model law on International Commercial Arbitration where the text prepared by UNCITRAL has then been adopted by the UN General Assembly, following its submission for consideration by all Members of the United Nations. Accordingly, when the General Assembly adopts the text, it is most likely that, if adopted under national law, it will be adopted in the form in which it was prepared by UNCITRAL (and indeed this is exactly what happened in the case of the Model Law in International Commercial Arbitration). Cfr S. Lebedev, *Legislative Means of Unification*, p. 32

¹⁶⁰R. David, *The Legal Systems of the World: Their Comparison and Unification*, cit., p. 79

¹⁶¹H. Kotz, *Unification and Harmonization of Laws*, cit., p. 1015

¹⁶²R. David, *Methods of Unification*, cit., p. 19

In more recent years an increasing number of voices have been raised in favour of a different approach to international trade law. A diminished confidence in the almighty power of state legislators, on the one hand, and an increased awareness of the need of involving the business community in the process of harmonisation on the other has led to the idea that unification of international trade law may well be achieved also by non-legislative techniques¹⁶³. This has intensified the phenomenon of privatisation of law-making: international commerce has increasingly developed its own uniform rules of international commercial law¹⁶⁴.

Business people, faced with the inadequacies of national laws in meeting the needs of international trade, have more and more drafted their own rules to regulate their business relations in a more satisfactory manner. They have created a new uniform international law, in order to avoid the various outdated national rules applicable to international transactions¹⁶⁵. This has led to a sectoral harmonisation through a wide set of standard contract terms, general conditions and model contracts adopted by professional groups and international business associations on the basis of current trade practices and related to specific types of transactions¹⁶⁶. Today, these standard rules have become so widespread and so well-known that they can often be looked at as the restatement of the customs of a particular trade sector.¹⁶⁷ They have become so developed and detailed that they in fact constitute codes as complete as the national ones. Often they will even appear more complete and more precise than national codes, since they are focused on individual, specialised transactions¹⁶⁸.

Despite their crucial importance in international trade, they are nonetheless affected by a major flaw. Although these instruments may be a suitable means of regulation for transactions between members of the same business community, in all the other cases they may appear a biased and one-sided instrument of regulation of international trade, since they clearly reflect the interests of a particular trade sector¹⁶⁹. They are often drafted by associations of a national character and therefore they may appear to favour the trade interests of the nation of origin. Besides, even when they are drafted by an international association, they may nevertheless reflect the interest of a particular

¹⁶³ M.J. Bonell, *Non-Legislative Means of Harmonisation*, UNCITRAL, Uniform Commercial Law in the Twenty-First Century, 1995

¹⁶⁴ K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, cit., p. 27

¹⁶⁵ R. David, *Methods of Unification*, cit., p. 24

¹⁶⁶ B. Kozolchyk, *The UNIDROIT Principles as a Model for the Unification of Best Contractual Practices in the Americas*, Am. J. Comp. L., 1998, 46, pp. 151-179

¹⁶⁷ R. David, *The Legal Systems of the World*, cit., p. 57

¹⁶⁸ R. David, *The Legal Systems of the World*, cit., p. 61

¹⁶⁹ M.J. Bonell, *Why an International Restatement?*, in ID, *An International Restatement of Contracts*, Transnational Publishers, 1997, pp. 12-13

business group¹⁷⁰. This may lead to a sort of “battle of the forms” in international disputes, in which each party claims to rely on his own standard contract terms.

In order to overcome this situation of a fragmented harmonisation through the development of sectoral international commercial customs, some independent organisations took the initiative to elaborate harmonisation tools more balanced in content and truly international in form, i.e. drafted in such a way as to be capable of being understood in a substantially uniform manner whoever adopts them¹⁷¹. These instruments are commonly referred to as “soft law”: they are non-binding sets of rules drafted by international organisations and business constituencies based on existing practices which parties can incorporate into their contracts¹⁷². For example, in 1933 the International Chamber of Commerce published for the first time the Uniform Rules and Customs relating to Documentary Credits¹⁷³ and have been adopted by the banking associations of more than 150 countries; in 1935 the ICC published the Incoterms¹⁷⁴, containing rules for the interpretation of the most commonly used trade terms. In more recent times, not only have private organisations such as the ICC been involved in this initiative, but also the United Nations and its specialised agencies, such as UNCITRAL (established in 1966 which in 1985 adopted the Model Law on International Commercial Arbitration¹⁷⁵), UNCTAD and the International Maritime Organization (established in 1959 which has adopted important instruments in the field of international maritime security such as the 1998 the International Safety Management Code applicable to particular types of ships like passenger ships, oil and chemical tankers, bulk carriers, and gas carriers).

As a consequence of the privatisation of law-making, the harmonisation and creation of the law no longer lies within the monopoly of state sovereignty. Instead, it occurs in a number of informal, non-legislative methods¹⁷⁶.

The activity of international arbitral tribunals selected by the parties for the settlement of their international disputes keeps the application and evolution of international trade law out of the courts, and thereby beyond the reach of domestic laws. A flourishing number of international organisations function as formulating agencies and draft code-like sets of rules for international

¹⁷⁰For example the standard terms drafted by the International Publishers Association are likely to prefer the publishers' interests to those of the authors, the terms drafted by the International Shipowners Association the shipowners' interests to the shippers' and so on.

¹⁷¹ M.J. Bonell, *Non-Legislative Means of Harmonisation*, cit., In the literature such organisations are commonly known as “formulating agencies”, that is those agencies or organisations of national, regional, or international character which are entrusted, delegated or merely involved in the formulation of trade policy or rules for the conduct of international commercial transactions (L. Mistelis, *Is Harmonisation a Necessary Evil?* cit, p. 18)

¹⁷²S.Vogenauner, *Introduction*, in S. Vogenauer and J. Kleinheitsterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford University Press, 2009, p. 4.

¹⁷³ The latest version has been published in 1993; a new edition has been published in 2006

¹⁷⁴ The latest version has been published in 2000

¹⁷⁵See *infra* pp. 164ff.

¹⁷⁶ K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, cit., p. 27

commerce. Individual projects of comparative law conducted by the academic community are heading towards the same end and quite often constitute the theoretical background for these sets of rules. Last but not least, businessmen active in international trade constantly create their own law through the drafting, use and refinement of general conditions of trade, standard contracts, as well as the development of international practices and usages. In short, the creation and unification of the law is being increasingly privatised.¹⁷⁷ The notion of privatised unification and creation of the law undermines the traditional positivist concept of law as an exclusive product of state sovereignty, enacted and sanctioned through the traditional means of state control. New enforcement mechanisms different from those of the state judiciary are becoming increasingly important in international trade. Compliance with this new source of law is ensured through a range of “self-supervision instruments”¹⁷⁸: arbitral tribunals, “black lists”, withdrawal of trade associations’ member rights and other mechanisms touching upon the commercial reputation of the parties. They constitute informal social sanctions whose common denominator is the danger of losing good standing within the community of merchants. This threat is felt as a strong enough incentive to lead to the adherence to the self-made law of international business.¹⁷⁹

The UNIDROIT Principles

Following the proliferation of conventions, uniform laws, standard terms, collection of usages, which are all limited in scope and fragmentary in character, the need is felt for a body of general principles and concepts to which to have recourse for the interpretation and coordination of the single uniform law instruments¹⁸⁰.

¹⁷⁷ K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, cit , p. 28

¹⁷⁸ K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, cit , p. 29

¹⁷⁹ K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, cit , p. 106. The author also underlines that nowadays almost 90% of international contracts contain an arbitration clause and that over 90% of international arbitral awards are voluntarily complied with. This high degree of acceptance of arbitral dispute resolution ends up in practice insulating the overwhelming majority of commercial disputes from domestic jurisdictions. This is a strong indication of the fact that international commercial law, in terms of drafting practice, implementation of contracts and dispute settlement, has a life of its own, the quality of an autonomous system intended to provide comprehensive legal framework for the development of international trade. (p. 111-112)

¹⁸⁰ M.J. Bonell, *Non-Legislative Means of Harmonisation*, cit , p. 37

Since the early 90s, an innovative instrument is assuming growing importance in the context of international trade law, which may provide a general framework of reference for a more coherent harmonisation: the UNIDROIT Principles¹⁸¹.

The UNIDROIT Principles of International Commercial Contracts (PICC) have been drafted by UNIDROIT (Institut International pour l'Unification du Droit), a UN Institute whose main purpose is to prepare harmonised uniform rules of private law applicable between the States and groups of states of the world¹⁸². The UNIDROIT Principles are a collection of non-national principles which are common to the existing legal systems and/or best adapted to the special requirements of international commercial contracts. Published for the first time in 1994 (a second revised edition has been published in 2004), their scope is limited to international commercial contracts (the so-called B2B transactions), i.e. international contracts between entrepreneurs and thus are not applicable to transactions between consumers and between entrepreneurs and consumers.

The UNIDROIT Principles do not fit into any of the traditional categories of legal instruments which have up to now been conceived at international level. They are not simple standard contract terms, nor are they drafted in the form of an international treaty: they do not have any binding force and will be applied in practice by reason of their persuasive value only¹⁸³.

They have been drafted on the model of the American Restatements, so that they may be considered a Restatement on Contracts at global level. The Restatement is an instrument of harmonisation typical of the American legal system, created in order to overcome the uncertainty and complexity caused by the presence of different states each constituting an independent source of law. Technically, it consists of a collection of rules coming from the various state systems represented in a systematic fashion¹⁸⁴; however, its purpose is not only that of re-stating in a more coherent manner the existing law, but also that of promoting those changes in the various state systems, which may produce further simplification and adaptation to the needs of society.

Although originated in two different contexts, both the PICC and the American Restatements appear directed towards the same main objective: overcoming the uncertainties and complexities caused by the existence of different domestic laws applicable to cross-border transactions. Like the American Restatements, the PICC represent a mixture of both tradition and innovation: in the absence of a common solution, provisions have been drafted according to a “best rule” approach. The UNIDROIT Principles present an even more creative character than the American Restatement

¹⁸¹On the UNIDROIT Principles see in more detail *infra* pp. 324ff.

¹⁸²On UNIDROIT see in more detail *infra* pp. 145ff

¹⁸³ M J Bonell, *General Report*, in M.J. Bonell (ed), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Contracts*, Kluwer, 1999, p. 3

¹⁸⁴R. Hyland, *The American Experience: Restatements, the UCC, Uniform Laws and Transnational Coordination*, in A.S. Hartkamp and E.H. Hondius (eds), *Towards a European Civil Code*, Kluwer, 2004, p. 59.

on Contracts: unlike the American legal system, the context in which the PICC are supposed to operate presents remarkable differences among the national laws on many legal issues; in addition there is no common legal background and conceptual framework among the various national lawyers. Consequently, often have the UNIDROIT Principles' drafters been faced with the problem of choosing between conflicting solutions over the same issue. And the choice has been made according to what seemed the best solution responding to the special requirements of international trade¹⁸⁵.

The PICC represent a mixture of tradition and innovation: while reflecting solutions found in many, if not all, legal systems, they also – especially when irreconcilable differences between the various domestic laws rendered a choice inevitable – embody what in the light of the special needs of international trade are perceived to be the best solutions, even if these solutions still represent a minority view.

Two are the most important features which make them a very innovative instrument in the context of harmonisation of international trade law.

The first is their soft law character. Although phrased as abstract rules of law, the Principles have not been drafted as a convention or model law to be transformed into national law. They constitute a source of soft law, that is to say contract principles without a direct binding force, the acceptance and application of which is exclusively dependent on its persuasive power and the authority of UNIDROIT.

The second feature is their neutrality. The Principles are detached from any national legal context and do not reflect the rules and principles of any single national legal order. This implies a more balanced content: in applying them to international disputes, judges and arbitrators will find it easier to avoid resorting to rules belonging to this or that domestic law and to adopt an autonomous and internationally uniform solution. Moreover, parties, when deciding which law should govern the contract, will no longer be faced with the necessity of either choosing a particular national law, which inevitably will be unknown or less familiar to at least one of them, or referring to not better defined international trade usages and customs or to the enigmatic *lex mercatoria*.

The UNIDROIT Principles' greatest advantage with respect to international conventions is their flexibility, that is to say their ability to serve different purposes. This renders them particularly suited to overcome the difficulties currently encountered in international trade law. As stated in the

¹⁸⁵Cfr also UNIDROIT, Principles of International Commercial Contracts with Official Commentary, Introduction, 1994, p. viii <<For the most part the UNIDROIT Principles reflect concepts to be found in many, if not all, legal systems. Since however the Principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted>>.

Preamble, the UNIDROIT Principles may be used in five different contexts: 1) as rules applicable to the contract, when the parties have expressly agreed that their contract shall be governed by them; 2) as rules applicable to the contract, when the parties have indirectly referred to them by stating that the contract shall be governed by the general principles of law, the *lex mercatoria*, the principles of natural justice, and other similar expressions. The main reason why the parties may choose the UNIDROIT Principles (or at least a system of non-national, neutral rules) as the *lex contractus* is the frequent difficulty to agree on a national law governing the contract. During negotiations each party often tends to impose his or her national law to the contract and is reluctant to accept the other's party law. Accordingly, when no one has sufficient bargaining power, the parties may sometimes end up referring to a neutral system of rules such as *lex mercatoria* or general principles of law; 3) as rules applicable to the contract when the parties – neither directly or indirectly – have made reference to them in the contract, but it proves impossible to establish the applicable national law¹⁸⁶; 4) as means of interpretation or integration of existing international instruments, in order to overcome the major weakness connected to international conventions: the risk that, once incorporated into the various domestic legal systems, they end up being interpreted according to national criteria with the result that different national judges will interpret identical rules differently. In this context, the UNIDROIT Principles provide a collection of common guidelines for an autonomous and internationally accepted method of interpretation and integration of uniform law instruments; 5) as a model for national and international legislators: both national and international laws are often inadequate to meet the needs of international trade and therefore the UNIDROIT Principles, in so far as they represent generally accepted standards at the international level, may constitute a useful tool to interpret and amend national and international laws in accordance with the requirements of international trade¹⁸⁷.

But it is especially in the context of international arbitration that the UNIDROIT Principles are expected to have more practical applications¹⁸⁸. Unlike state courts, who are generally bound by their national legal systems to apply exclusively national laws to international disputes, international arbitrators enjoy a wider discretion in the choice of the applicable system of rules: in the absence of a specific choice made by the parties, they are generally enabled to decide the

¹⁸⁶This may happen, for example, when the national law which is potentially applicable according to conflict of laws rules is that of a remote country whose legal sources are of a rudimentary character or extremely difficult to access; but in most cases this occurs when conflict of laws rules identify a plurality of national laws all potentially applicable to the contract and they provide contradictory solutions to relevant points of the dispute. See F. Marella, *La Nuova Lex Mercatoria*, in *Trattato di Diritto Commerciale e di Diritto Pubblico dell'Economia*, 2003, p. 158

¹⁸⁷This has for example already happened in the case of the new Dutch Civil Code (entered into force in 1992), the revision of the German law of obligations (entered into force in 2002) and especially the Civil Code of the Russian Federation (Parts I and II entered into force in 1995 and 1996 respectively), with specific provisions directly inspired by them. See M.J. Bonell, *An International Restatement of Contracts*, Transnational Publishers, 1997, p. 235-236

¹⁸⁸See *infra* pp. 360ff.

dispute according to the rules of law they deem appropriate¹⁸⁹; and the term rules of law is commonly interpreted as allowing the arbitrator to adopt rules which do not belong to a national legal system, but are transnational in character.

Hard and soft law in the legalization literature

With respect to the subject-matter of harmonisation of international trade law, the literature on legalization¹⁹⁰ provides an important contribution to the discussion on the comparative advantages and disadvantages of hard and soft law¹⁹¹. It must nonetheless be noted that the concepts of hard and soft law in the legalization literature quite differ from those commonly adopted by lawyers. Whereas the latter usually mean by hard law a set of legal rules bestowed with coercive sanction and by soft law a set of non-legal rules of mere persuasive nature, in the legalization literature these two terms have less defined borders: a set of rules which is highly legalized in all three dimensions (obligation, precision, delegation) constitutes “hard law”; below this full level of legalization, there are continuous gradations of hardness and softness, in which the distinction between hard and soft law tends to blur. For example, we can have a set of rules characterized by a moderate level of legal obligation coupled with high precision, but very limited delegation; or by a very high level of legal obligation, but very low precision and very limited delegation¹⁹². This discussion aims at challenging the common view that soft law is a “failure”, a device which may destabilize the whole international normative system and turn it into an instrument that can no longer serve its purpose¹⁹³. In contrast, it is argued that international actors often deliberately choose softer forms of legalization as superior institutional arrangements, offering many of the advantages of hard law, avoiding some of the costs of hard law and having some advantages of their own¹⁹⁴.

The most important advantage of hard law is that it greatly increases the credibility of state commitments and accordingly cooperation among them¹⁹⁵: precise obligations drafted in legal terms prevent opportunistic interpretations based on self-interest, since non-complying states must

¹⁸⁹Cfr art 1496 of the French Code of Civil Procedure; art 1054(2) of the Dutch Code of Civil Procedure; art 182 of the Swiss Law on Private International Law; art 17 (1) International Chamber of Commerce Regulations, art 22.3 London Court of International Arbitration Arbitration Rules.

¹⁹⁰ See *supra* pp. 69 ff

¹⁹¹K. W. Abbott and D. Snidal, *Hard and Soft law in International Governance*, IO, 2000, 54, 3, pp. 421-456

¹⁹²K. W. Abbott and D. Snidal, *op. cit.*, p. 424

¹⁹³P. Weil, *Towards Relative Normativity in International Law?*, Am J. Intl L. 1983, 77, p. 423

¹⁹⁴K. W. Abbott and D. Snidal, *op. cit.*, p. 423

¹⁹⁵K. W. Abbott and D. Snidal, *op. cit.*, p. 426-430

justify their behaviour by relying on legal arguments and not solely on their own interests and preferences. Moreover, non-compliance with a hard legal norm has a sort of spillover effect, because the reputational effect of the violation can be generalised to all agreements subject to international law. On the other hand, the most serious disadvantage of hard law is that it entails higher contracting costs¹⁹⁶: States generally pay greater attention to negotiating and drafting legally binding agreements, since the costs of violation are higher; in addition, international cooperation through hard law is frequently hampered by the often lengthy and complex ratification processes. Another disadvantage is that hard law, being based on negotiated consensus, tends to reflect a narrow and often lowest common denominator not necessarily responsive to complex global challenges like environmental protection and labour market regulation. Moreover, states can either be parties or non-parties to a hard legal regime: such rigidity does not favour regime development, let alone success, because it excludes a priori those states which are financially or technically unable to comply and those which disagree with the obligations¹⁹⁷. Yet, hard law reduces the post-agreement costs of applying and enforcing commitments, as well as of further negotiations¹⁹⁸: precisely drafted rules can be better interpreted and applied to specific situations; moreover, proposal for amendments or new norms should be compatible with settled rules and the basic principles of the relevant regime, so that bargains need not be completely reopened and legal coherence is maintained. By contrast, a major advantage of soft law is its lower contracting costs¹⁹⁹: since one or more elements of legalization can be relaxed, soft law is often easier to achieve than hard law. A device very frequently used to lower the obligation dimension is the escape clause, i.e. a clause authorising non-compliance, should certain circumstances occur: for example, most arms control agreements include the clause whereby each party shall, in exercising its national sovereignty, have the right to withdraw from the agreement if it decides that extraordinary events related to the subject matter of the agreement have jeopardized the supreme interests of its country. In other agreements, the contents of legal obligations are phrased in very general terms and their specification is left to non-binding instruments, such as recommendations issued by specialized agencies. This the case for example of the Nuclear Non-Proliferation Treaty, in which many sensitive issues such as the protection of nuclear materials are predominantly regulated by recommendations from the International Atomic Energy Agency. These devices, although relaxing the legally binding force of international commitments, may ignite a process of social learning: over

¹⁹⁶K. W. Abbott and D. Snidal, *op. cit.*, p. 434

¹⁹⁷W. H. Reinecke and J. M. Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords*, in D. Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 2000., p. 88.

¹⁹⁸K. W. Abbott and D. Snidal, *op. cit.*, p. 430

¹⁹⁹K. W. Abbott and D. Snidal, *op. cit.*, pp. 434-436

the time, non-binding declarations can shape the practices of states and their expectations of appropriate conduct, leading to the emergence of customary law or the adoption of harder agreements. Accordingly, one may suppose that softer forms of legalization will be more attractive to states as contracting costs increase, as in the case of a large number of actors involved in negotiations, or particularly sensitive issues with potentially strong distributional effects²⁰⁰. Soft law offers also a number of advantages not available under hard legalization. First, to the extent that it permits weaker forms of delegation, it is a very effective method of limitation of sovereign costs, coupling legal obligations with inter-state implementation mechanisms²⁰¹. For example, in the field of international money-laundering regime, the OECD Financial Action Task Force issues policy recommendations and guidelines, administers a system of peer review and can even impose mild sanctions. Secondly, soft law provides more effective ways to deal with the uncertainty related to many international issue-areas, by giving rise to processes allowing parties to learn about the impact of rules over time and preventing them from being locked into agreements they regret, in case such rules turn out to have hidden costs or unforeseen contingencies²⁰². Hortatory or precise but not legally binding rules provide general standards against which behaviour can be assessed and support learning processes which reduce uncertainty over time. By the same token, moderate delegation involving political and administrative bodies where states retain significant control, allows the collection of information and expertise and thus reduces uncertainty. Thirdly, soft law can be quickly amended or replaced if it fails to meet its purposes: this flexibility may be particularly appropriate in fast changing and technology driven contexts, or where an effective regulatory response is not yet clearly identified, due to scientific uncertainty or other causes, but there is an urgent requirement to take some action²⁰³. In such cases, soft law instruments may provide an experimental response to new challenges as they continually arise²⁰⁴. Fourthly, soft law facilitates compromise among actors with different interests and values and different degrees of power²⁰⁵. Negotiating a hard and highly elaborated agreement among heterogeneous states is a costly and lengthy process; by contrast, soft law allows states to adapt their commitments to their particular situations, rather than trying to accommodate divergent national characteristics within a single text. Moreover, soft law provides for flexibility in implementation, helping states to deal with

²⁰⁰K. W. Abbott and D. Snidal, *op. cit.*, p. 436

²⁰¹K. W. Abbott and D. Snidal, *op. cit.*, pp. 436-440

²⁰²K. W. Abbott and D. Snidal, *op. cit.*, pp. 441-444

²⁰³D. Shelton, *Law, Non-Law and the Problem of Soft-Law*, in ID (ed), *Commitment and Compliance*, cit., p. 13; W. H. Reinecke and J. M. Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords*, cit., p. 95

²⁰⁴M. E. O'Connell, *The Role of Soft Law in a Global Order*, in D. Shelton (ed), *Commitment and Compliance*, cit., p. 110.

²⁰⁵K. W. Abbott and D. Snidal, *op. cit.*, pp. 444-447

the domestic political and economic consequences of an agreement and thus increasing the efficiency with which it is carried out. Fifthly, soft law accommodates states with different degrees of readiness for legalization²⁰⁶: those whose institutions and resources allow them to comply with hard commitments can enter agreements of that kind; those whose weaknesses in these areas prevent them from complying with hard agreements may opt for softer forms of commitments through reservation clauses or exceptional regimes for a transitory period. Many treaties envisage such special provisions for developing countries, transitional economies, and other categories of states. Such arrangements are often preferable to either a softer agreement among all parties or a harder agreement with limited membership: over time, if the soft arrangements are successful and without adverse consequences, the initially reluctant states may accept harder legalization. Accordingly, soft law may be employed when there are concerns about the possibility of non-compliance, e. g. because of domestic political opposition, lack of ability or capacity to comply, uncertainty about whether non-compliance may be ascertained or sanctioned, or disagreement with some aspects of the proposed regime. In soft law arrangements inability to comply is not a critical barrier to entry: soft law instruments may be intended to induce states to participate or pressure non-consenting states to conform, thus avoiding the in-or out mechanism of most legally binding agreements²⁰⁷. Finally, soft law allows non-state actors a role that is possible only rarely in traditional law-making processes: it is open to transnational private actors which cannot normally participate in the drafting, implementation and enforcement of hard law, because for the most part they are not recognised as legitimate actors of the international system²⁰⁸. The advantages of soft law do not come without cost: flexibility of soft law makes it harder to ascertain whether a state is complying with its commitments and therefore create opportunities to free riding. Accordingly, states face a tradeoff between the advantages of flexibility and the disadvantages in ensuring performance²⁰⁹.

Interactions between hard and soft law

²⁰⁶K. W. Abbott and D. Snidal, *op. cit.*, p. 445

²⁰⁷D. Shelton, *Law, Non-Law and the Problem of Soft-Law*, in ID (ed), *Commitment and Compliance*, cit. p. 12; W. H. Reinecke and J. M. Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords*, cit., p. 95

²⁰⁸D. Shelton, *Law, Non-Law and the Problem of Soft-Law*, cit., p. 13; W. H. Reinecke and J. M. Witte, *Interdependence, Globalization and Sovereignty: The Role of Non-Binding International Legal Accords*, cit., p. 95

²⁰⁹K. W. Abbott and D. Snidal, *op. cit.*, p. 446

The legalization paradigm shows how blurry the boundaries between hard and soft law are. Examples of full legalization, where all the three dimensions are present at the highest level, are rare: more common are those arrangements in which at least one dimension is relaxed. For example, treaties with imprecise or indeterminate provisions have been termed “legal soft law” in that they merge legal form with soft obligations; the International Court of Justice has recognised that legally binding obligations among states may be created through oral agreements, unilateral statements, minutes of a meeting, exchange of letters²¹⁰; reservations and interpretative declarations are instruments on which states may rely in order to deny or limit legal obligations stemming from hard law commitments; treaties frequently envisage private dispute resolution processes (negotiation, mediation, conciliation, arbitration) instead of adjudicatory mechanisms. Accordingly, the widespread inclusion of soft law commitments in hard law instruments shows that it is not always clear where law ends and non-law begins, or, in other terms, where soft law should be placed²¹¹. By contrast, some soft law instruments may have a specific normative content that is “harder” than the soft commitments in treaties; moreover, they frequently envisage supervisory and implementation mechanisms traditionally found in hard law texts: this is the case for instance of the above-mentioned Agenda 21²¹², which, although laying down non-binding rules, envisaged an ad hoc body (the Commission on Sustainable Development) to supervise implementation. The distinction between hard and soft law is becoming ever more difficult to draw, mainly because it is rare to find soft law standing in isolation; rather, it is most frequently used either as a precursor or as a supplement to a hard law instrument²¹³.

Soft law can be used to fill gaps in hard law instruments or supplement hard law with new norms. International environmental law-making provides numerous examples of conventions generating “secondary” or “delegated” soft law, i.e. the statements and practices which develop under a treaty to supplement or correct its text: a framework convention is combined with a series of accompanying non-binding instruments (such as conference resolutions, administrative agreements, memoranda of understanding) specifying the details of the convention's provisions or providing guidance to their interpretation and application²¹⁴.

²¹⁰Cp *Qatar v. Bahrain*, 1994, ICJ Rep. 6, in which the International Court of Justice upheld the binding character of the signed minutes of a meeting

²¹¹D. Shelton, *Law, Non-Law and the Problem of Soft-Law*, cit., p. 8

²¹² See *supra* p. 71

²¹³D. Shelton, *Law, Non-Law and the Problem of Soft-Law*, cit., p. 10.

²¹⁴See e.g. The 1992 Montreal Protocol to the Vienna Convention for the Protection of the Ozone Layer (YBIEL, 1992, 2, p. 819) which provides a framework for non-compliance procedure the details of which have been specified by the internal practices and decisions of the Implementation Committee envisaged by the Protocol itself.

In other instances, a given set of rules is first formulated in a non-binding form with the possibility, or even aspiration, of hardening the provisions of an existing treaty, developing into a subsequent treaty, or becoming a catalyst for the establishment of customary international law²¹⁵. For example, the 1996 International Covenant on Economic, Social and Cultural Rights (IESCR) contained very weak obligations, had no monitoring committee and no compliance mechanism; however, a number of external factors, such as greater political and scholarly attention to economic and social rights, NGOs activity, practice of similar bodies, notably the Human Rights Committee, led to the establishment in 1986 by ECOSOC of the Committee on Economic, Social and Cultural Rights to which states were required to report. In turn, the Committee has strengthened the provisions of the Covenant through its General Comments, which have inter alia suggested steps to take against states failing to comply with their reporting obligations: accordingly, the combined impact of these measures has been to raise the level of obligation under the Covenant far beyond that originally envisaged. Likewise, the use in international trade of pesticides and chemicals was for years regulated through non-binding instruments developed by the FAO and the United Nations Environment Programme, but in September 1998 ninety-five States adopted a treaty with binding obligations to regulate this trade²¹⁶. Moreover, in recent years non-binding instruments have sometimes provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have helped to establish the content of the norm²¹⁷. As stated by the International Court of Justice, although non-binding instruments do not become binding merely through repetition, a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule²¹⁸.

Harmonisation as a product and harmonisation as a process

Most legal doctrine has so far dealt with harmonisation only as a product: there is a vast amount of literature on the products of harmonisation, such as commentaries to the various international

²¹⁵C. Chinkin, *Normative Development in the International Legal System*, cit., p. 30 and 32.

²¹⁶Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and pesticides in International Trade, ILM 1999, 38, 1.

²¹⁷D. Shelton, *Law, Non-Law and the Problem of Soft-Law*, cit., p. 1

²¹⁸ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ILM, 1996, 35, par. 71.

conventions, model laws and international restatements²¹⁹. But little attention has been paid to harmonisation as a process, that is the working methods used by the different international organisations engaged in an harmonisation project²²⁰. The emphasis on the process of harmonisation is based on the premise that much of the success of a harmonisation project depends on its planning, its organisation and the care with which its boundaries are delineated²²¹. This was not always taken sufficiently into account in the past, with the result that in many cases, only after the harmonisation tool was drafted it was discovered that the effort was not really worthwhile: there was not great demand for it, or even hostility, from the sectors affected²²².

In order to avoid this waste of effort, time and money, some authors have analysed and discussed the methods adopted by the harmonising agencies for selecting, initiating and dealing with a particular harmonisation project, with a view to assessing the most significant problems which may impede progress towards completion, adoption and application of a harmonisation instrument.²²³ Although methods and approaches vary from agency to agency, legal doctrine has identified a number of phases commonly recurring in most harmonisation processes. In each phase it is also possible to identify a number of related issues and problems.

The preliminary stage

This phase has the purpose of exploring the feasibility of an harmonisation project.

²¹⁹ For the 1980 Convention on the International Sale of Goods see e.g. P. Schlechtriem and I. Schwenzer (eds), *Commentary on the UN Convention on the International Sale of Goods* (CISG), Oxford University Press, 2005; for the UNCITRAL Model Law on International Commercial Arbitration see e.g. H. N. Holtzmann and J. E. Neuhaus, *A Guide to the Uncitral Model Law on International Commercial Arbitration: Legislative History and Commentary*, Kluwer law, 1995; for the UNIDROIT Principles see e.g. M.J. Bonell (ed), *An International Restatement of Contract Law: The Unidroit Principles Of International Commercial Contracts*, Transnational Publisher, 2005.

²²⁰ On the distinction between harmonisation as a product and harmonisation as a process see F. Cafaggi, *Una governance per il diritto europeo dei contratti?*, in Id (ed.), *Quale armonizzazione per il diritto europeo dei contratti?* CEDAM, 2003, pp. 183- 211

²²¹ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, Oxford University Press, 2007 p. 215

²²² R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit, p. 217. In the field of international commercial arbitration the best-known example is the European Convention Providing a Uniform Law on Arbitration which was signed in 1961 in Geneva and was conceived mainly as an instrument laying down uniform rules for the promotion of arbitration in East-West disputes. Yet, on account of the complexity of its provisions, most of which concerned only with the resolution of largely theoretical problems, this convention has found scarce application in practice. Another example, always in the context of the harmonisation of arbitration laws in Europe, is the 1966 Strasbourg European Convention, which, although aimed at establishing a uniform arbitration law for both international and domestic arbitrations, has never entered into force: it was signed only by Austria and Belgium and ratified only by the latter. Cfr A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, 1991, p. 64 and P. Fouchard, E. Gaillard, B. Goldman, *Traite' de l'Arbitrage Commercial International*, Litec, 1996, pp. 157-163

²²³ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit, p. 216

In the preliminary or exploratory phase the most important issue is the selection of the subject, that is the area or the particular institution of the law to be harmonised.

The idea for a harmonisation project usually emerges in a paper discussed at a conference or in an article published in a journal, which draws the academic community's attention. This was the case for example of Schmitthoff's paper at the 1962 Colloquium on the Sources of Law of International Trade²²⁴, which is commonly considered the first step in the creation of UNCITRAL. But the idea may also come from an organisation not directly involved in harmonisation projects, which communicates it to the secretariat of a relevant agency or from a formulating agency itself. This was the case for example of the Model Law of International Commercial Arbitration and of the UNIDROIT Principles. In the former case, the first step was taken by UNCITRAL Secretariat in 1978, during a meeting with a number of interested international organisations²²⁵; in the latter case the idea came from the UNIDROIT Governing Council in 1971²²⁶. Once the idea has come, in some way or another, to a formulating agency's attention, the most important issue is ascertaining the feasibility of the project. Nowadays all agencies seek to ascertain whether the problem which the harmonisation project purports to address really exists, and, if so, whether it is susceptible of solution by harmonisation. Furthermore, the preliminary survey aims at exploring whether the project is sufficiently serious as to justify the time, effort and money which the preparation, conclusion and promotion of the project entail.²²⁷ This is the most important stage of the harmonisation process: the lack of an accurate survey on the feasibility of the project has been the main cause in the past of the failure of many harmonisation attempts²²⁸. The most important flaw which may affect the project in this preliminary stage is its over-ambitiousness: several projects have failed because they sought to achieve too much, especially at the outset²²⁹. This was the case of UNIDROIT's initial idea of a universal code of commercial contracts, to be achieved by means of an international convention: after a first preliminary report in 1974, this project was set aside for many years as being too ambitious and was taken up only in 1980, when it was redrafted in a more feasible fashion.²³⁰

Another big flaw of the initial harmonisation project may be its scarce relation with the business community interests: the project may tackle problems which the commercial lobbies involved do

²²⁴ See *infra* p. 134

²²⁵ See *infra* pp. 203ff.

²²⁶ See *infra*, p. 324.

²²⁷ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit., p. 217

²²⁸ H. Kronke, *International Uniform Commercial Law Conventions: Advantages, Disadvantages, Criteria for Choice*, ULR, 2000, 1, p. 17

²²⁹ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit., p. 230

²³⁰ See *infra* pp. 324ff.

not see at all, or which are not felt to be really serious²³¹. In selecting the topic for a harmonisation project, one should take account of the radicated conservatism of business circles, which are deeply attached to their national law and usually perceive new rules as a dangerous upheaval of the status quo²³². Accordingly, in choosing a topic for harmonisation, it is essential to ascertain in advance how far the interests concerned are prepared to abandon their national rules and to accept uniformity of law²³³. Sometimes, even where the problem of the harmonisation of a certain subject is particularly felt within the business community, the chances of success depend on an accurate balance of the interests involved: if the result envisaged is not a win-win situation for all the parties affected by the harmonisation project, the reluctance of the disadvantaged lobby is likely to be significant and the chances of sufficiently wide acceptance of the future instrument recede²³⁴

The formulatory stage

Once a valid subject has been identified, the second phase, the formulatory stage²³⁵, consists in the proper elaboration of the harmonisation project. Before embarking in drafting, two preliminary and closely connected issues come to the fore: the selection of the agency and the selection of the proper harmonisation tool.

Selection of the agency

The question whether the organisation which has taken up the project is the most suitable for the project itself is related to one of the most important problem of the harmonisation process: the coordination among the various formulating agencies. The solution to the issue of the selection of the agency depends on a number of factors, namely the nature of the instrument envisaged, the

²³¹H. Kronke, *International Uniform Commercial Law Conventions*, cit, p. 17

²³²R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit, p. 730

²³³H.C. Gutteridge, *Comparative Law: An Introduction to the Comparative Method of Legal Study & Research*, Cambridge University Press, 1946, p. 175. Cfr also p. 157 << the citizens of many countries are deeply attached to their national law: at one extreme we have, for instance, the Frenchman, who carries in his pocket the Code Civil, the dog-eared leaves of which bear witness to the frequency with which it is consulted, at the other end of the line we find the Englishman... who is convinced that his common law is the quintessence of human wisdom and justice. It must not be forgotten that to invite the citizen to give up a rule of law to which he has become accustomed may be to demand almost as great sacrifice as the abandonment of his national speech or religion>>

²³⁴H. Kronke, *International Uniform Commercial Law Conventions*, cit, p. 17

²³⁵H. C. Gutteridge, *Comparative Law*, cit, p. 175

agreements reached with the other formulating agencies and the determination of the agency in charge of the project playing a leading role in that particular sector of harmonisation²³⁶.

The flourishing of formulating agencies whose fields of action tend to overlap is not necessarily a bad thing, to the extent that this fosters a certain degree of healthy competition. Nonetheless, a number of factors should be taken into consideration, in determining the competence of an agency to deal with a given project. For example, the International Chamber of Commerce is not a law-making body and therefore it is not engaged in the preparation of legislative tools, such as international conventions or model laws. On the other hand, since it is the international non-governmental body which best represents the world business class at the international level, it may have an enormous influence on the development of uniform rules and standard terms which may be directly incorporated by individual parties into their contracts. This is indeed what happened through the elaboration by the ICC of such instruments as Incoterms, the Uniform Customs and Practice of Documentary Credits, the Uniform Rules for Demand Guarantees. Where competences between the work of different agencies effectively overlap, the decision as which one is best suitable for the project is a matter of established practice. An important instance is represented by the relationship between UNIDROIT and UNCITRAL: the former was set up to promote the harmonisation of private law, including commercial law; the latter is devoted to the harmonisation of international trade law. Accordingly, in the field of international trade law, both organisations appear suited to carry out a project. What happens in practice is that the secretariats of the two organisations work together in order to avoid duplication of efforts: the decision as which organisation will concretely deal with a given project is taken on a case by case basis.

Not infrequently two or more organisations operate in the same field of harmonisation, but through different kinds of instruments. Here, coordination among agencies and instruments operating in the same field of harmonisation becomes most important. For example, demand guarantees are the subject of both the ICC's Uniform Rules for Demand Guarantees and the UN Convention on independent guarantees and stand-by letters of credit. The Convention contains provisions on judicial remedies that would be outside the scope of ICC Rules, but both instruments deal with the rights and duties of the parties. Accordingly, duplication is avoided by the convention's deferment to party autonomy and thus leaving room to the Uniform Rules drafted by the ICC. Another important example is represented by the relationship between the Model Law and the NYC, but this point will be dealt with in detail further²³⁷.

²³⁶ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit, p. 219

²³⁷ See *infra* pp. 217ff.

Selection of the instrument

The selection of the instrument largely depends on the competences of the organisation undertaking the project. For instance, since the ICC is not a law-making body, it can only draft instruments aimed at harmonising contractual practice, in particular contractually adopted rules, such as standard contract terms, model contracts and contractual guides. The Hague Conference on Private International Law, which is the specialised body for private international law conventions, will deal only with this particular instrument.

But when a formulating agency has at its disposal a wide range of harmonisation tools, as in the case of UNCITRAL and UNIDROIT, what are the criteria determining the instrument's choice? The preliminary question is whether governments will be involved in the project. In the case of the UNIDROIT Principles, the view was taken that, since they were meant to be non-binding rules, the work should be done exclusively by scholars and government should not be involved. Accordingly, the choice of a legislative instrument such as a convention or a model law was excluded²³⁸. Where it is envisaged that the instrument will be adopted by states, the choice is between a convention and a model law. Where there is a reasonable expectation that states will accept a common text without raising too many exceptions or recurring to too many opting out clauses, the convention technique is preferable, in that it ensures more uniformity. On the other hand, a model law is more suitable, when it is felt that it will be difficult to agree on a common text and that there will be states which will claim the possibility to adapt the common text to their specific needs.

Once the agency and the instrument has been selected, careful attention should be paid to the planning and organisation of the drafting process. This entails a wide range of specific issues. The issue of a close connection with business interests is at stake also in this stage of the process. Here the problem is to involve the interested business sectors in the drafting. What frequently happened in the past – and still does in some formulating agencies – is that business associations were invited only at the last stage of the process, once the new instrument's main features had already been decided by government officials and academic experts. Business associations were considered as observers or, at best, as messengers of the new harmonisation tool: they were merely asked to take it home and to spread the word among their members²³⁹. This of course greatly contributed to the drafting of harmonisation measures perceived as distant by the business community. Nowadays

²³⁸See *infra* pp. 326ff.

²³⁹R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, op cit, p. 733

many commentators stress the importance of involving the business community not only in the promotion of the harmonisation tool, but also in its elaboration: it is suggested that the most successful instruments are those whose drafting process has taken in large account business interests, concerns and experience, especially before embarking on detailed drafting. Maybe the most important example in this respect is the latest revision of the Uniform Customs and Practice for Documentary Credits (the so-called UCP 600) published in 2007 by the International Chamber of Commerce. This set of rules has been defined as the most successful act of commercial harmonisation in the history of world trade, being currently observed by banks in approximately 180 countries²⁴⁰. The latest revision process looks very impressive for the wide range of individuals and groups who gave their contribution: the UCP Drafting Group examined more than 5000 individual comments before arriving at its final proposal; the UCP Consulting Group, consisting of members from more than 25 countries served as the advisory body²⁴¹; the more than 400 members of the ICC Commission on Banking Technique and Practice made pertinent suggestions for changes in the text; and 130 ICC National Committees worldwide took an active role in consolidating comments from their members. Given the wide variety of the interests taken into consideration, it is not surprising that the UCP are frequently cited as the foremost example of how international business self-regulation can be more efficient than treaties, government regulation or case-law²⁴².

A widely debated problem is whether the drafting should be approached by the organisation as a whole, or rather by a smaller committee. This issue is related to the problem of avoiding the elaboration of over-ambitious projects which we have seen before. In the past the text was generally drafted, discussed and formally adopted by a diplomatic conference or by the plenum of the organisation in charge of the project. But this system entails a number of drawbacks, which seriously affect the quality of drafting. Setting up a diplomatic conference is very complicated and costly: its meetings entail substantial expenses, with participants from many parts of the world having to be funded by governments for their travel, accommodation and subsistence costs. Where, as it is common, there are two or more working languages, the costs of translation and interpretation have to be covered. In addition, most of its participants are officials heavily engaged in government work, and the time they can devote to the conference is limited. All these factors limit the frequency of the meetings, so that often the diplomatic conferences meet no more than once a year and sometimes less frequently than that. Another important drawback is related to the conference's

²⁴⁰ G. Jimenez, *The International Chamber of Commerce: Supplier of Standards and Instruments for International Trade*, ULR, 1996, 2, p. 286

²⁴¹ The consulting Group was composed by banking and transport industry experts and co-chaired by John Turnbull, Deputy General Manager, Sumitomo Mitsui Banking Corporation Europe Ltd, London and Carlo Di Ninni, Adviser, Italian Bankers Association, Rome.

²⁴² *Ibidem*

membership, which is continuously subject to changes, with the consequence that new members have to be given the time to catch up with the work already done²⁴³. The final result is that the diplomatic conference has often very little time to discuss the various issues on the agenda and accordingly to take ponderate decisions. Consequently, all the complex issues related to the elaboration of a harmonisation instrument must be approached in a very limited numbers of meetings. This is often reflected in bad drafting. In order to overcome these drawbacks, the general practice today is to confer the power of drafting to a restricted committee and only the final discussion and approval to the diplomatic conference. This is for example the practice followed for the elaboration of all UNCITRAL's most recent legislative instruments: once a restricted working group has drawn up a draft text, the full Commission takes it over and adopts the final text, which is subsequently approved by the UN General Assembly or by a diplomatic conference²⁴⁴. It is argued that the quality of draft legal text increases proportionally to the decrease of the number of draftsmen²⁴⁵: accordingly, it is considered incomparably more efficient the work of a small working group, whose membership remains constant for the whole duration of the process and which has ample time for studying proposals, redrafting texts and reconsidering issues than that of a large forum where a large number of participants going over the issue for the first time and where legal texts must often be redrafted on the spot²⁴⁶. On this reading, the process of a large convention discussing a broad project of many articles and ending in a failure is contrasted to that of a small working group beginning from a small canvas of a mere few articles and gradually proceeding to a more elaborated text.²⁴⁷ Experience has shown that the drafting process of an instrument developing gradually is in the final analysis faster and has higher chances of success than an initial grand design: this allows time for the development of a consensus in support of the project and the

²⁴³R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit., p. 236. Sometimes new members even challenge issues which have already been settled: this may doubtless turn out useful, since it may show the weakness of what previously agreed, but on the other hand it hampers the speedy progression of the work.

²⁴⁴W. Vis, *Process of preparing universally acceptable uniform legal rules*, in UNCITRAL, *Uniform Commercial Law in the Twenty-First Century*, United Nations publication, 1995, p. 15

²⁴⁵W. Vis, *Process of preparing universally acceptable uniform legal rules*, op. cit., p. 15, quoting R. David

²⁴⁶J. Honnold, *Goals of Unification*, in UNCITRAL (ed), *Uniform Commercial Law in the Twenty-First Century*, cit., p. 15

²⁴⁷This was the case, for example, of the UNIDROIT project of a convention on agency in the international sale of goods. The 1979 original project was very broad and covered both the "internal" relations between principal and agent and the "external" ones between the agent and the purchaser. The diplomatic conference failed to finish its work and managed to reach agreement only on a limited number of articles. The work was then taken up by a restricted number of experts nominated by UNIDROIT, which set aside the articles of the draft convention dealing with the relation between principal and agent and focused exclusively on third-party relationships. This revised text was approved by a second diplomatic conference in 1983, but has so far attracted an insufficient number of ratifications to bring it into force. By contrast, the project of a convention on international interests in mobile equipment was from the outset carried out by a restricted working group, which began to discuss on a text of few articles. The project grew as industry experts demonstrated the need for ever-wide range of provisions, so that the final project in the end amounted to ninety-nine articles. The text was adopted in november 2001 and entered into force in march 2005, which is a remarkably speedy process for international standards.

introduction of new ideas and provisions as it unfolds²⁴⁸.

But this middle-ground solution has not always proved useful in overcoming the drawbacks related to the diplomatic conference. The problem always remains that, when it comes to the final text's approval, most of the diplomatic conference's delegates have little or no involvement in or knowledge of the text to be approved, since they did not attend the drafting committee's sessions. So, when the conference is called to discuss and approve the final text, it is generally necessary to examine it afresh, article by article, paragraph by paragraph: time pressures build up as the conference proceeds and towards the end there is likely to be a scramble to finish on time. In this process it is all too easy for errors of one kind or another to occur and for some of the coherence of the original draft prepared by the committee to be lost.²⁴⁹ Accordingly, the only way to overcome or at least reduce the drawbacks related to the diplomatic conference is to pay keen attention to its planning and management. A good solution may be to appoint a person expert in the field to act as responsible of the project in charge of the organisation of regular meetings, the elaboration of a timetable for the project, the preparation of drafts, the invitation to submit, observations, proposals, and the like.

The post-adoption stage

This stage has only recently come to the fore, the adoption of the instrument being traditionally considered as the culmination of the work. Nowadays there is an increasing awareness that a greater effort is needed to promote the instrument and to secure ratifications and accessions. Promotion is necessary in order to overcome traditional scepticism against new laws. Lawyers and businessmen's traditional conservatism has been best described by Rene David: <<lawyers and businessmen are attached to the status quo, to the order of things which they know, and to which their behaviour and their ways of doing things have been adapted. They view all reform with suspicion, seeing primarily the trouble it will cause, rather than its beneficial effects and the progress which it is intended to produce. This attitude can be clearly seen when the international unification of law is considered. Everyone accepts unification provided this means the others falling into line with his national law>>²⁵⁰. This is why new uniform laws are often rejected by national lawyers and businessmen as << a synthetic compromise on the lowest common denominator

²⁴⁸R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit, p. 231

²⁴⁹R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit, p. 237

²⁵⁰R. David, *International Encyclopedia of Comparative Law*, vol II ch 5, 1972, p. 24-25

without supporting case law>>²⁵¹. Despite the increasing awareness of the importance of promotion of harmonisation tools, the amount of resources spent for this activity remains inadequate. As has been noted by the Secretariat of UNCITRAL, given the large amount of money spent in the drafting of harmonisation tools, it is not understandable why international organisations and their member states are so reluctant in spending more for making that text known²⁵².

What can be done to overcome this conservative routine²⁵³? The most important antidote is an adequate and disseminated information to all the addressees and ultimate users of a given text: business circles, practitioners, and especially judges. It goes without saying that promotion is useless if it is not combined with the involvement of the business community during the drafting stage. Otherwise, one risks promoting a text perceived as too distant by its own addressees. As Sacco has put it, when the new source of law is based on the will of the interested parties, the new rule is grounded in general consent and consequently there is no traumatic break with the previous law²⁵⁴.

Once new texts are better understood, once the objectives behind the rules and the underlying policies are clear, they can be more easily acceptable. It is in particular necessary to dispel misconceptions²⁵⁵ and explain departures from traditional domestic law, in order to eliminate concerns about the adoption of a new rule conceived as foreign, that is strange or unknown. In addition, it is useful to emphasise that a well-drafted uniform law can be easily applied in many jurisdictions and therefore can quickly raise a large amount of case-law which can dissipate doubts of interpretation of its norms. Finally, one should create awareness about the fact that an international transaction is not naturally rooted in one particular domestic law and therefore can be better regulated by a uniform transnational law.

The promotional initiatives carried out by formulating agencies are varied. UNCITRAL, for example, periodically publishes a collection of its uniform texts and related materials, as well as a yearbook providing reports of its activity, with particular reference to the status of its conventions. It has also set up an electronic database collecting the case law relating to its harmonisation

²⁵¹Secretariat of UNCITRAL, *Promoting wider awareness and acceptance of uniform law texts*, in UNCITRAL, *Uniform Commercial Law in the Twenty-First Century*, United Nations publication, 1995, p. 253. The Secretariat refers, by way of example, that the UNCITRAL Model Law on Arbitration was once labelled “esperanto law” and “UNCITRAL fast food”.

²⁵²Secretariat of UNCITRAL, *Promoting wider awareness and acceptance of uniform law texts*, cit, p. 254. The Secretariat has for example estimated that the cost for the UN Sales Convention borne exclusively by the United Nations, excluding all the costs for delegation, amount to 4 million US dollars.

²⁵³Again David <<routine is the worst and most dangerous enemy of the unification of law>>, *op. cit.*, p. 26

²⁵⁴R. Sacco, *Diversity and Uniformity in the Law*, *Am J Comp L*, 2001, 49, p. 178

²⁵⁵An example of misconception is that there is legal certainty only with a national law and that legal certainty cannot be provided by a uniform law. In many cases this is not more than a myth, if one compares the uniform law with national law. This is for example what happened in Hungary with the reception of the Model Law on International Commercial Arbitration. At the beginning, the ten Hungarian professors who examined the model law had many concerns and wanted to change many provisions, but in the end they agreed to stick to the text of the model law.

instruments, organises regional and national seminars to promote its initiatives and provides technical assistance to national legislators involved in legislative reform.

The main actors of uniformity in transnational commercial law: UNCITRAL and UNIDROIT

UNCITRAL general features

The United Nations Commission on International Trade Law (UNCITRAL) is a specialised commission of the United Nations, established in 1966 in order to further the progressive harmonization and unification of the law of international trade. UNCITRAL is composed of sixty member states elected by the General Assembly of the United Nations. Membership in UNCITRAL is limited to a small number of states, so as to facilitate the deliberations. UNCITRAL was originally composed of 29 States; its membership was expanded in 1973 to 36 states and again in 2004 to 60 states. Membership is representative of the various geographic regions and the principal economic and legal systems of the world. In particular, there are five regional groups represented within UNCITRAL: Africa, Asia, Eastern Europe, Latin America and Caribbean, Western Europe and Other States (this latter category includes Australia, Canada, New Zealand and the United states). Members are elected for six years, half the members being renewed every three years. UNCITRAL is open to participation as observers to other interested UN member states, as well as by international organizations, both governmental and non-governmental: they are allowed to join all sessions to the same extent as members, with the sole exception that they have no right to vote. This exception is however of little significance, since UNCITRAL typically reaches its decision by consensus, rather than by voting: during its sessions all efforts are made in order to take into account all concerns raised and to reach a final text which is acceptable to all.²⁵⁶

UNCITRAL's work is organized and conducted at three levels²⁵⁷. The first level is UNCITRAL itself, often referred to as the Commission, which holds an annual plenary session lasting from two

²⁵⁶UNCITRAL. *The UNCITRAL Guide*, United Nations Publication, 2006, p. 3, available on the website [uncitral.org](http://www.uncitral.org/pdf/english/texts/general/V0650941.pdf) at <http://www.uncitral.org/pdf/english/texts/general/V0650941.pdf> (July2009)

²⁵⁷ *The UNCITRAL Guide*, cit., p. 2

to four weeks and taking place in alternate years at United Nations headquarters in New York and at the Vienna International Centre. The second level is composed by the intergovernmental working groups, whose purpose is to develop the topics related to UNCITRAL's work programme. The Commission has established six Working Groups to perform the substantive preparatory work on topics within UNCITRAL's statutory purposes: Procurement, International Arbitration and Conciliation, Transport Law, Electronic Commerce, Insolvency Law and Security Interests. Each Working Group is composed by experts specialised in the topic, who can hold sessions more often (usually twice a year, holding a spring session in New York and a fall session in Vienna) and in a less formal environment²⁵⁸. The Working Groups report on their progress at UNCITRAL's annual session and submit their drafts to the latter for review and approval. The third level is the Secretariat, which assists the Commission and its working groups in the preparation and conduct of their work. It is made up of highly qualified professionals from the International Trade Law Division of the UN Office of Legal Affairs and its tasks include making preparatory reports, providing necessary background information, suggesting and reviewing preliminary draft texts. In order to improve the quality of its technical assistance, the Secretariat often consults outside experts in a particular field coming from different legal traditions. Such experts have so far included academics, practising lawyers, judges, bankers, arbitrators and members of various international, regional and professional organizations.

As we can see from this brief outline, UNCITRAL structure, allowing a wide range of experts and stakeholders to participate and contribute to its works, is highly representative of the transnational business class and constitutes an example of epistemic community²⁵⁹: its sessions represent a <<wholesome mix of academic specialists in commercial and comparative law, practising lawyers, and members of government ministries with years of experience in international lawmaking>>²⁶⁰. Moreover, its decision-making method, essentially based on consensus rather than on voting and veto mechanisms, is an example of how Habermas' theory of communicative action can work in practice²⁶¹.

The Birth of UNCITRAL

²⁵⁸ H.M. Holtzmann and J.E. Neuhaus, *A Guide to the UNCITRAL Model law: Legislative History and Commentary*, Kluwer, 1989, p. 5

²⁵⁹ On this concept see *supra* pp. 75ff

²⁶⁰ J. Honnold, *Uniform Law for International Sales Under the 1980 United Nations Convention*, Kluwer, 1999, p. 51

²⁶¹ On this concept see *supra* pp. 77 ff

Participants to the debate which gave rise to UNCITRAL were faced with most of the issues that we discussed in more general terms in the previous paragraphs, when dealing with the broad topic of harmonisation of transnational commercial law, namely the obstacles to harmonisation, the various techniques, approaches and instruments of harmonisation and the notion of a new law merchant²⁶². The first step towards the establishment of UNCITRAL is commonly considered prof. Schmitthoff's speech at the 1962 Colloquium, convened in London by the International Association of Legal Science, on the "Sources of Law in International Trade"²⁶³. In his intervention, prof Schmitthoff lamented the lack of coordination among the formulating agencies dealing with the unification and harmonisation of international trade law²⁶⁴. In a subsequent article published some years later, he suggested as a remedy the establishment of an international agency of the highest order, possibly on the level of the United Nations, which should be charged with the task of coordination²⁶⁵. Following prof. Schmitthoff's remarks, Hungary took a decisive role in fostering these ideas. In 1964 and 1965²⁶⁶, it submitted to the UN General Assembly a memorandum²⁶⁷, in which it pointed out that, although a number of international organisations were already dealing with the issue of the development of international trade law, their efforts were uncoordinated and therefore it claimed a more active role of United Nations in this area. In the wake of Hungary's initiative, the General Assembly of the UN requested the Secretary-General to carry out a comprehensive study reviewing the work so far accomplished in the unification and harmonisation of international trade law, analysing the methods and the topics suitable for further advances and considering the future role of the United Nation in the field.²⁶⁸ Accordingly, in 1966 the Secretariat prepared a report entitled "Progressive Development of the Law of International Trade"²⁶⁹, which was based on a preliminary study by prof. Schmitthoff. Not only did the Report lay the foundations for the establishment of UNCITRAL, but it also constitutes an excellent summary of the results so far accomplished and the main obstacles still to overcome in the field of the harmonisation of international trade law. The Report consists of four chapters. Chapter One identifies two different but complementary approaches, which have so far been used to reduce conflicts and divergencies arising from the laws of different countries. The first, defined as the "clinical method", consists in establishing common

²⁶² See *supra* pp. 85 ff.

²⁶³ Cfr A. Broches, *Birth of UNCITRAL*, in UNCITRAL (ed), *Uniform Commercial Law in the Twenty-First Century*, 1995, United Nations Publication, p. 7

²⁶⁴ C.M. Schmitthoff, *The Law of International Trade: its Growth, Formulation and Operation*, in C.M. Schmitthoff (ed.), *The Sources of the Law of International Trade*, 1964, p. 37

²⁶⁵ C.M. Schmitthoff, *The Unification of the Law of International Trade*, JBL, 1968, p. 105

²⁶⁶ In 1964 Hungary's proposal was not considered by the General Asembly and therefore it was re-submitted in an identical fashion the following year.

²⁶⁷ "Consideration of steps to be taken for progressive development in the field of private international law with a particular view to promoting international trade", UN Doc A/5728 (1964) and A/5933 (1965)

²⁶⁸ UN Doc A/RES/2102 XX (1965).

²⁶⁹ UN Doc A/6396 (1966).

rules regulating the conflict of laws; the second – the “preventive method – consists in the harmonisation or unification of substantive rules²⁷⁰. Lastly, the report summarises Schmitthoff’s well-known doctrine of the development of international trade law²⁷¹. According to him, the development of the law of international trade has gone through three stages. The first was that of the medieval *lex mercatoria*, a body of universally accepted rules which was applied to the members of the cosmopolitan class of merchants at the fairs, markets and ports of all European countries. In the second stage, the law of international trade was incorporated into the municipal law of the various national states, which replaced the feudal stratification of medieval society. In the third stage, international trade law is returning to be universal: commercial custom has again developed widely accepted legal concepts, such as f.o.b. and c.i.f. terms, and international conventions have led to a significant level of harmonisation in important branches of the law, such as the sale of goods, transport by sea air and land and arbitration. In particular, the law of international trade in its third stage of development shows three characteristics. The first is the similarity of the rules in all national legal systems²⁷². Although international trade law is still formally incorporated into municipal law, it is the only part thereof transcending the divisions between legal families and between countries of free market economy and countries of planned economy. When it comes to international trade, lawyers of all countries find without difficulty that they speak a common language, because this branch of law relies on three basic common principles: party autonomy, *pacta sunt servanda*, arbitration as the ordinary way of settling disputes²⁷³. The second characteristic is that, although international trade law is largely universal in its contents, its application still depends, as it forms part of municipal law, on the authority of national sovereigns²⁷⁴. Finally, the third feature, which is also the outstanding characteristic of the modern development of this field of law, is that although its application still depends on state sovereignty, its formulation is brought about, to a large extent, by formulating agencies²⁷⁵. Some of these are United Nations organs, others are intergovernmental organisations, others are non-governmental ones and are formed by merchants and jurists not acting as government representatives.

Chapter Two reviews the work and achievements of the main formulating agencies in the field of harmonisation and unification of international trade. First, it surveys the activities of

²⁷⁰ The first method is defined “clinical”, because it leaves untouched the situation of competing substantive laws applicable to a particular transaction, which is seen somewhat as a “disease”, and merely seeks to mitigate the disadvantages arising from it. The second one is defined “preventive”, because it has the purpose of avoiding conflict of laws by enacting uniform rules of substantive law. (cfr par. 16-18).

²⁷¹ Id, par. 20

²⁷² Id. par. 22

²⁷³ Id. par. 23

²⁷⁴ Id. par. 24

²⁷⁵ Id. par. 25

intergovernmental organisations having a global reach²⁷⁶, such as the UNIDROIT, the Hague Conference on Private International Law, the United Nations specialised agencies (International Bank for Reconstruction and Development, International Civil Aviation Organisation); then it deals with regional international organisations²⁷⁷, such as the Council for Mutual Economic Aid, the European Economic Community, the Council of Europe, the Organisation of African Unity; finally, it analyses the work of a number of non-governmental organisations²⁷⁸, such as the International Chamber of Commerce, the International Association of Legal Science, the International Law Association and the Institute of International Law.

Chapter Three describes in further detail the instruments used in the harmonisation and unification of international trade law: international agreements, model and uniform laws, uniform commercial customs and practices²⁷⁹. In this respect, the report observes that each of these instruments complements the others and therefore the future development of the law of international trade requires that all of them should continue to be actively pursued²⁸⁰. It also enumerates further topics²⁸¹ which may be suitable for harmonisation or unification, emphasising however that this process is not desirable per se, but only where it is proved that common measures would have a beneficial effect on the development of international trade²⁸². Moreover, it observes that, since the topics related to international trade are primarily of a technical nature, harmonisation can be achieved more easily than in other sectors of the law more closely connected with national traditions, such as family law, succession, personal status²⁸³. Finally, the report suggests that unifying measures may have a “radiation” (nowadays we would more commonly say spill-over) effect²⁸⁴: the common principles hammered out by one instrument can subsequently be followed in others²⁸⁵.

²⁷⁶ Id. pars. 27- 111

²⁷⁷ Id. pars. 112-146

²⁷⁸ Id. pars. 147-183

²⁷⁹ Id. pars. 190-195

²⁸⁰ Id. par. 195

²⁸¹ Agency law, including the issues relating to agents and brokers; the law relating to joint ventures; the law relating to corporations entering into foreign trade relations; the law of international contracts with particular reference to frustration and force majeure, time limits and prescription (cfr par. 207).

²⁸² Id. par. 204

²⁸³ Id. par. 203

²⁸⁴ Id. par. 205

²⁸⁵ The report provides the example of the presumption that the contract is regulated by the domestic law of the country where the seller has his abital residence at the time when he receives the order. This principle, which was originally laid down in the 1955 Hague Convention on the Law Applicable to International Sales of Goods, has been subsequently adopted by a large number of harmonisation tools, both legislative and non-legislative: the General Conditions of Delivery of Goods of the Council for Mutual Economic Assistance, the arbitration clauses of the General Conditions of Sales of the UN Economic Commission for Europe and, after the publication of the report, the Rome Convention on the Law Applicable to Contractual Obligations.

Chapter Four describes the shortcomings of the process of harmonisation and unification²⁸⁶. The report stresses the paucity of success which has so far characterised the movement for the unification and harmonisation of the law of international trade²⁸⁷. It points out that the progress made has been rather slow in relation to the amount of time and effort employed and that developing countries have played only a small role in the activities carried out in the field. Furthermore, it notes that none of the relevant agencies enjoys worldwide acceptance, and none has a balanced representation of developed and developing countries. Finally, the Report observes that there has been insufficient coordination and cooperation among agencies. Consequently, there are a wide number of competing agencies involved in overlapping attempts to achieve uniformity in the field of international trade law. What is more, a large part of these attempts are time-consuming and over-ambitious, with the final result that they often end up in draft conventions or model laws which fail to culminate in the adoption of uniform legislation. When conventions are adopted, generally only a small percentage of the states members of the United Nations become parties. In order to overcome these shortcomings, the report proposes to systematise the process of harmonisation and unification and also to allow developing countries a better opportunity to participate to it²⁸⁸. The United Nations would be in the best position to ensure the achievement of these objectives, with its almost universal membership representing the various legal, economic, and social systems, as well as all stages of economic development.²⁸⁹ Nonetheless, there is no existing United Nations organ which is both technically competent and able to devote sufficient time to a complex and time-consuming task such as that of promoting the progressive development of the law of international trade. Therefore – the Report concludes – a new organ, a commission for international trade law, needs to be created, which would increase the usefulness of existing formulating agencies and improve the chances of bringing their work to a successful conclusion²⁹⁰. This Commission would act as a sort of “clearing house”, by exercising some supervision over the activities of the formulating agencies and promoting contacts and furthering collaboration between them. In addition, the Commission should be in charge of determining which projects should be carried to conclusion, which should be revised and which set aside. Although coordination should be its primary role, it would be desirable to authorize it, when appropriate, to perform formulating functions as well²⁹¹.

²⁸⁶ Id. par. 210

²⁸⁷ Id. par. 210 d)

²⁸⁸ Id. par. 212

²⁸⁹ A. Broches, *Birth of UNCITRAL*, cit., p. 7

²⁹⁰ Id. par. 218

²⁹¹ Id. par. 221

The Report was discussed by the General Assembly during its twenty-first session in 1966. The most discussed issue was the determination of the specific tasks of the future commission. Some representatives suggested that the commission should coordinate and centralize the efforts already made in the field of harmonisation and unification of international trade law and promote wider acceptance of instruments already in existence. Others argued that it should also perform the function of formulating new instruments designed to further the development of international trade law²⁹². The final resolution²⁹³, which was adopted at the end of the debate and gave birth to UNCITRAL, did not innovate on this point with respect to what already stated in the report: it stressed its role of coordination of the work of the formulating agencies and also authorised it to prepare or promote the adoption of new conventions, model laws and uniform laws. Another topic of discussion was the membership of the future commission. It was agreed that it should be small enough to guarantee its smooth functioning and large enough to allow an adequate representation of countries of the various legal and socio-economic systems and of various stages of economic development²⁹⁴ in the world. Resolution 2205 decided that the commission would be composed of twenty-nine states elected by the General Assembly of the United Nations for six years from different groups of countries²⁹⁵. In order to ensure continuity in its membership, a rotation system was envisaged, whereby the terms of fourteen of the members would expire every three years²⁹⁶. The president of the General Assembly would select, by drawing lots, the fourteen members serving for three years within each group of states.

The first session of the Commission was opened on 29 January 1968²⁹⁷. The most important issue on the agenda was the definition of the work programme. The report had not recommended a specific work programme for UNCITRAL: it had merely suggested some topics and laid down some overall criteria on which the harmonisation and unification process should focus. Far from drafting a general working programme and defining exactly which topics should fall within the definition of harmonisation of international trade law, the commission limited itself to confirm the broad definition of international trade law provided for in the Report and took an ad hoc approach to the harmonisation process. It decided to draw up a list of topics needing harmonisation or unification and from that list identify those having priority. For each topic the Commission had also to decide

²⁹² J. Carey, *UNCITRAL: its Origins and Prospects*, Am J. Comp. L., 1967, 15, 3, p. 635

²⁹³ Resolution 2205 (XXI) Establishment of the United Nations Commission on International Trade Law

²⁹⁴ UN Doc A/6594, Report of the Sixth Committee, 15 december 1966, par. 26

²⁹⁵ Seven from Africa, five from Asia, four from Eastern Europe, five from Latin America and eight from Western Europe and other States.

²⁹⁶ Resolution 2205 (XXI) par. 1-2

²⁹⁷ The birth of UNCITRAL – Contini observes (Am. J. Comp. L., 1968, 16, p. 667)- was brief by international standards: only two years after the subject had first been discussed in the General Assembly, the new Commission held its first session.

whether it would be given regional or worldwide treatment and which would be the appropriate harmonisation or unification instrument²⁹⁸. During the debate, seventeen different topics were proposed by the various members and eventually the Commission decided to focus its efforts on three broad sectors of international trade law: international sale of goods, international payments and commercial arbitration²⁹⁹.

Another important resolution adopted in the first session was the agreement that the Commission should take decisions by way of consensus. This wise decision enabled it to establish a tradition of non-ideological, constructive discussions, aimed at finding technically sound and widely acceptable solutions³⁰⁰. This is one of UNCITRAL's distinctive features which has remained unchanged until today. Although UNCITRAL is an intergovernmental organisation whose members are State representatives, its decision-making process has so far never followed the formal procedures of a diplomatic conference³⁰¹, but rather, as Honnold puts it, the informal ones of a Quaker meeting³⁰². UNCITRAL resembles more an epistemic community than an intergovernmental body: consensus is founded on rational arguments rather than on a trade-off among the various stakeholders³⁰³.

UNCITRAL activities

²⁹⁸ J. Carey, *UNCITRAL: its Origins and Prospects*, cit., p. 636

²⁹⁹ The first Working Group which was established within the commission had just the purpose of advising on the methods of work which may be followed in dealing with these priority topics. Cfr. par. 45

³⁰⁰ A. Broches, *Birth of UNCITRAL*, cit., p. 9

³⁰¹ During its first session, the commission decided that the rules relating to the procedures of the committees of the General Assembly would apply to its proceedings, until such time as the Commission adopted its own rules. Since then, the Commission has never adopted formal procedural rules.

³⁰² By referring to the Quaker meetings, Honnold wants to recall the traditional values of absence of authority, friendship and respect for the other, on which these meetings are founded. Quaker communities also hold "meetings for business", in which the purpose is not to bow to the will of the majority, as its members do not vote. Rather, the chief of the meeting – the Clerk – is in charge of discerning the "sense of the meeting": when he feels that an item has been thoroughly considered, he drafts and offers a 'minute' to the meeting. This documents summarises the previous discussion and records any decision that has been arrived at. The minute must receive the assent, spoken or tacit, of the meeting. If the Clerk is not able to discern a clear sense of the meeting, no decision will be taken, and no minute will be made except to record that the meeting is not ready to proceed. Cfr the website emes.quaker.eu.org/documents/files/meeting-the-spirit.html#2 (July 2009).

³⁰³ J. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, Am. J. Comp. L. 1979, 27, 2/3, p. 210-211. Honnold explains further how the consensus is reached within the Commission. Like in a Quaker's meeting for business, much depends on the skills of the chairman. When he senses that the debate has produced the basis for consensus, he will invite the group to accept the result. When differences persist, he may appoint a small working group which discusses the different points of view and finds an acceptable solution. When objections still remain, a member of the commission may ask that the records show that he "reserves his position" on the point. This dissenting opinion shows that the state representative was loyal to his government's instructions and "fought the good fight".

Since its establishment, UNCITRAL has prepared a wide range of conventions, model laws and other instruments dealing with the substantive law that governs trade transactions or other aspects of business law which have an impact on international trade. The work of UNCITRAL does not end with the adoption of a text, but it also includes activities to promote its work and the adoption of the legislative and non-legislative texts it has produced³⁰⁴. These activities include organizing educational programmes, seminars and conferences, with a view to familiarizing participants with UNCITRAL's work, assisting governments and legislative authorities to review existing legislation in line with UNCITRAL's texts, and providing advice and assistance to international and other organizations, such as professional associations, organizations of attorneys, chambers of commerce and arbitration centres, on the use of UNCITRAL's harmonisation tools.

Another important task within the mandate of UNCITRAL is the coordination of the work of organizations active in the field of international trade law, both within and outside the United Nations system, in order to foster cooperation, avoid duplication of efforts and prevent the adoption of contradictory harmonisation measures³⁰⁵. In recent years a growing number of regulating agencies in the field of international trade has emerged, making UNCITRAL's coordination function more and more important. This task is essentially carried out by the Secretariat, which actively follows the meetings and participates to the works of a wide number of organizations, whose regulatory activities relate to the topics of UNCITRAL's programme. Those organizations include, for example, the Hague Conference on Private International Law, the International Bar Association, the International Chamber of Commerce, the International Institute for the Unification of Private Law (UNIDROIT), the United Nations Regional Commissions, the World Bank and the World Trade Organization.

As far as the field of commercial dispute resolution is concerned, UNCITRAL has adopted a number of significant measures. In 1976 it issued the Arbitration Rules, a comprehensive set of rules covering all aspects of arbitration proceedings, which have been widely accepted and extensively used throughout the world³⁰⁶. In 1980 UNCITRAL adopted the Conciliation Rules, establishing a set of rules which parties may employ for the conduct of conciliation proceedings arising out of their commercial relationships. After the publication of the Model Law on International Commercial Arbitration in 1985, UNCITRAL has issued in 1996 the Notes on Organizing Arbitral Proceeding, designed to assist arbitration practitioners, by providing an

³⁰⁴ G. Herrmann, «*United Nations Commission on International Trade Law* », in R. Bernhardt (ed.). *Encyclopedia of Public International Law*, vol IV, North Holland, 2000, p. 1063

³⁰⁵ G. Herrmann, « *United Nations Commission on International Trade Law* », cit., p. 1065

³⁰⁶ H.M. Holtzmann and J.E. Neuhaus, *A Guide to the UNCITRAL Model Law*, cit., p. 5

annotated list of matters on which an arbitral tribunal may wish to formulate decisions during the course of arbitral proceedings, including deciding on a set of arbitration rules, the language and place of an arbitration and questions relating to confidentiality, as well as other matters, such as conduct of hearings and the taking of evidence and possible requirements for the filing or delivering of awards. Finally, in 2002 UNCITRAL adopted the Model Law on International Commercial Conciliation. Also in the field of dispute resolution UNCITRAL activity is not only limited to rulemaking. UNCITRAL's promotion efforts have been focussed especially on the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which, although adopted prior to the establishment of the former, is nonetheless an instrument of fundamental importance for international arbitration. In particular, UNCITRAL Secretariat has published important studies on its application and interpretation, which have contributed to increase its effectiveness³⁰⁷. Moreover, in 1982 UNCITRAL has published a set of Recommendations to assist arbitral institutions and other interested bodies in the application of UNCITRAL Arbitration Rules.

UNCITRAL harmonisation tools

In order to accomplish its mandate to harmonize the law of international trade, UNCITRAL has adopted two different categories of harmonisation tools, which operate at different levels and involve different degrees of harmonisation: legislative and non-legislative (or contractual) instruments.

Legislative techniques

³⁰⁷ Cfr e.g. United Nations, *Enforcing Arbitration Awards under the New York Convention: Experience and Prospects*, United Nations Publication, 1999, available at www.uncitral.org/pdf/english/texts/arbitration/NY-conv/NYCDay-e.pdf; *Recommendation Regarding the Interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards, done in New York, 10 June 1958*, adopted by the United Nations Commission on International Trade Law on 7 July 2006 at its thirty-ninth session, available at <http://www.uncitral.org/pdf/english/texts/arbitration/NY-conv/A2E.pdf>. (July 2009).

The traditional legislative technique is represented by the international convention, which is designed to unify the law in a given field by establishing binding legal obligations. UNCITRAL uses this instrument in order to reach the highest level of harmonisation among the laws of the participating states. UNCITRAL conventions usually allow little flexibility to adopting states, since they generally do not provide for reservations or declarations, or they provide them only to a very limited extent.

UNCITRAL has so far drafted the following conventions: the UN Convention on the Limitation Period in the International Sale of Goods (1974); the United Nations Convention on the Carriage of Goods by Sea (1978); the United Nations Convention on Contracts for the International Sale of Goods (1980); the United Nations Convention on International Bills of Exchange and International Promissory Notes (1988); the United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (1991); the United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (1995); the United Nations Convention on the Assignment of Receivables in International Trade (2001); and the United Nations Convention on the Use of Electronic Communications in International Contracts (2005).

The most innovative legislative technique, which has met with considerable success in the past twenty years, is constituted by the model law. A model law is a legislative text that is recommended to states for enactment as part of their national law. It is an appropriate vehicle for harmonization of national laws when it is expected that states will wish or need to make adjustments to the text of the model to accommodate local requirements that vary from system to system, or where strict uniformity is not necessary or desirable. It is precisely this flexibility that makes a model law potentially easier to negotiate than a convention containing binding obligations that cannot be altered. Notwithstanding this flexibility, in order to increase the likelihood of achieving a satisfactory degree of unification and to provide certainty about the extent of unification, UNCITRAL usually recommends states to make as few changes as possible when incorporating a model law into their legal system.

The Model Law on International Commercial Arbitration of 1985 was the first model law adopted by UNCITRAL and was followed by the Model Law on International Credit Transfers (1992); the Model Law on Procurement of Goods, Construction and Services with Guide to Enactment (1994); the Model Law on Electronic Commerce with Guide to Enactment (1996); the Model Law on Cross-Border Insolvency with Guide to Enactment (1997); the Model Law on Electronic Signatures with Guide to Enactment (2001); and the Model Law on International Commercial Conciliation (2002).

Recent model laws completed by UNCITRAL have been accompanied by a “guide to enactment”, providing explanatory information to assist governments and legislators in using the text. The guides include, for example, information that assist states in considering what, if any, provisions of the model law might have to be varied to take into account particular national circumstances, information relating to discussions in the working group on policy options and considerations, and matters not addressed in the text of the model law that may nevertheless be relevant to the subject matter of the model law itself.

When in a given field it proves impossible to draft a uniform set of rules, either in the form of convention or model rules, UNCITRAL may limit its action to the elaboration of a set of principles or legislative recommendations in the form of a Legislative Guide. Yet, this harmonisation tool does not consist in a mere statement of general objectives: instead of establishing, as in the case of a convention or a model law, a single set of solutions, it provides a set of possible legislative solutions to certain issues. Moreover, it discusses the advantages and disadvantages of different policy choices, in order to assist the national legislature in evaluating different approaches and in choosing the most suitable one in a particular national context. Finally, a Legislative Guide may also be used to provide a standard against which governments and legislative bodies could review and update existing laws. UNCITRAL’s first legislative recommendation was adopted in 1985, to stimulate review of legislative provisions on the legal value of computer records. In 2000, UNCITRAL published the Legislative Guide on Privately Financed Infrastructure Projects and in 2004 it issued the Legislative Guide on Insolvency Law. A legislative guide on secured transactions is currently being prepared.

Model provisions purport to accomplish the “harmonisation of the harmonisation”: they are provisions recommended in future conventions or revisions of existing ones. They are issued where it is felt that a number of conventions dealing with the same issue contain contradictory provisions and there is consequently the need for further harmonisation. In 1982, for example, UNCITRAL formulated a model provision establishing a universal unit of account of constant value that could be used, in particular, in international transport and liability conventions, for expressing amounts in monetary terms³⁰⁸.

³⁰⁸ *Provisions on a universal unit of account and on adjustment of the limit of liability in international transport conventions*, United Nations Publication, 1982 available at www.uncitral.org/pdf/english/texts/transport/UoAP/unit_of_account_English.pdf. The need to establish a universal unit of account stems from the fact that in many international transport and liability conventions the limitation of liability is expressed in a certain currency (generally the US dollar), which may constantly fluctuate due to changes in monetary exchange rates. Accordingly, the UNCITRAL model provision provides for the adoption, as universal unit of account, of the so-called Special Drawing Right (SDR) as determined by the International Monetary Fund. The SDR consists in an artificial unit of account defined in terms of a basket of major currencies used in international trade (currently the euro, the pound sterling, the yen and the US dollar). The weight of each currency in the basket is determined by the IMF Executive Board every five years in accordance with the relative importance in international trade.

With a view to achieving uniformity also in the application and interpretation of its legislative texts, in 1988 UNCITRAL established a database collecting court decisions and arbitral awards relating to those texts (case law on UNCITRAL Texts, CLOUT)³⁰⁹. This system relies on national correspondents who are required to collect the relevant case law in their jurisdiction, draft abstracts of the decisions and submit both the texts and the abstracts to the UNCITRAL Secretariat, who will translate them into the six official languages of the UN³¹⁰. Although for the time being the majority of the cases reported relates only to the CISG and the Model Law on International Commercial Arbitration, material related to other UNCITRAL texts will be included as relevant case law develops³¹¹.

Non- legislative techniques

Contractual techniques consist essentially in the elaboration of standard contract terms, i.e. uniform rules which parties may use in their relations either by incorporation or by mere reference to them

³⁰⁹ See http://www.uncitral.org/uncitral/en/case_law.html

³¹⁰ The CLOUT 's User Guide (A.CN.9/SER.C/GUIDE/1/Rev.1) further specifies the criteria for selection of the relevant case-law. The system aims at collecting final decisions of courts and arbitral tribunals which interpret or apply specific provisions, as well as those which refer in general to a legal text elaborated by UNCITRAL. The primary task of national correspondents is to collect final decisions and awards issued in their respective «implementing states» (i.e. those states that are party to a UNCITRAL Convention or have enacted legislation based on an UNCITRAL Model Law). However, national correspondents may also collect other relevant decisions and awards relating to a national law which is closely modelled on the text of a UNCITRAL Convention, even if the state is not party to the Convention. The abstracts are generally not a complete summary of the decision or award, but rather a pointer to the specific issues concerning the application and interpretation of the relevant UNCITRAL text in a given decision or arbitral award. This is because their purpose is to provide the reader with sufficient information to decide whether it is worthwhile to obtain and examine the complete decision or arbitral award which is the subject of the abstract. To this aim, the following points are included in the abstract : the reasons for applying or interpreting the provisions of the UNCITRAL text in the way they have been interpreted ; the claim or relief sought by the parties and any other factor describing the procedural context within which the case was decided ; the countries of the parties and the type of transactions involved. The abstracts are forwarded to the Secretariat together with the complete court decision or arbitral award in its original language. However, only the abstracts are translated into the six official languages of the United Nations ; the full decisions and awards are made available in the form in which they are forwarded to the Secretariat to any interested person for individual use upon request and against payment of a fee covering the cost of copying and mailing.

³¹¹ The User Guide refers that at the time of publication of the guide, i.e. february 2000, the following legal texts are covered by the system: Convention on the Limitation Period in the International Sale of Goods (New York,1974), and as amended by the Protocol of 1980; United Nations Convention on Contracts for the International Sale of Goods (Vienna, 1980); UNCITRAL Model Law on International Commercial Arbitration (1985); United Nations Convention on the Carriage of Goods by Sea, 1978 (Hamburg); United Nations Convention on Independent Guarantees and Stand-by Letters of Credit (New York, 1995); UNCITRAL Model Law on Procurement of Goods, Construction and Services (1994); UNCITRAL Model Law on Electronic Commerce (1996); UNCITRAL Model Law on Cross-Border Insolvency (1997). In addition, the system will also cover the following, and any future, Conventions and Model Laws, when they enter into force or are implemented by States: United Nations Convention on International Bills of Exchange and International Promissory Notes (New York, 1988); United Nations Convention on the Liability of Operators of Transport Terminals in International Trade (Vienna, 1991); UNCITRAL Model Law on International Credit Transfers (1992).

in their contract. Examples are the UNCITRAL Arbitration Rules (1976) and the UNCITRAL Conciliation Rules (1980).

The legal guides are designed to help parties to draft international contracts. Legal guides are issued in sectors where it is not possible to identify standard rules and practices. They provide the parties with the expertise and reference materials necessary to face negotiations; they discuss various issues underlying the drafting of a particular type of contract; consider various solutions to those issues; describe implications, advantages and disadvantages of those solutions; and recommend the use of certain solutions in particular circumstances. The first legal guide was the UNCITRAL Legal Guide on Drawing up International Contracts for the Construction of Industrial Works (1987). It was followed by the UNCITRAL Legal Guide on International Countertrade Transactions (1992) and, in 1996, the UNCITRAL Notes on Organizing Arbitral Proceedings.

The International Institute for the Unification of Private Law (UNIDROIT): An Overview

The birth of UNIDROIT

The Rome-based International Institute for the Unification of Private Law (UNIDROIT) was founded in 1926 under the initiative of the Italian Government, which proposed to the League of Nations the creation of an international institute for the study of private law, whose main purpose should have been to examine ways of harmonizing and coordinating the rules of private law of the different states or groups of states, with a view to gradually promoting the adoption of a uniform system of private law by the states³¹². According to the founding Statute of 1926, the links between the Institute and the League of Nations were very close, so that the former appeared a sort of auxiliary body of the latter³¹³: for example, the Council of the League of Nations had to approve the

³¹²M. Matteucci, *UNIDROIT: The First Fifty Years*, in UNIDROIT (ed), *New Directions in International Trade Law: Acts and Proceedings of the 2nd Congress on Private Law by the International Institute of Private Law Unidroit*, Oceana Dobbs Ferry, 1977, p. xvii

³¹³ M. Matteucci, *op.cit.*, p. xviii

UNIDROIT Council and the norms concerning its functioning and administration; every year an annual report on the Institute's activities was submitted to the assembly of the League of Nations³¹⁴. After Italy had withdrawn from the League of Nations in 1937 and consequently given its notice of termination of the UNIDROIT Statute, the Institute became a fully independent intergovernmental organization, on the basis of a new statute signed on the 15th March 1940, which entered into force on the 21st April of the same year and is still into force today, albeit with minor emendments.

UNIDROIT structure and working method

The International Institute for the Unification of Private Law (UNIDROIT) is an independent intergovernmental organisation with its seat in Rome. Membership of UNIDROIT is restricted to states acceding to the UNIDROIT Statute. UNIDROIT's members are currently 63.

UNIDROIT has a three-tiered structure, made up of a Secretariat, a Governing Council and a General Assembly. The Secretariat is the executive organ of UNIDROIT, responsible for the day-to-day carrying out of the Work Programme and is appointed by the Governing Council for five years. The Governing Council supervises every activity of the Institute and draws up its Work Programme. It is made up of one ex officio member, the President of the Institute, who is appointed by the Italian Government, and 25 members elected by the General Assembly among eminent judges, practitioners, academics and civil servants. The President and the members of the Governing Council hold their office for a term of five years and can be re-elected. The General Assembly is the ultimate decision-making organ of UNIDROIT and is made up of one representative from each member state. It determines the Institute's budget each year, approves the Work Programme every three years and elects the Governing Council every five years.

The working method followed by UNIDROIT is generally that of a typical intergovernmental body. Once a subject has been included in the UNIDROIT's Work Programme, the Secretariat, where necessary, draws up a feasibility study and/or a preliminary comparative law report, designed to ascertain the desirability and feasibility of the project. On the basis of this preliminary study, the Governing Council decides whether the project is to be pursued and if so it confers the task of

³¹⁴M.R. Saulle, *Istituto Internazionale per l'Unificazione del Diritto Privato*, Enciclopedia del Diritto, vol. XXIII, Giuffrè, 1973, p. 59; M. Matteucci, *op. cit.*, p. xix

producing a draft convention upon a study group consisting of a small number of experts sitting in their personal capacity. The results of the study group's work are circulated among member state representatives to find out whether the draft meets with sufficient interest. If the response is positive, there are two alternative routes for the adoption of the draft convention³¹⁵. The first involves the creation of a governmental committee of experts in charge of the revision of the draft under economic, social and general political aspects. The draft Convention, as emended by the committee, is submitted to the Governing Council for approval and advice as to the most appropriate steps to be taken. Where it judges that the draft Convention reflects a consensus among a sufficient number of states and accordingly stands a good chance of adoption at a diplomatic Conference, the Governing Council entrusts the UNIDROIT Secretariat with the task of setting up such Conference for final adoption of the draft as an international Convention. The second alternative, which was employed in the case of several conventions on the law of transport and shipping, is the adoption of a draft text by another international organization which then takes up the final procedural steps according to its own rules .

As we will see in more detail below³¹⁶, in drafting the UNIDROIT Principles, the Institute followed a different working method, which departed from the traditional intergovernmental bargaining: the Principles were drafted by a restricted Working Group of experts sitting in their personal capacity, without the direct involvement of government representatives. This was due to the particular nature of the UNIDROIT Principles, which were not conceived as a binding instrument to be approved by an international diplomatic Conference.

UNIDROIT activities

According to art. 1(1) of the UNIDROIT Statute, the purposes of the Institute are to examine ways of harmonising and coordinating the private law of states and of groups of states, and to prepare gradually for the adoption by the various states of uniform rules of private law. In order to carry out its statutory tasks, UNIDROIT can rely on a number of instruments broadly envisaged in art 1 of its

³¹⁵ P. Widmer, *The International Institute for the Unification of Private Law: Shipyard for World-wide Unification of Private Law*, EJLR, 1998/9, 1, p. 191

³¹⁶ See *infra* pp. 328ff.

Statute, such as drafts of laws and conventions, studies in comparative private law, conferences and scholarly works.

Until recently, UNIDROIT's main contribution to the harmonisation of private law has been that of carrying out preparatory studies related to the elaboration of draft conventions, which were then adopted either by a diplomatic conference convened by the member states of UNIDROIT, or under the auspices of other international organisations. The most important study in this respect was conducted under the leadership of Ernst Rabel since 1926, which led to the two Hague Conventions on the International Sales of Goods of 1964 (adopted by a conference convened by UNIDROIT member states), as well as to the 1980 Vienna Convention on Contracts for the International Sales of Goods (adopted by UNCITRAL). As mentioned above, UNIDROIT has conducted such preliminary studies especially in the field of transport law: the most important are those related to the 1956 CMR Convention on the Contract for the International Carriage of Goods by Road, which was eventually adopted by the Committee on Internal Transport of the UN Economic Commission for Europe. In more recent years, UNIDROIT has concentrated its activity on sectors other than transport law and the sale of goods: the most important examples are represented by the two 1998 UNIDROIT Ottawa Conventions on International Financial Leasing and International Factoring, the 1995 UNIDROIT Convention on Stolen or Illegally Exported Cultural Objects and the 2001 Cape Town Convention on International Interests on Mobile Equipment.

UNIDROIT's latest activities show a sharp preference for non-binding harmonization tools. This shift of approach reflects a general skepticism toward unification of the law through international conventions: a wide number of conventions in the preparation of which UNIDROIT had been involved had either remained dead letter or reached a very scarce number of ratifications³¹⁷. Moreover, too often was UNIDROIT's role with respect to international conventions confined to that of conducting preliminary studies to the benefit of other international organizations. Accordingly, UNIDROIT's decision to embark on the elaboration of harmonization instruments of a soft law character, not directly involving national governments or other international organisations, might also be read as an expression of the desire to overcome its traditional subordinate role with respect to other formulating agencies and to gain a unique role in the field of harmonisation of private law. In particular, UNIDROIT has so far elaborated three types of non-binding harmonization instruments: model laws, legal guides and general principles of law.

³¹⁷ For example, the 1973 Conventions on the Contract for the International Carriage of Passengers and Luggage by Road (CVR) and on the Limitation of the Liability of Owners of Inland Navigation Vessels (CLN), which were based on drafts prepared by a UNIDROIT Study Group and adopted by the Economic Commission of Europe, have never entered into force, because they failed to reach the required number of ratifications.

Published in 2002, the Model Franchising Disclosure Law identifies a number of disclosure obligations upon franchisors (relating for example to information to be disclosed, the format of the information document and exemptions from information to be disclosed) in their relationship with franchisees, so as to ensure that the prospective franchisees who intend to invest in franchising receive material information about franchise offerings and thereby a safe legal environment between all the parties in a franchise arrangement is created³¹⁸. The Model Law on Leasing, adopted on the 13th November 2008, was designed to help developing countries and countries in transition toward a market economy to develop a leasing legislation in line with international standards. Whereas the 1988 UNIDROIT Ottawa Convention on International Financial Leasing covers cross-border leasing transactions, this model law is designed for domestic leasing contracts and is therefore aimed at creating a legal basis for the development of a modern leasing industry within the territory of the enacting country³¹⁹.

In 1998 UNIDROIT published the first edition of the Guide to International Master Franchising Arrangements (the second edition was published in 2007). This Guide offers a comprehensive examination of the whole life of master franchise arrangements, from the negotiation and drafting of the master franchise agreement and other associated agreements, to the end of the relationship and its effects. It deals principally with the positions of the parties directly involved, i.e. the franchisor and the sub-franchisor, but, in instances where it is considered to be of particular importance, the positions of others affected, such as sub-franchisees, are covered.

In 2004 the Governing Council of UNIDROIT adopted the Principles of Transnational Civil Procedure, prepared by a joint American Law Institute/UNIDROIT Study Group. The Principles, consisting of 31 provisions, aim at reconciling differences among various national rules of civil procedure, taking into account the peculiarities of transnational disputes as opposed to purely domestic ones. They may not only serve as guidelines for code projects in countries without a consolidated civil procedure tradition, but may initiate law reforms even in countries with long and high quality procedural traditions; they may also be applied by analogy in international commercial arbitration.

The most important soft law instrument elaborated by UNIDROIT (at least by judging from the amount of literature to which it gave rise) is represented by the UNIDROIT Principles of International Commercial Contracts, which will be analysed below in chapter five³²⁰.

³¹⁸ Model Franchising Disclosure Law- Explanatory Report, par. 3 available at <http://www.unidroit.org/english/modellaws/2002franchise/2002modellaw-e.pdf>

³¹⁹ UNIDROIT 2008, Study LIXA, Doc. 13, Appendix VII, p. iii, available at <http://www.unidroit.org/english/documents/2008/study59a/s-59a-13-e.pdf>

³²⁰ See *infra* pp. 319 ff.

CHAPTER THREE: MAIN FEATURES OF INTERNATIONAL COMMERCIAL ARBITRATION AND ITS LEGITIMACY

Arbitration may be defined in general terms as a consensual, private process for the binding resolution of a dispute through the decision of one or more private, independent individuals selected by the parties to the dispute.¹ The decision of the arbitral tribunal (commonly known as the award) is final and legally binding on the parties and will be recognised and enforced by the courts of most states around the world.²

Arbitration has proved to be an important testing ground for the development of transnational commercial law: it is in its context that issues such as the meaning and the role of the *lex mercatoria* have had the greatest significance. In addition, international commercial arbitration represents the privileged field for application of the UNIDROIT Principles of International Commercial Contracts (and, to a lesser extent, the Principles of European Contract Law).³

General Characteristics of Arbitration

Normally disputes are solved through a process of adjudication. Adjudication is a process in which disputants present proofs and arguments to a neutral third party who has the power to issue a binding decision⁴. The two most important forms of adjudication are litigation in courts (public adjudication) and arbitration (private adjudication). Arbitration is a form of private adjudication based on an agreement between the parties. By agreeing to arbitrate, parties agree that their disputes should be resolved, not by judges in court, but by arbitrators acting in a private capacity: they

¹ Cfr C. Bühring-Uhle, *Arbitration and Mediation in International Business*, Kluwer Law, 1998, p. 39; P. Capper, *International Arbitration: a Handbook*, Lovells Publishing, 2004, p. 2.

² P. Capper, *International Arbitration: a Handbook*, cit. p. 2

³ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases, and Materials*, Oxford University Press, 2007, p. 622. On this point see *infra* pp. 360ff.

⁴ S. Goldberg, F. Sander & N. Rogers, *Dispute Resolution*, Little, Brown and Company Publishing, 1992, p. 199

"contract out" of their right to litigate disputes in those national courts which would otherwise be competent to adjudicate⁵

Arbitration is a private adjudication process based on three essential features, which differentiate it from other means of dispute resolution.. First, arbitration is an adjudication process essentially founded on a private agreement, that is the party agreement to refer the dispute to arbitration.⁶ Second, the arbitrator's purpose is basically that of reaching a decision on the case, rather than, for example, suggesting a way in which a compromise may be reached. Third, the decision of the arbitrator, although stemming from a private agreement, may be recognised and enforced in national courts as though it were a national court's judgement⁷

Foundation on party agreement renders arbitration a private adjudication process distinct from litigation, which, as we have just seen, is a public adjudication process and consequently is not dependent upon the will of the parties⁸. The arbitration agreement serves three main functions. The first is to show parties' consent to resolve their dispute by arbitration. Once the parties have reached an agreement on arbitration, such decision is binding upon them: in selecting arbitration, parties agree to submit their dispute to a private tribunal, to exclude the jurisdiction of the public courts, and to abide by the decision of that tribunal. Consequently, the consent to arbitration cannot be unilaterally withdrawn.⁹ The second is that it constitutes the basic source of the powers of the arbitral tribunal. As a general rule, an arbitral tribunal may exercise only those powers which the

⁵ J. M. Lookofsky; *Transnational Litigation and Commercial Arbitration*, Transnational Juris Publications, 1992, p. 559

⁶ In particular, the arbitration clause (or *clause compromissoire*) is the agreement by which parties decide to refer to arbitration disputes which may arise between them at some time in the future, whereas the submission agreement (or *compromis*) deals with disputes already arisen between parties.

⁷ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, 1993, p. 3

⁸ Of course, foundation on party agreement does not mean that party autonomy is unlimited. The most important limitations to this freedom stem from the concept of arbitrability, that is the range of disputes which may be decided through arbitration. Each state can decide, in accordance with its own economic and social policy, which matters may be settled by arbitration and which may not. Claims are generally deemed not arbitrable where they are perceived as matters of public interest, as in the case of human rights or criminal law, or where it is felt that court jurisdiction provides a more adequate form of protection, as in the case of family law. Arbitrability constitutes a significant limitation to party autonomy, if only one considers that the types of non-arbitrable claims differ from nation to nation. Consequently, it may well happen that a claim arbitrable under a certain national law may not be arbitrable under another. Therefore, before resorting to arbitration, parties need to take into account how the arbitrability issue is dealt with under a plurality of national law and namely under the law of the arbitration agreement, under the law of the place of arbitration, or under the law of the country where enforcement is sought.

⁹ The agreement to arbitrate is difficult to be enforced at law. None of the traditional enforcement remedies appear adequate in practice: neither an award of damages, given the difficulty of quantifying the loss sustained, nor an order for specific performance, since a party cannot be compelled to arbitrate if he does not want to do so. That is why the problem of the arbitration agreement's breach has been approached, both at national and international level, with a policy of indirect enforcement. For example, art 11 of the UNCITRAL Model Law provides that a party may request a court at the place of arbitration to appoint an arbitrator where the other party refuses to do so. Such an order has the effect of setting up the arbitration process, since the tribunal may proceed in the absence of the other party. A different remedy is provided for by the New York Convention: art 2.3 states that courts in a contracting state in which proceedings have been filed in breach of an arbitration agreement are to refer the parties to arbitration at the request of one of the parties, unless the arbitration agreement is null and void, or incapable of being performed.

parties may confer upon it together with the additional or supplementary powers conferred by the law (or laws) governing the arbitration. The third is to establish the jurisdiction of the arbitral tribunal. In the ordinary litigation process before a court, the court's jurisdiction is determined according to several criteria, of which parties' agreement will be only one. In the arbitral process, the agreement of the parties is the only source determining jurisdiction.

Although it does not have the powers of a court, an arbitral tribunal is entrusted by the parties with the right and duty of reaching a decision which will be binding upon them. This feature distinguishes arbitration from the other "alternative" means of dispute resolution (ADR) – such as mediation and conciliation – which aim to arrive at a negotiated settlement. Moreover, it allows to qualify arbitration as an adjudication process, in a sense assimilated to litigation. Accordingly, the most important principles of due process are generally to be followed also in the conduct of arbitration proceedings. For instance, art V.1(b) of the New York Convention provides that the enforcement of an arbitral award may be refused if the party against whom the award is invoked has been faced with denial of a fair hearing, that is he was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings or was otherwise unable to present his case¹⁰

Once rendered, the arbitral decision has legal effects comparable to the judgement of a public court. If the award is not complied with voluntarily, it may be enforced in front of a national court according to its legal proceedings. As a consequence, the validity and effectiveness of an award ultimately depends on the support of the national legal system. That is why a number of commentators emphasise the hybrid nature of the arbitral process¹¹: it starts with a private agreement between the parties, it goes on by way of private proceedings, it ends with a binding award bestowed with legal force and effect, which most national courts, provided that certain conditions are met, will be prepared to recognise and enforce. The discipline of the arbitration process results from the inter-relation among the rules of the arbitration institutions, national laws and international treaties.

¹⁰ This does not mean, however, that proceedings must be conducted as though the parties were in front of a national court. It is generally enough that the hearing was conducted in accordance with the agreement between the parties, the principles of equality of treatment and the right of each party to have a proper opportunity to present his case. Cfr A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 462

¹¹ E.g. A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 8

Reasons for development: inadequacy of international transactions and litigation

In parallel with the outstanding development of international trade, international commercial arbitration has over the last half century developed to such a point that it now constitutes the ordinary way of settling commercial disputes internationally. It is commonly estimated that 90% of international contracts provide for an arbitration clause¹².

The growing importance of arbitration in international trade is a direct consequence of the globalisation phenomenon. Arguably, globalisation has led to the steep increase of international transactions, and, at the same time, of international disputes. This is because international transactions are in great need of legal certainty. International transactions are more complex and of a larger duration than domestic transactions: hence, the higher probability of disputes. In addition, whereas domestic transactions take place within a well-defined national legal framework, at the international level such a framework is largely missing. International transactions are still for their most part subject to national laws, which often vary significantly and inevitably generate conflicts. The traditional solution of conflict of laws rules can only to a limited extent remedy this situation¹³.

Inadequacy of international transactions

In the context of a globalised world economy, the typical international transaction is no longer represented by the relatively simple international sale of goods between a seller and a buyer. The business transactions of the globalisation era now include large-scale construction projects, joint ventures, high-technology licensing agreements, or strategic alliances between two or more industrial conglomerates. Such transactions usually expand over long periods of time, deal with complex technologies, include more than two parties, and involve often governments, which tend to

¹² This is a *communis opinio* among scholars. Cfr e.g. T.A. Guzman, *Arbitrator Liability: Reconciling Arbitration and Mandatory Rules*, Duke Law Journal, 2000, 49, 5, p. 1279.

¹³ D. Lehmkuhl, *Resolving Transnational Disputes: Commercial Arbitration and the Multiple Providers of Governance Services*, 2003 ECPR Workshop Paper, available at www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/edinburgh/ws11/Lehmkuhl.pdf. (July 2009)

safeguard with their sovereign power the vital national interests potentially affected (national security, industrial policy, exploitation of national natural resources).

The most troublesome feature of these long-term international contracts is their inherent uncertainty: they are particularly vulnerable to change, and therefore carry an even greater potential for conflicts than domestic transactions¹⁴. A number of factors account for this uncertainty. International transactions are frequently exposed to financial risks such as fluctuations in exchange rates, which can have a disastrous impact on the economic balance of the transaction itself¹⁵. Similarly, international transactions are also particularly vulnerable to political events within any of the countries involved in the transactions itself: turmoil, revolutions, closed trade routes, war.

Moreover, international transactions suffer from cultural differences, which in most cases constitute a serious hurdle to a sheer understanding between parties. In the first place, there are language differences, since in most international business relations at least one party has to communicate in a foreign language¹⁶. Normally, parties will attempt to solve the problem by resorting to a third language (commonly English) known by both of them; nonetheless, the potential for miscommunication is still large, mainly because each party will understand certain notions and concepts from the standpoint of his own social and legal background¹⁷. Cultural differences are not only found in language. There is indeed a subtler, non verbal communication in which cultural differences are even more difficult to detect and overcome. Accordingly, non-verbal language is frequently an important source of misunderstanding in intercultural communication¹⁸.

¹⁴ C. Bühring-Uhle, *Arbitration and Mediation in International Business*, cit, p. 9

¹⁵ For instance, the decline of the value of U.S. dollars vis à vis the Japanese Yen during the 1980s rendered many long-term supply contracts ruinous for the American purchasers of Japanese goods. Cfr J.W. Salacuse, *Making Global Deals: Negotiating in the International Marketplace*, Random House Business Books, 1992, p. 150

¹⁶ The problem exists even where both parties speak the same language; as the famous G.B. Shaw saying goes: <<England and America are two countries separated by a common language>>.

¹⁷ Take the example of a French and an American party negotiating the transfer of the property of a farm: "immovable property" under French law encompasses farm animals and agricultural machinery, whereas "real property" in most American jurisdictions does not. Hence, although using the same word "property" each party may actually think of quite a different set of assets.

¹⁸ Business practice tells many anecdotes of misunderstanding stemming from non verbal communication. The different perceptions about the importance and the use of time in business relations constitutes a shining example. Cultural groups who value punctuality and the efficient use of time, may very often feel annoyed, when involved in time-consuming rituals before getting to the "core business" of a negotiation. On the other hand, in cultural contexts emphasising the building of personal relationships in business dealings and the necessity to invest time in this process, the insistence on tight schedules and deadlines may be felt as rude or even as a tactical manoeuvre to overwhelm or deceive the other party. Cfr E. Hall, *The Silent Language in Overseas Business*, Harv Bus Rev, 1960, p. 87 ff. In this respect, many practitioners underline for example the central role which personal relationships play in Chinese society. Commonly referred to as *guanxi*, personal relationships are deeply rooted in Chinese culture: they constitute the "oil of life" and are just as important as the formal lines of authority. This also accounts for the large use of conciliation in China as means to settle disputes. There are approximately 40,000 conciliation centres in China, spread throughout all levels of society, from local villages to workplaces and commercial transactions between firms: the goal in Chinese society is mainly to have the dispute settled and not adjudicated. Cfr T. Hagelin, *Reflections on the Economic Future of Hong Kong*, Va. J. Trans. L., 1997, 30, p. 734; A. Ye, *General Introduction to and Comments on the Integrated Dispute Resolution Systems in the PRC*, in International Council for Commercial Arbitration (ed), *Proceedings of the 17th ICCA Conference 16-18 May 2004*, Kluwer, 2004.

Finally, adequate communication and information is frequently hampered by the considerable geographical distance between the parties. Distance-communication in writing, over the telephone, via e-mail or video-conference is inevitably less effective than person-to-person communication, since it lacks the full arsenal of verbal and non-verbal communication, as well as of social interaction (business meals, coffee-breaks, conversations on non-business matters), which is extremely important in building and maintaining relationships and therefore achieving a full understanding between parties¹⁹.

Inadequacy international litigation

To make things worse, not only international contracts, but also international disputes are fraught with greater uncertainty than domestic disputes. This is mainly due to the fact that both legal and non-legal control mechanisms will tend to be less effective in international business.

Non-legal control devices are less effective, because they largely depend on the coherence of the social environment. And in international business, the social context is normally much weaker. Parties will be successful in solving conflicts informally, in contexts where there is a high concern for business reputation and for the continuation of the business relationship with the other party. Although considerable exceptions may be found²⁰, in the weaker context of international trade, quite often contracting parties never expect to see each other again: social norms represent less an effective device to prevent disputes. Besides, the ability of the parties to solve conflicts informally is frequently restricted by the same cultural, linguistic, and logistic differences, inherent in the business transaction, and which may have contributed to the emergence of the dispute itself .

As far as legal control mechanisms are concerned, suffice it to say that no international tribunal for the resolution of commercial disputes exists. Therefore, international commercial litigation must necessarily be conducted in front of national courts, and frequently is conducted in front of several courts at the same time. Moreover, international litigation in front of a national court entails a situation in which a plurality of different legal systems are involved in the dispute. This in turn creates a number of complications, that increase the uncertainty and costs of litigation. But most of

¹⁹ C. Bühring-Uhle, *Arbitration and Mediation in International Business*, cit. , p. 15

²⁰ The classic examples are constituted by the oil and diamond industries, where the global market is made up of a limited number of large players are involved in constant relations.

all, there is no such thing as a binding decision in international trade, which can be enforced internationally throughout the world.

The most important legal problems involved in international court litigation regard: court jurisdiction, the procedural and substantive law applicable to the dispute, and the effect of the foreign judgement abroad.

The problem of court jurisdiction stems from the fact that no uniform international standards about the assertion of jurisdiction exist²¹. The rules under which national courts assume jurisdiction over a dispute vary from country to country and frequently lead to conflicting outcomes. Accordingly, it may well happen that the same dispute is subject to parallel lawsuits in different jurisdictions, and that the different national courts involved end up with contradictory judgements²². Parties may attempt to solve the problem of parallel litigation by drafting an unambiguous choice of forum clause. But, in the absence of uniform international standards, the danger of parallel lawsuits cannot be excluded entirely: parties to a choice of forum clause cannot be certain that the chosen forum will accept the jurisdiction²³, nor can the parties be assured that all the other courts will respect their forum selection and refrain from exercising their own jurisdiction.

Procedural problems in international litigation arise especially from the dramatic differences between civil and common law systems in the methods and scope of evidence gathering. The most important source of conflict is represented by the American doctrine of discovery. Discovery is a fundamental principle of procedural law, whereby each party is entailed to request documents and other evidence from other parties, or even compel the production of evidence, on all the relevant facts to the case²⁴. This principle allows for example the cross-examination of witnesses by the

²¹ There are uniform standards limited to particular regions of the world. The most important standards are provided by the Brussels I Regulation/ Lugano Convention regime, which is applicable in all European states, both belonging and not belonging to the EU (See *infra* p. 159).

²² Well known examples of parallel litigation are constituted by the *Hunt and British Petroleum case* (*B.P. Exploration Co. Ltd v. Hunt*, Queen's Bench Division, Commercial Court, Cause 1975 B No. 4490 and *Hunt v. BP Exploration Co. Ltd*, 492 F.Supp. 885 N.D. Tex 1980, 580 F. Supp. 304, N. D. Tex 1984) where the same dispute ended up in front of the House of lords, the ECHR, and the Court of Texas, and the *Laker case* (*British Airways Bd. v. Laker Airways*, 1985 A.C. 58,), where British and American courts engaged in a legal battle over jurisdiction, which caused enormous transaction costs.

²³ Even if in theory all state laws accept the validity of a forum choice clause, its effective respect is a matter of judicial discretion. Judicial practice shows that recognition of choice of forum clauses is subject to a great variety of requirements which allow for a great margin of interpretation. A common requirement is for example that the clause must be reasonable, but the reasonableness of the clause depends on a multiplicity of factors varying from court to court; sometimes courts are even tempted to exploit their discretion and recognise clauses that permit judges to reduce their workloads by sending cases abroad. A very much followed criterion in common law countries is the *forum non conveniens* doctrine, whereby a court may decline its jurisdiction simply because it believes that the defendant, for a number of very discretionary reasons (the location of witnesses and documents, the better availability of judicial resources), can more adequately pursue his action in another jurisdiction. Cfr W.W. Parker, *When and Why Arbitration Matters*, in G.M. Bersesford Hartwell, (Ed.), *The Commercial Way to Justice*, Kluwer Law, 1997, pp. 76-80

²⁴ Cfr J.M. Lookofsky; *Transnational Litigation and Commercial Arbitration*, cit., p. 641-642; see also generally G. Born, *International Civil Litigation in the United States Courts: Commentary and Materials*, Kluwer, 1996, ch 11, pp. 843-922 and Wikipedia, voice *Discovery (Law)*

lawyers of both sides²⁵, and even the right on lawyers of each side to be granted entry onto the premises of the other side to conduct their own investigations²⁶. The principle of discovery has a very broad scope under the American Federal Rules of Evidence: the only requirement is that the information sought must be relevant to the subject matter involved in the pending action²⁷. As a consequence, this standard of relevance allows for very broad intrusions into the private sphere of the other party; intrusions which in many civil law countries often amount to criminal infringements, because in such countries the gathering of evidence is regarded as an official function within the exclusive domain of the courts²⁸. Nonetheless, when judging over international disputes, American courts frequently issue unilateral orders of discovery abroad, without first seeking permission or cooperation of the foreign sovereign state concerned.²⁹ As a result, a foreign litigant requested by an American court to implement an order of discovery in his home country is frequently torn between two contradictory obligations and sanctions: if on the one hand he complies with the American request, he will violate his own national law and consequently be subject to the relative sanction; if on the other hand he does not implement the discovery order, he will bear the sanction the American court can impose in case of non-cooperation.

What is more, such unilateral orders of extraterritorial discovery have given rise to a number of diplomatic protests and notes by states, which consider them as a violation of their sovereignty³⁰. A number of foreign jurisdictions, including Canada, France and the United Kingdom have even passed specific legislation - the so-called "blocking statutes" - in order to prevent the implementation of extraterritorial orders of discovery from the American courts.

It is thus no surprise that US doctrine itself considers the issue of discovery one of the most troublesome aspects of their relations with foreign jurisdictions³¹. In order to solve the problem of the divergent methods of evidence gathering, some twenty states have acceded to the Hague Convention on the Taking of Evidence Abroad, which lays down a common procedure by which a judicial authority in one contracting state may request evidence located in another contracting state. Nonetheless, resort to the Convention has so far been limited and American courts have frequently issued orders of discovery by-passing the Convention

²⁵ Fed R. Civ. P. Rule 33

²⁶ Fed R. Civ. P. Rule 34

²⁷ Fed R. Civ. P. Rule 26(b) (1)

²⁸ C. Bühring- Uhle, *Arbitration and Mediation in International Business*, cit, p. 32

²⁹ J.M. Lookofsky; *Transnational Litigation and Commercial Arbitration*, cit. , p. 472

³⁰ J .M. Lookofsky; *Transnational Litigation and Commercial Arbitration*, cit., p. 473

³¹ Cfr par. 442 Restatement (Third) of Foreign Relations Law of the United States, reporter's note 1 (1987)<<no aspect of the extension of the American legal system beyond the territorial frontier of the United States has given rise to so much friction as the requests for documents in investigation and litigation in the United States>>, quoted by J..M. Lookofsky; *Transnational Litigation and Commercial Arbitration*, cit. , p. 473

The problem of the different substantive laws applicable to international disputes has already been dealt with in the chapter on the harmonisation of international trade law³². Here, it is enough to remind that, in the absence of an unambiguous choice made by the parties, national courts will have to resort to their own choice of law rules, with most uncertain results. Even where party have succeeded in agreeing on a certain national law, it may be hard to predict the outcome of the dispute, when a court is called upon to apply a foreign law, since it may lack the background knowledge to fully understand the rules embodied in an unfamiliar legal tradition.

But the most important source of uncertainty in international litigation is undoubtedly the issue of enforcement of foreign judgements. On account of the territorial limitations of state sovereignty, a court judgement has *per se* no binding force outside the jurisdiction where it is rendered. In a foreign country, it may have effect only if it is recognised by the competent authority (usually the court) of that country. So, in a foreign country, a foreign judgement will have the effect of a final decision and the power to preclude a new litigation on the same dispute, only if it is recognised in that jurisdiction. By the same token, the enforcement of a foreign judgement abroad is subject to the discretionary decision of the competent local authorities. It follows that, in the absence of a specific international treaty, states are under no obligation to recognise and give enforcement to foreign judgements. And indeed there are no clear rules in international practice³³, since national courts tend to recognise and give enforcement to foreign judgements on a mere case-by-case basis and sometimes the decision varies not only from country to country, but even from court to court within the same country.

In Europe, the problem of parallel litigation has been solved by a specific Regulation, the so called Brussels I Regulation, which provides uniform criteria for the assertion of international jurisdiction of the courts in the member states and introduces the principle of automatic recognition of judgments given in the European Union. It also provides a limited number of exceptions upon which recognition and enforcement may be refused (lack of jurisdiction, improper service in case of default judgements, violation of international public policy). Finally, it ensures a uniform court practice, by conferring upon the European Court of Justice the power of deciding on questions of interpretation arising out of the application of the Convention.

³² See *supra* pp. 94ff

³³ Generally speaking, legal doctrine has identified three main approaches to the recognition problem followed by the courts throughout the world: 1) the courts simply disregard foreign decisions; 2) the courts recognise foreign decision on a reciprocity basis; 3) the courts recognise foreign judgements only in so far as they meet certain procedural and substantive standards, commonly encompassed under the label of the "due process of law". (Cfr F. Juenger, *The Recognition of Money Judgements in Civil and Commercial Matters*, Am. J. Comp. L., 1998, 36, 1, p. 5.).

But, outside the scope of the Brussels Regulation (the Regulation is applicable only to civil and commercial matters³⁴), European legal systems follow no uniform approach to this issue, since each country continues to apply its own criteria for recognition and enforcement of foreign judgements. On the one hand, we find Denmark, which, absent a specific obligation stemming from an international treaty, is extremely hostile to the recognition of foreign judgements³⁵. On the other hand, we find countries such as England and Italy, where recognition and enforcement of foreign judgements is the general rule: only the usual grounds of defences will be available against enforcement (public policy, respect of "due process" principles). In the middle, we find countries like Germany, which essentially subject enforcement to the condition of reciprocity: according to art 722 of the German Civil Procedure Code, a foreign judgements will not be recognised, inter alia, where the foreign court has no jurisdiction under German law³⁶ and where there is no guarantee of reciprocity³⁷.

As we can see, although the Brussels Convention represents an important achievement in this field, it may not be considered to put the final word on the problem. On account of its limited territorial scope, it leaves untouched the member states' existing recognition regimes with respect to non-member states.

Outside Europe, the situation is even worse: only few multilateral conventions have been signed, but have little practical significance³⁸. There are also a number of bilateral treaties, which EU countries have signed with non-EU states. In addition to having a very limited importance, such treaties may create new enforcement problems, since there are no clear rules in case of conflict among them.³⁹

In conclusion, litigation of international disputes in front of national courts is subject to a number of risks:

³⁴ The so called "new Brussels II Regulation" (Council Regulation No 2201/2003 of 27 November 2003) disciplines the mutual recognition and enforcement of decisions in divorce matters and matter of parental responsibility.

³⁵ J. M. Lookofsky; *Transnational Litigation and Commercial Arbitration*, cit, p. 495: foreign judgements are considered to bear a certain evidentiary weight, but the real value of this has been opened to question.

³⁶ This requirement is known as the mirror image principle, since Germany in a sense project its own rules of jurisdiction on the judgement rendering court: foreign judgements are recognised, provided they have been rendered in the same cases in which German courts could be deemed competent

³⁷ Under the principle of reciprocity, the party seeking recognition must show that comparable judgements from the state where recognition is sought would be recognised in the country where the judgement at issue originated. In recent practice, German courts have however interpreted this requisite with flexibility, requiring only an essential similarity between the cases. Cfr Martiny, *Recognition and Enforcement of Foreign Money Judgements in the Federal Republic of Germany*, Am. J. Comp. L., 1987, 35, p. 749-52.

³⁸ Cfr the Hague Convention on the Recognition and Enforcement of Foreign Judgements in Civil and Commercial matters, which was ratified only by Cyprus, the Netherlands and Portugal, and the Montevideo Convention on the Extraterritorial validity of Foreign Judgements and Arbitral Awards

³⁹ The conflict of conventions is described as a nightmare for lawyers in international litigation. Cfr J. M. Lookofsky; *Transnational Litigation and Commercial Arbitration*, cit. , p. 500

- 1) it may already be difficult for the parties to agree on an appropriate forum. Even where parties find an agreement, courts of several countries may still claim jurisdiction over the same dispute, giving rise to the problem of parallel litigation;
- 2) during the litigation, parties may be forced to gather evidence or tolerate the taking of evidence through unfamiliar methods;
- 3) additional uncertainty may result where national courts have chosen and apply a foreign substantive law to the dispute
- 4) a judgement may have no effect at all outside the jurisdiction where it was obtained.

As we will see, the growing importance of arbitration in international trade may be explained as a response to the typical risks on international litigation.

The sources of international arbitration

Arbitration as a “forensic minefield”

Although the staunch defenders of the floating arbitration thesis claim the contrary, arbitration does not exist in a legal vacuum. As a general rule, the conduct of arbitral proceedings is regulated by two main sources. The first is the will of the parties, which constitutes arbitration’s foundational principle (a sort of *Grundnorm*⁴⁰), the second is the governing law, generally referred to as the curial law or the *lex loci arbitri*, which is the national law of the place or seat of arbitration. Whereas in most cases the *lex loci arbitri* will regulate all matters of the arbitral proceedings⁴¹, it may sometimes happen that, in addition to these two basic sources, other different systems of laws or rules⁴² may come into play in regulating some specific aspects of the arbitration. In particular it is possible to identify five different systems of laws or rules which may impact upon the international arbitral process⁴³: the law governing the parties’ capacity to enter into an arbitration agreement, the

⁴⁰ J.F. Poudret and S. Besson, *Droit Compare’ de l’Arbitrage International*, Bruylant, 2002, p. 83

⁴¹ Cfr. M. Mustill, S.C. Boyd, *Commercial Arbitration*, Butterworths, 2002, p. 61

⁴² These may be both rules of substantial law and conflict of laws rules; both national laws and international conventions, rules resulting from the parties’ will, rules of arbitral institutions, previous arbitral decisions. P. Fouchard, E. Gaillard, B. Goldman, *Traite’ de l’Arbitrage Commercial International*, Editions Litec, 1996, p. 71

⁴³ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 72

proper law of the arbitration agreement, the law governing the existence and proceedings of the arbitral tribunal, the proper law of the contract i.e. the law governing the substantive issues of the dispute and finally the law governing recognition and enforcement of the award. Given the wide variety of the different sets of laws or rules which may be applicable at the same time, arbitration may sometimes turn into a “forensic minefield”⁴⁴ i.e. a process in which the arbitrator, the parties and their counsel need to face a complex maze of national, international and non-national conflicting laws and rules⁴⁵. For instance, as far as the issue of arbitrability is concerned, it may happen that a claim may be arbitrable under the law governing the arbitration agreement and under the *lex loci arbitri*, but not according to the law of the place of enforcement. It follows that an award on such dispute, although validly rendered under the curial law, may prove to be unenforceable under the law of the place of enforcement. Another issue for potential conflict is the capacity of the parties to arbitrate, which is not always regulated by the *lex loci arbitri* since it depends upon the party’s nationality or place of usual residence. This issue is particular problematic in cases where one or more parties is a state, because generally national systems impose restrictions on the capacity of a state or state agency to enter into an arbitration agreement. Conflicts may frequently arise since there is no uniform solution for this issue. Some national laws (e.g. in United Kingdom, Germany, The Netherlands and Switzerland) put no restriction on the capacity of the state or state agencies to enter into an arbitration agreement; by contrast other laws (e.g. Saudi Arabia and Belgium) prevent the state and state agencies from entering into arbitration agreements; other laws take (e.g. in the United States) a middle-ground position and prevent only the Federal Government from entering into arbitration agreements, whereas they envisage no such limitation on state agencies.

The sources of uniform arbitration rules aim at reaching the ideal situation in which the potential for conflicting laws and rules is minimised and international arbitral proceedings are conducted in the same way no matter where they take place⁴⁶. In such an ideal situation, the arbitral tribunal would be guided by the agreement of the parties, or failing this agreement, by its own judgement; in addition, it would be able to render an award enforceable on the same conditions in any state. Arguably, as we will see in more detail in the following chapters, the complete fulfilment of this situation will remain an ideal: each state has its own national characteristics and practices, its own concept of how arbitrations should be conducted; moreover, states with a long tradition in arbitration practice and highly developed arbitration laws are particularly reluctant to switch to uniform rules. Nonetheless, the publication of international standard of arbitral procedure embodied

⁴⁴ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit p. 72

⁴⁵ J.M. Lookofsky; *Transnational Litigation and Commercial Arbitration*, 1992, cit., p. 561

⁴⁶ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 77

in the UNCITRAL Model law and in the New York Convention has fostered an almost universal wave of legislative reform aimed at updating national arbitration laws to the modern needs of international practice⁴⁷. Urged by the international environment's pressure, states which had previously shown hostility vis a vis arbitration or which submitted it to a rigorous system of court supervision have softened their approaches in order not to undermine their stake in the arbitration market. These countries have come to realise that a simple, liberal and modern arbitration law is a good "marketing strategy" allowing to draw a far greater number of arbitral disputes in their territory⁴⁸. Hence, the pressures exerted on national legislatures in favour of a reform. It is to the survey of these sources of uniform arbitration rules that we now turn.

The sources of uniform rules in international commercial arbitration

The two main sources of uniform rules in international commercial arbitration are:

- The 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (commonly referred to as "the New York Convention" or NYC) and
- The United Nations Commission for International Trade Law (UNCITRAL) Model Law on International Commercial Arbitration (commonly referred to as "the UNCITRAL Model Law") and the UNCITRAL Arbitration Rules.

Despite the limitation suggested by its name, the NYC establishes minimum standards both for enforcement and jurisdiction aspects of international commercial arbitration. According to the discipline provided by the Convention, each contracting state must recognise foreign arbitral awards as binding and enforce them using procedures comparable with those applicable to domestic awards.⁴⁹ In addition, always according to the Convention, a contracting state asked to recognise and enforce a foreign arbitral award can refuse to do so only on the basis of the limited criteria set forth by the Convention itself⁵⁰. Sponsored by the United Nations, it is one of the most successful

⁴⁷ P. Fouchard, E. Gaillard, B. Goldman, *Traité de l'Arbitrage Commercial International*, cit, p. 83. Already during the drafting process of the UNCITRAL Model Law some states like France (1980) decided to reform their national arbitration laws. After its publication there has been a worldwide wave of legislative reform e.g. in the United Kingdom, Germany, Sweden, Austria.

⁴⁸ P. Fouchard, E. Gaillard, B. Goldman, *Traité de l'Arbitrage Commercial International*, cit, p. 84

⁴⁹ New York Convention art III

⁵⁰ The New York Convention sets out three fundamental standards for international arbitration: the arbitration must comply with the terms of the arbitration agreement; the parties must be treated fairly and with equality (i.e. according to

agreements concluded within its framework⁵¹. To date, it has been ratified by over 130 countries, thus providing the most extensive network for the enforcement of decisions resolving disputes: the regime established by the Convention far exceeds any comparable international regime for enforcing court decisions⁵². This is undoubtedly one of the most important advantages of international arbitration over international court litigation.

The UNCITRAL Model Law has been adopted by UNCITRAL in 1985 with a view to harmonising the different national arbitration procedures and adapting them to the specific needs of international commercial arbitration practice⁵³. It is important to point out that the purpose of the Model Law is not to replace the various arbitration laws of the world with a single uniform law of universal application. Rather, it purports to make available to national legislatures a set of principles and rules that can be adopted to provide or improve national laws governing international commercial arbitration and, in so doing, to bring such laws into closer harmony with each other. The Model Law provides a model which states can use as the basis for their national law but they are in no sense bound to follow its exact wording; they can depart from it to a greater or lesser extent.⁵⁴ The original idea was to draft a protocol annexed to the NYC which should deal with the conduct of arbitral proceedings, but eventually UNCITRAL took the view that harmonisation in this field could be achieved more effectively by the promulgation of a model law, rather than by a supplementary protocol to the Convention, since the former means allows more room for flexibility⁵⁵. The Model Law covers all stages of the arbitral process from the arbitration agreement to the recognition and enforcement of the arbitral award and reflects a worldwide consensus on the principles and important issues of international arbitration practice.

Whereas The Model Law constitutes a model for national legislations, the Arbitration Rules constitute a model for ad hoc arbitration and arbitration institutions. The Rules' aim is therefore similar to that of the Model Law: creating a greater uniformity in the rules applicable to arbitration proceedings in order to render the parties reasonably sure of obtaining an award which would be enforceable under the NYC⁵⁶. Drafted in 1976, the Rules cover all aspects of the arbitral process,

the principles of international due process); the award must respect international public policy both with respect to its content and its subject matter. Where such criteria are not met, the Convention allows a national court to refuse to enforce an award made outside its jurisdiction. cfr J.D.M. Lew, *Achieving the Dream: Autonomous Arbitration*, Arbitration International, 2006, 22, 2, p. 189

⁵¹ C. Bühring-Hule, *Arbitration and Mediation in International Business*, cit p. 75

⁵² P. Capper, *International Arbitration: a Handbook* . cit., p. 3

⁵³ UNCITRAL Secretariat , *Explanation of Model Law*, UN Doc A/CN.9/264 (reproduced in UNCITRAL Yearbook, vol. XVI - 1985).

⁵⁴ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases, and Materials*, Oxford University Press, 2007, p. 632.

⁵⁵ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 508; M.R. Sammartano, *International Arbitration Law and Practice*, Kluwer, 2001, p. 830.

⁵⁶ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 480

providing a model arbitration clause, setting out procedural rules regarding the appointment of arbitration and the conduct of arbitral proceedings and establishing rules in relation to the form, effect and interpretation of the award.

The Model Law and the Arbitration Rules are not affected by substantial differences in terms of provisions⁵⁷: this comes as no surprise, given that they were drafted by the same institution essentially for the same harmonisation purpose. The most important differences regard the scope of these two sets of rules. The Model Law applies only to international and commercial arbitration, whereas the Arbitration Rules may be used for both domestic and international disputes. But most importantly the Arbitration Rules can in no way derogate the mandatory provisions of the national law applicable to the arbitration⁵⁸, whereas the Model Law is designed to prevail as a *lex specialis* with respect to other provisions governing international commercial arbitration within the jurisdiction of a country which adopts the Model Law⁵⁹. Moreover the Model Law contains an important provision regulating the extent of court intervention in the arbitration process, which is of course not found in the Arbitration Rules. Art 5 states that << in matters governed by this Law, no court shall intervene except where so provided in this Law>>: this means that, in all the topics and aspects of arbitration regulated by the Model Law, a national court can intervene only in those cases expressly provided for by the Model Law itself.

Both the Model Law and the Arbitration Rules have met with considerable success in the arbitration practice. Although the latter were designed specifically for use in ad hoc arbitration, a number of arbitral institutions have adopted them, either in full or in part.⁶⁰

In some cases the arbitral institutions have only formally adopted the UNCITRAL Rules, but have in fact radically changed them as to undermine the basic principles of the arbitral proceedings as

⁵⁷Even though the Model Law, which is addressed to national legislators, contains provisions on the recognition, enforcement and the setting aside of the awards: similar rules are of course not provided by the Arbitration Rules, which are conceived for private parties. Conversely, only the Arbitration Rules contain detailed provisions for establishing the costs and fees of arbitration, admittedly one of the most troublesome issues on which an agreement is difficult to find

⁵⁸ See art 1(3) of the Arbitration Rules

⁵⁹A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 512. There is in this respect a specific exclusion regarding national rules on arbitrability: if the law of the country concerned excludes the possibility of submitting certain types of disputes to arbitration, this will prevail; so will any legislation providing for compulsory arbitration (art 1.5)

⁶⁰ See for example the Rules of Procedure of the Inter American Commercial Arbitration Commission (IACAC), or the Rules for Arbitration of the Kuala Lumpur Arbitration Centre and the Cairo Arbitration Centre. But the most significant practical application of the UNCITRAL Arbitration Rules has been in connection with the proceedings of the Iran-United States Claims Tribunal. The Iran-United States Claims Tribunal was established in 1982 pursuant to the Algiers Accords, which resolved the crisis between United States and Iran culminated with the Iranian seizure of US Embassy hostages in 1979. The Tribunal was established to resolve existing disputes between the two countries and their nationals, especially the claims against US citizens and the Iranian governments involving commercial debts, nationalisations, expropriations, breaches of contracts and other matters. The Tribunal sits in The Hague and is comprised of nine arbitrators: three appointed by Iran, three by the United States, and three by the party-appointed members acting jointly or, in absence of agreement, by an appointing authority. The tribunal adopted with some modifications, the UNCITRAL Rules and therefore plays an important role in the development of a case law related to such rules.

envisaged by UNCITRAL. This has given rise to concerns over the expectations of the parties, who submitted their disputes with a view to having them settled according to UNCITRAL Rules and were in fact faced with a radical different kind of arbitration. Accordingly, in 1982 UNCITRAL issued a set of recommendation⁶¹ urging an arbitral institution which adopts the Arbitration Rules to refrain as far as possible from modifying them and, if exceptionally some modifications are needed, to highlight the departure from the Rules.

To date, more than 40 States have adopted the Model Law in whole or in part⁶², as the basis for their national law of arbitration⁶³. Strangely enough, none of the so called major arbitration jurisdictions have adopted the Model Law⁶⁴, although they all actively participated to its drafting and are still participating to the ongoing discussions over its reform. Nonetheless, where national arbitration laws have not adopted the Model Law, they have moved on to adopt its underlying philosophy: they shifted from an arbitration system centred on control and supervision by national courts to a system based on party autonomy and non-intervention⁶⁵. This has given the Model Law the status of generally accepted standard in international arbitration, akin to general trade usages or *lex mercatoria*⁶⁶ it is therefore virtually inconceivable that any state will in future introduce legislation relating to arbitration without first looking at the text of the Model law⁶⁷. Moreover, comparative surveys have shown that even where states have adopted arbitration laws not based on the Model Law, the practical effects of the discipline have not been greatly different: most of the fundamental issues such as arbitrability, due process, constitution of the tribunal, and the tribunal's right to shape the proceedings are dealt with in an identical (or almost identical) fashion.⁶⁸ by way of conclusion, the NYC, the UNCITRAL Arbitration Rules and the Model law represent a

⁶¹ UN Doc. A/CN.9/230 "Recommendations to assist arbitral institutions and other interested bodies with regard to arbitration under the UNCITRAL Arbitration Rules", YBCA, 1983, VIII, p. 211

⁶² For a complete list of the countries which adopted a legislation based on the Model Law, see UNCITRAL's website www.uncitral.org

⁶³ In countries like Australia, Bulgaria, Canada, Cyprus, Hong Kong, and Nigeria the Model Law was adopted either without change or with little modifications. Countries like the Netherlands and Spain have not passed legislation directly based on the Model Law, although the influence of the latter – or at least its *travaux préparatoires* – is visible. A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 526.

⁶⁴ England, France, Sweden, Switzerland, USA (only four states in USA have adopted the Model Law).

⁶⁵ This is the case for example of Swiss Private International Law Act 1990, which on the one hand strongly limits court intervention, on the other hand provides arbitrators with a wide discretionary power to control the arbitration process, except where the parties agree otherwise. Moreover, it establishes that, where neither party is domiciled or has a place of business in Switzerland, the parties can expressly agree to exclude all juridical recourse, subject to few restrictions. A similar liberal act has been adopted in Sweden in 1999 and, in a more moderate vein, in France in 1981. Despite the 1996 reform, English arbitration law has still a more conservative approach, since courts have retained a substantial power of intervention, arbitrations are subject to a large number of mandatory provisions, and parties are allowed to challenge awards in front of the national court on a lengthy list of grounds. J.D.M. Lew, *op. cit.*, p. 192

⁶⁶ J.D.M. Lew, *op.cit.*, p. 191

⁶⁷ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit p. 525

⁶⁸ C. Soderlund, *A Comparative Overview of Arbitration laws: Swedish Arbitration Act 1999, English Arbitration Act 1996 and Russian Federal Law on International Commercial Arbitration 1993*, Arbitration International, 2004, 20, 1, p. 84

significant contribution to the development of a uniform, international arbitration process designed to produce a binding and enforceable method for the resolution of disputes in international trade across national boundaries.⁶⁹

In addition to these sources collected in written official texts, the arbitration system includes the rules and practices of the leading arbitral institutions. As a result of the activities of such institutions, supplemented by the comments of academic doctrine, there is a growing body of international rules and practice relating to international arbitration which is documented in the many legal journals which specialise in the field.

Finally, it should be borne in mind that, despite the frequent claims of the alleged independent character of international arbitration, every arbitral process has a juridical seat in a certain country. Consequently, such arbitration must be conducted in accordance with the arbitration law of that state. Although most national arbitration laws limit the power of intervention of state courts, the latter often play an important role in supporting arbitration, especially in the recognition and enforcement of the award. As a general rule, state courts are not allowed to make the final decision on the merits of the dispute. However, courts have the power to review, set aside, or refuse the enforcement of the award, normally on public policy grounds. An unsuccessful party may challenge an award in the courts of the juridical seat of the arbitration or in the courts of the state where enforcement is sought. In this respect, art. V NYC provides a set of limited grounds on which the recognition and the enforcement of an award may be refused, at the request of the party against whom it is invoked.

As we can see, despite the considerable efforts made by the United Nations in this field, the arbitral process is governed by a maze of different normative systems which have simultaneous application. Consequently, it is not always easy for the interpreter to identify the exact rules or set of rules applicable to the particular dispute.

Advantages of arbitration

International arbitration offers a number of advantages over court litigation, which descend from its character of private adjudication process. They are commonly found in, procedural flexibility,

⁶⁹ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit p. 527

speed and lower costs, neutrality, confidentiality and, most importantly, simpler enforceability of the decision⁷⁰.

Arbitration is a consensual process; a party cannot be compelled to arbitrate a dispute, unless he has agreed to arbitration. Party autonomy is a fundamental principle of arbitration: parties are free to determine not only whether, but also how, their disputes should be solved. They have also the power and freedom to: select the tribunal (or agree on the method of selection); choose the rules that will apply to the proceedings and choose the language of the arbitration.

Hence, the advantage of procedural flexibility. Procedural flexibility means that the parties, or, if they fail to agree, the arbitrators, are free to determine the rules for the conduction of arbitration. Parties can even choose the place of arbitration and, more importantly, the person or the persons who are going to decide the dispute⁷¹. This allows parties to choose arbitrators according to the particular skills and expertise necessary to solve their particular dispute: they can for example appoint corporate, or banking, or securities law, but also civil engineering experts. Consequently, an experienced tribunal of this kind should be able to grasp quickly the salient issues of fact and law in dispute and so save the parties both time and money, as well as offering them the prospect of a sensible award⁷². Finally, parties may agree that the arbitration should be held in a language (such as English) understood by both of them and in which their business relationship has been conducted. Nonetheless, one must also look at the other side of the coin. The private nature of arbitration means also that arbitrators often consider their task as a commercial service, and therefore they may be tempted to use flexibility in order comply with customer-satisfaction standards rather than legal certainty, so that neither party goes home empty-handed after the dispute.

Arbitration's procedural flexibility may result in savings of time and costs, even if this will often depend on a number of other factors such as the number of arbitrators, the complexity of arbitration and the degree of cooperation between the parties⁷³. Neutrality, i.e. the possibility of selecting a

⁷⁰Cfr J.W. Rowley (Ed.), *Arbitration World*, , The European Lawyer, 2006, p. xii; M.Kerr, *International Arbitration v Litigation*, JBL, 1980, p. 164; R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases, and Materials*, cit., p. 624.

⁷¹ In major multi-million dollar arbitration cases parties even have the habit to conduct the so-called "beauty contests" i.e. they interview the potential candidates prior to making the choice of nominating their own arbitrator (cfr K.P. Berger (ed), *The Practice of Transnational Law*, Kluwer Law, 2001, p. 25).

⁷²A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit., p. 23

⁷³ *Ibidem*. Cfr also J.M. Lookofsky; *Transnational Litigation and Commercial Arbitration*, cit. , p. 559-60, <<In actual fact, international arbitration is sometimes a slow-moving business, and it rarely comes cheap>>, especially because the arbitrator's fees are generally geared towards the amount of the dispute. Cfr also R. Goode, *Commercial Law*, Lexis Nexis, 2004, p. 1163: <<the court fees in an action are relatively modest, whereas in an arbitration the parties are responsible for the arbitrator's remuneration and travel and accommodation expenses (which may be particularly heavy if there are several arbitrators coming from different countries), the hire of accommodation for the hearing and the payment of the stenographer if they wish to have a full record of the evidence. In the case of an institutional arbitration the parties also have to pay the administrative charges of the arbitral institution. On the other hand, the arbitrator's

neutral forum completely detached from the litigants' nationality is undoubtedly an advantage, if only one considers that either party is usually reluctant to submit the dispute to the court of the other party's state.

Also the advantage of confidentiality stems from the private nature of the arbitration process. In most legal systems, arbitral awards do not automatically become matters of public record, as court judgements usually do: they may be published only with the parties' consent⁷⁴.

We have already dealt with the more favourable enforcement regime laid down in the New York Convention, which binds most of the world to enforce arbitral awards considered valid according to the criteria set out by the Convention itself. The possibility of a worldwide enforcement is very important especially in cases where the dispute has been settled in a country in which the respondent does not have any or enough assets. In such cases, the winning party may have a guarantee to enforce the award in the different country where the losing party's assets lie

If these are the advantages of international arbitration, it may then be considered appropriate, at least in general terms, to resort to this dispute-settlement mechanism, where one or more of the following circumstances occur:

1) parties wish to overcome the problems connected to parallel litigation and choice of forum clause. As we have seen above, parties may try to solve the problem of parallel litigation by drafting an appropriate choice of forum clause. But it is not always easy to agree on a forum. There may be many reasons why such agreement cannot be reached. A party may comprehensively be reluctant to accept the state court of the other party, because it may feel a bias of "hometown justice"⁷⁵, i.e. suspect that the judge will tend to rule in favour of the local party⁷⁶. Moreover, even where provided with sufficient guarantees as to the impartiality of the judge, the party may nonetheless feel not familiar with the legal system and the language of the country concerned⁷⁷. Another reason may be for example that the procedures of the courts having otherwise jurisdiction are considered too cumbersome and lengthy; finally a party may simply find a local forum unfavourable (for example because it entails an uneven distribution of trial costs: the foreign party has to bear the costs of

greater familiarity with the practices of the industry or market may shorten the proceedings and thus save expense>>.

⁷⁴ Though confidentiality cannot fully insulate arbitration from the public eye. Arbitral awards may become object of litigation in front of public courts and accordingly the general public may have an indirect knowledge of them.

⁷⁵ C. Bühring-Uhle, *Arbitration and Mediation in International Business*, cit. p. 22

⁷⁶ "The literature on arbitration refers many cases of "hometown justice" bias. See e.g. W.W. Park, *When and Why Arbitration Matters*, cit., p. 75 <<In some countries the questionable integrity of the judicial system may make judicial proceedings resemble auctions more than trials, with judgements going to the highest bidder>>; or M.J. Bond, *A Geography of International Arbitration*, Arbitration International, 2005, 21, 1, p. 102, who refers that in Brazil it is common practice for lawyers of both sides to personally hand the brief to the judge and discuss the case in private outside the presence of the other parties. Were this to occur in England - the author observes- not only would the lawyer be banned from legal practice forever, but would also be prosecuted, since this behaviour undoubtedly constitutes a criminal offence.

⁷⁷ M. Huleatt-James & N. Gould, *International Commercial Arbitration: a Handbook*, cit., p. 8

hiring local counsel in addition to its home counsel, of translating documents and lodging in the venue of the trial⁷⁸). In arbitration parties can choose their own forum and place of dispute settlement, without being bound by the jurisdiction rules of any country. An arbitral tribunal can be agreed upon in a mutually accessible country, with proceedings in a common language, and according to procedural rules which give neither side an unfair advantage;⁷⁹

2) parties wish to keep their dispute private and therefore rely on arbitration's confidentiality;

3) The language of the contract may be different from the language of the state court having jurisdiction. In this case, the parties may wish to avoid the trouble of translating all documents into the state court's language;

4) Similarly, and more importantly, the chosen governing law of the contract object of the dispute may be different from the law of the state court. In this case, parties wish to avoid problems arising from the fact that the national judge is required to apply a foreign law, which he is likely not to be familiar with;

5) parties wish to have a final binding decision which is not subject to an appeal. In many states, it is not possible to appeal against an arbitration award on the grounds that the arbitrator made an error of law. In other states, it is possible for the parties to agree to exclude the right of appeal;

6) parties wish to benefit from a wider enforcement regime. On account of the wide geographical purview of the New York Convention, the award will be enforced on a worldwide basis and national courts will generally enforce arbitral awards far more readily than foreign court judgements⁸⁰;

Disadvantages of arbitration

On the other hand, and always in general terms, arbitration may result an inappropriate or unfeasible device for dispute settlement in the following circumstances:

1) the dispute is not "arbitrable" under the law applicable to the arbitration agreement, the law of the state where the arbitration is to take place, or the law of the state where the enforcement is sought;

⁷⁸ C. Bühring-Uhle, *Arbitration and Mediation in International Business*, cit, p. 23

⁷⁹ W.W. Park, *When and Why Arbitration Matters*, cit., p. 75

⁸⁰ J.M. Lookofsky, *Transnational Litigation and Commercial Arbitration* . cit., p. 560

- 2) one of the parties lacks the capacity, under the law of its domicile, to participate in an arbitration⁸¹;
- 3) the nature of the remedy sought is not normally within the powers of an arbitral tribunal: for example, if a party seeks a coercive order such as a permanent injunction;
- 4) in disputes related to state contracts involving a developing country, there is a strong objection to arbitration by the public contracting party, which perceives as a pro-Western bias the rules regulating the arbitral process, and consequently insists that the dispute should be settled by national courts applying domestic law⁸²;
- 5) parties distrust arbitration because it lacks full appeal and formal rules of evidence⁸³.

International and commercial arbitration

Most publications on arbitration deal only with a particular type thereof: international commercial arbitration. Although the definition of the terms international and commercial entails important consequences, both in terms of theory and practice, no uniform definition exists. Therefore, it is always necessary to refer to the relevant state's arbitration law in order to get to know the proper meaning of the terms "international" and "commercial". Usually, this will be the so called *lex loci*, i.e. law of the state in which the arbitration is to take place.

International arbitration is to be distinguished from domestic arbitration. This is because many countries have different rules for domestic arbitrations, usually providing for greater oversight and involvement of the courts than is the case with international arbitrations.⁸⁴ There are good reasons for doing this. First, an international arbitration will usually have no connection with the state in which the arbitration takes place, other than the fact that it is taking place on the territory of that state.⁸⁵ Secondly, in international arbitrations there are very few issues of consumer protection involved, because parties are usually corporations or state entities. Accordingly, the state concerned

⁸¹ For example, according to their respective national laws, the Saudi Arabian State and the US federal government may not be a party to an arbitration agreement (though US state agency may be).

⁸² J. M. Lookofsky; *Transnational Litigation and Commercial Arbitration*, cit. , p. 560

⁸³ For example, arbitrators have not the power to require the attendance of witnesses under penalty of fine or imprisonment: this coercive power is typical of state sovereignty and states are not likely to delegate to a private arbitral tribunal, however eminent it may be. Cfr A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 47

⁸⁴ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases, and Materials*, 2007, p. 628

⁸⁵ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 12

can afford to take a more relaxed attitude towards such arbitrations⁸⁶. Thirdly, in the conduct of international arbitration often a great variety of different nationalities, cultures, mentalities, legal backgrounds, legal systems and legal principles come into play. This entails a greater flexibility in the regulation of its proceedings, but most of all the need to abandon narrow, parochial concepts of how an arbitration should or should not be conducted.⁸⁷ The NYC applies to enforcement of awards not considered as domestic awards in the state where the recognition and enforcement is sought. The Convention therefore recognises that a different legal regime may apply to domestic awards. National laws adopt divergent criteria for the definition of the international character of the arbitration. In some jurisdictions an arbitration will be considered as international with reference to the nature of the dispute, in others to the nationality of the parties, in others to the residence of the parties. In an attempt to harmonize the different definitions of international arbitration, the UNCITRAL Model Law has set out the following criteria. According to art. 1.3 of the Model Law an arbitration is international if:

- a) involves parties having their places of business in different states, or
- b) deals with disputes arising out of obligations to be performed in a different state from the place of business of at least one of the parties
- c) the subject matter of the arbitration is connected to a state different from the place of business of at least one of the parties
- d) parties have expressly agreed that the subject matter of the arbitration agreement relates to more than one country.

The definition envisaged by the Model Law relies on a mixed approach: it does not focus on one criterion to the exclusion of the others, but it identifies a number of factors the most important of which is the place of business of the parties to the arbitration⁸⁸.

Also the definition of the commercial character of the arbitration has a fundamental importance. It constitutes an essential condition for the so-called "arbitrability" of the dispute.. Under the laws of some states, only commercial disputes can be submitted to arbitration; besides, the New York Convention allows states to exclude disputes from its application, which are not regarded as commercial under their national laws. The term also denotes cases in which states act in their private capacity and therefore are not covered by sovereign immunity; finally it distinguishes international commercial arbitration governed by private law from other forms of international arbitration (such as disputes between states) disciplined by public international law.

⁸⁶*ibidem*

⁸⁷ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 13

⁸⁸ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases, and Materials*, 2007, p. 629

The UNCITRAL Model Law provides a uniform definition of international but not of commercial arbitration. However, in a footnote to art 1 it suggests that the term commercial should be given a wide interpretation so as to cover matters arising from all relationships of commercial nature, whether contractual or not. This footnote constitutes only a recommendation: in order to decide whether a given arbitration is commercial reference must be made to the relevant national law.

Different types of arbitration

Within the field of international commercial arbitration, two important distinctions are to be made: on the one hand, between general arbitration and specialised arbitration; on the other hand, between institutional and ad hoc arbitration.

Specialised forms of international arbitration exist in many industries such as commodities trade and shipping: they are conducted under the auspices of a particular trade association, according to specialised arbitration rules, typically by experts of that particular trade sector, and frequently exclude lawyers both from the tribunal and from the counselling to the parties. Given their high specialisation, they are generally not covered by the legal literature of international commercial arbitration.

Institutional arbitration occurs within a framework of a specialised, permanent institution which administer the whole adjudication process. Such institution will set the arbitral process in motion by constituting an arbitral tribunal, providing a pre-established set of procedural rules, drafted by experts and in many cases continually updated. In addition, the institution helps with the selection of the place of arbitration, the appointment and - where necessary - the replacement of arbitrators, and lays down criteria for the arbitrators' fees. Finally it may also provide accessory services such as logistical support (notification of written pleadings and documents, reservation of hearing rooms).⁸⁹

The most important advantage of institutional arbitration lies in the prestige of the institution. which strengthens the credibility of the award and facilitates both voluntary compliance and enforcement. The disadvantages of institutional arbitration are commonly considered the high administrative fee and the delays stemming from sometimes cumbersome administrative procedures.

⁸⁹ C. Bühring- Uhle, *Arbitration and Mediation in International Business*, cit p. 46

Conversely, in ad hoc or non-institutional arbitrations, the parties, alone or with the arbitral tribunal, devise and administer their own procedure without reference to institutional rules or supervision⁹⁰.

The advantages of ad hoc arbitration are the higher party control over the procedure, greater flexibility in adapting the procedures to the peculiarities of the dispute, and savings in terms of costs and delays associated with institutional arbitration. On the other hand, the disadvantages stem from the lack of institutional supervision. It is virtually impossible for the parties to foresee and provide for all the procedural issues which may come up during the arbitration process⁹¹. Before the dispute, it is generally very difficult to foresee what kind of procedure will be most appropriate, what contingencies will have to be taken into consideration and whether both sides will cooperate to get the matter resolved. In institutional arbitration, such hurdles are overcome, as we have seen, by reference to a pre-established body of rules.

A compromise solution is frequently found in the practice of using arbitration institutions as appointing authorities for ad hoc arbitration under the UNCITRAL Rules. At a substantially reduced fee, the parties benefit from two of the most important advantages of institutional arbitration: a set of detailed procedural rules and the certainty that the tribunal will be established.

The international commercial arbitration's social context: grand old men vs technocrats

The development of international commercial arbitration has also been studied from a sociological perspective. The best known sociological account of the arbitration system has been outlined by Yves Dezalay and Bryant G. Garth in their book "Dealing in Virtue"⁹². According to these authors, two opposing trends may be observed in the social context of international commercial arbitration. On the one hand, international commercial arbitration has become a field of intense competition between arbitral sites, arbitral institutions, counsel, and arbitrators⁹³. Competition among arbitral institutions and arbitrators is so intense because parties have the power to select their own private

⁹⁰ P. Capper, *International Arbitration: a Handbook*, cit, p. 22

⁹¹ L. Craig, W. W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, Dobbs Ferry Oceana, 2000, §4.03

⁹² Y. Dezalay and B. Garth, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, The University of Chicago Press, 1996

⁹³ J. Werner, *Competition within the Arbitration Industry*, *Journal of International Arbitration*, 1985, 5, 2

judge and therefore they constantly evaluate the skills and the authority of their potential arbitrators⁹⁴. Consequently, arbitrators and institutions compete in order to gain more and more “symbolic capital”⁹⁵, i.e. prestige, status and recognition as leading arbitrators: success in this field is dependent upon the capacity of persuading the parties that given groups of individuals or institutions actually represent the leading arbitration providers. There is a tendency to try to “make it by faking it”, exaggerate the experience of individuals and institutions in order to allow them to gain acceptance as being successful⁹⁶. On the other hand, despite this fierce competition, the arbitration community is characterized by a high degree of cohesion: there is a relatively small number of important institutions of an international scope (the most important of which is the International Chamber of Commerce), and of individuals in each country who act as the key players both in the capacity of counsel and arbitrators⁹⁷. These individuals are connected by personal and professional relations cemented by conferences, journals and the common participation to arbitrations. In the international arbitration community, roles are frequently mixed: the same individuals belonging to the networks around the main arbitral institutions are found in the roles of lawyers, co-arbitrators, or chairs of the arbitral tribunal⁹⁸.

Developments in the field of international commercial arbitration are marked by a social conflict between two generations of arbitrators, the “grand old men” versus the technocrats. These two generations carry different values as to the characteristics qualifying someone as an arbitrator, i.e.

⁹⁴ Y. Dezalay and B. Garth, *Dealing in Virtue*, *op cit*, p. 18

⁹⁵ The notion of symbolic capital was coined by the French sociologist Pierre Bourdieu in his book *Distinctions: A Social Critique of the Judgment of Taste* (Routledge, 1984). With this concept he means wealth, in the form of reputation for competence and image of respectability and honourability, which legitimates the maintenance of status and power in a given social group. The idea underlying the notion of symbolic capital is that in modern society, characterized by increasing technical specialization among individuals, distinctions in terms of knowledge and education are replacing the old hierarchies of caste and class. On this reading, knowledge is a resource capable of generating “profits” that are subject to monopolization by individuals and groups and that can be transmitted from one generation to the next. Culture is directly implicated in social inequality: like economic capital, cultural or symbolic capital is unequally distributed in society and therefore creates opportunities for exclusive advantages. Holders of this form of capital exert considerable power over other groups, using it to gain elite positions in society. Accordingly, classes are differentiated from one another in terms of the overall volume of capital (economic and cultural) controlled by elite groups. The distribution of the different classes ranges from those who are best provided with both economic and cultural capital (professionals) to those who are most deprived in both respects (workers with low qualifications). In the context of international arbitration, arbitrators and institutions exert their symbolic capital in order to gain or maintain the status of leading arbitrators. (cfr P. Bourdieu, *Distinctions: A Social Critique of the Judgement of Taste*, Routledge, 1984, p. 114 and 291; D. Jary and J. Jary, *Symbolic Capital*, Collins Dictionary of Sociology, Collins 2000, p. 127; George Ritzer (ed), *The Blackwell Encyclopedia of Sociology*, Blackwell, 2007, p. 888-889)

⁹⁶ Y. Dezalay and B. Garth, *Merchants of Law as Moral Entrepreneurs: Constructing International Justice from the Competition for Transnational Business Disputes*, *Law and Society Review*, 1995, 29, 1, p. 32

⁹⁷ Y. Dezalay and B. Garth, *Merchants of Law as Moral Entrepreneurs*, *cit*, p. 31

⁹⁸ The words of an anonymous, leading arbitrator reported by Dezalay and Garth (*Dealing in Virtue*, *cit*, p. 50) are particularly telling in this respect: <<This is a mafia. There are about, I suppose, 40 to 50 people in Western Europe who could claim they make their living doing this. I'm one of them. It took me probably close to 15 years to get to the point that when I go as I do regularly to the Swiss Arbitration Association or I go to a ICC gathering, I will know and be recognized and know and talk to a number, you know, the leading figures. And... that's how you just get into it. Now why is it a mafia? It's a mafia because people appoint one another. You always appoint your friends – people you know>>

what constitutes symbolic capital, what are the characteristics of the people who are recognized as having authority to handle these high-stakes, complicated and lucrative disputes⁹⁹. The old generation of the “grand old men” is for its large part composed by senior European professors who have risen to the top of their national legal profession and gained a very high stake of authority, experience and wealth before being asked to serve as arbitrators.¹⁰⁰ Accordingly, they conceive arbitration more as an honorary duty than as a profession. In order to preserve the independence of judgment, the grand old men are convinced that arbitrators should render an occasional service, provided on the basis of long experience and wisdom acquired in law, business or public service. This old generation is increasingly criticized by the new one, made up of practitioners who came to arbitration in the wake of the rapid growth of this market in the 1980s¹⁰¹. They juxtapose to the grand old men’s authority and experience their specialization and technical competence. In contrast with the amateurism or idealism of their predecessors, they present themselves as international arbitration professionals, as entrepreneurs selling their services to other business practitioners¹⁰². The development of this new generation of arbitrators is mainly fostered by two factors. The first is the profound modifications of the ICC structure as a result of the rapid expansion of the arbitration market. In order to deal with the constant increase of new cases characterized by greater geographical diversity, not only did the ICC increase its level of bureaucratization, but also needed to recruit new arbitrtators who did not fit the profile of the Continental grand old men¹⁰³. The second is the Anglo-american law firms’ entrance into the arbitration market. In the wake of the

⁹⁹ Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 29

¹⁰⁰ Y. Dezalay and B. Garth, *Merchants of Law as Moral Entrepreneurs*, cit, p. 36. The best known representative of this group is, according to Dezalay and Garth, the Swiss professor and lawyer Pierre Lalive. As they put it, everyone with a rudimentary knowledge about international commercial arbitration knows his name, and most have met him at one time or another (or will say they have). His curriculum exemplifies the typical grand old man career . He started with a cosmopolitan education in Geneva and subsequently at Cambridge University. He became professor at the University of Geneva in 1955 and since the 1960s he has held eminent offices in the most prestigious institutions in the field of international law: in 1967 he became professor of the International Academy of Comparative Law in the Hague, from 1989 to 1991 he was President of the Institute of International Law, from 1988 to 1993 he was President of the UNIDROIT Committee of Governmental Experts on the Protection of Cultural Property. His first important role as an arbitrator was in 1955, when he served as secretary general before the World Court in the famous Aramco oil arbitration. He is the founder of one of the world’s leading law firms: Lalive & Partners. As his curriculum shows, his career is not entirely centered on international commercial arbitration. On the contrary, arbitration represents an additional specialization to a career already made in international law and in successful legal practice. The cosmopolitan symbolic capital represented by professor Lalive allowed him to be easily welcomed into any national or international field that required the services of legal professionals: he entered at the top because his presence would lend prestige to whatever organization or activity he elected to enter.

¹⁰¹ Y. Dezalay and B. Garth, *Merchants of Law as Moral Entrepreneurs*, cit, p. 37. The representative of this new generation of arbitrators is considered by Dezalay and Garth Jan Paulsson. Contrary to professor Lalive’s, Jan Paulsson career is entirely centerd on international commercial arbitration. He began with working as an associate lawyer for Coudert Brothers in 1975 on one of the Lybian oil nationalization cases. He has coauthored the leading book on ICC arbitration (together with Craig and Park), he is the general editor of the review *Arbitration International* and the President of the London Court of International Arbitration.

¹⁰² Y. Dezalay and B. Garth, *Merchants of Law as Moral Entrepreneurs*, cit, p. 38

¹⁰³ Y. Dezalay and B. Garth, *Merchants of Law as Moral Entrepreneurs*, cit, p. 44 and 48

increasing importance of arbitration in the context of international trade, these firms now consider it important to include this specialty in the range of services they are able to offer to their international clients¹⁰⁴. Anglo-american law firms see the new generation's attitude towards arbitration as the gateway to enter this market and to introduce in it the legal techniques which are the basis for their dominance. And so the new generation, supported by U.S. law firm, is pushing to bring more transparency, rationalization and competition into the system. In the field of ICC arbitration, it has for example successfully introduced a declaration of independence, which all the proposed arbitrators are required to sign, mentioning any significant relationship between arbitrators and counsel for parties in the arbitration. Moreover, large American law-firms also had a role in the promotion of new arbitration centers (London, Stockholm, Vienna) competing with ICC.¹⁰⁵ But most of all US law-firms are exerting a strong influence in the transformation of arbitration into a particular kind of litigation, a litigation in a different forum. Contrary to the grand old men's mentality, who conceive arbitration as a duty and namely the duty to clarify and aid the judge in rendering good justice, the lawyers employed in US law firms do not feel any responsibility but to satisfy their clients with all the legal means at their disposal¹⁰⁶. Accordingly, they have a less dogmatic and more tactical approach to arbitration. They reject its specificity, they consider it merely as one of the possible solutions that they can propose to their clients to solve a dispute. In order to best fulfill their clients' interests, they engage in forum shopping and are ready to operate in many jurisdictions and types of proceedings at the same time¹⁰⁷. They are even ready to jeopardize the traditional advantages of arbitration, which claims to be more rapid and less costly because informal, by introducing a number of technicalities typical of litigation.

In conclusion, international commercial arbitration is moving from a small, closed group of self-regulating artisans to a more open and competitive business centred on Anglo-American law firms' dominance¹⁰⁸: a sort of US-style off-shore litigation¹⁰⁹.

The debate on the “floating” arbitration

¹⁰⁴Y. Dezalay and B. Garth, *Merchants of Law as Moral Entrepreneurs*, cit, p. 39

¹⁰⁵ Y. Dezalay and B. Garth, *Dealing in Virtue*, cit., p. 49

¹⁰⁶ Y. Dezalay and B. Garth, *Dealing in Virtue*, cit., p. 56

¹⁰⁷ Y. Dezalay and B. Garth, *Dealing in Virtue*, cit., p. 57

¹⁰⁸Y. Dezalay and B. Garth, *Merchants of Law as Moral Entrepreneurs*, cit, p. 41

¹⁰⁹ Y. Dezalay and B. Garth, *Dealing in Virtue*, cit., p. 54

The “floating” arbitration theory

The most important principle underpinning the laws of international commercial arbitration in all jurisdictions is the autonomy of the parties. The recognition of parties' freedom can be considered inherent to the definition of arbitration itself: not surprisingly, it is also recognised as the most fundamental principle in the main harmonisation tools of the field, such as the UNCITRAL Model Law, the UNCITRAL Arbitration Rules and the ICC Rules. The emphasis on this principle has led to the claim that arbitrators in international arbitrations derive their authority from the consent of the parties, rather than from any national legal system. This is the main core of the so-called floating arbitration theory. According to this doctrine, international commercial arbitration does not owe its existence, validity, or effectiveness to a particular national law¹¹⁰, its legal force being founded only on the agreement of the parties.¹¹¹

The debate on the floating arbitration mirrors, and to a large extent overlaps, with that on the new *lex mercatoria*.¹¹² Like the latter, it is characterised by a fierce contrast between two opposite views: the autonomist thesis, which supports the autonomous character of the international commercial arbitration legal system, and the nationalist thesis, which denies this autonomy. As we will see in the following chapters, this contrast is frequently found in the drafting process of uniform rules of international commercial arbitration. Like in the *lex mercatoria* debate, the autonomous character of arbitration developed in order to overcome national law's drawbacks as applied to international disputes. Although international arbitration deals with matters connected to more than one state, it is generally regarded as governed by the law of a particular state, namely the law of the state in which the arbitration is held (the *lex loci arbitri*). But the application of the *lex loci arbitri* has frequently led to unsatisfactory results, especially in the context of recognition and enforcement of awards. Supporters of the autonomous character of arbitration claim for the necessity of insulating international arbitration from the restrictive national rules applicable to international disputes.

The concept of non-national arbitration emphasises the complete privatization of the international arbitral process. It is assumed that international commercial arbitration is sufficiently regulated by its own rules, which are either adopted by the parties or drawn up by the arbitral tribunal itself¹¹³. Accordingly, it needs no recognition from whatever national legal system. The conduct of

¹¹⁰ H. Smit, *Proper choice of Law and the Lex Mercatoria Arbitralis*, in T. Carbonneau (ed), *Lex Mercatoria and Arbitration*, 1998, Kluwer Law, p. 94

¹¹¹ J. Paulsson, *Arbitration Unbound: Award Detached from the Law of its Country of Origin*, ICLQ, 1981, 30, p. 367

¹¹² See *supra* pp. 85 ff.

¹¹³ A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit., p. 90

international commercial arbitration is fostering the emergence of an autonomous body of both procedural and substantive rules applicable to international commercial transaction (the so-called *lex mercatoria arbitralis*).

The procedural side of the *lex mercatoria arbitralis* is constituted in the first place by the procedural rules of the main arbitration institutions. Such rules are quite similar on the major issues that involve the conduct of arbitral hearings. Accordingly, they clearly express a consensus within the international commercial community as to how arbitral institutions should supervise arbitral proceedings¹¹⁴. This consensus is confirmed by the existence of the UNCITRAL Arbitration Rules, which constitute the model upon which most of arbitral institutions have set up or reformed their arbitration rules. Moreover, most national laws on arbitration do not differ in the regulatory approach towards arbitration: they essentially subscribe to the de-regulatory methodology that promotes the autonomy of the arbitral process and which is founded upon the principle of contractual freedom¹¹⁵. The success of the UNCITRAL Model Law on International Commercial Arbitration is fostering this convergence. Finally, the NYC represents the agreement among the vast majority of states as to the legal discipline of award enforcement. In conclusion, it is possible to identify a well-defined body of procedural rules which regulate arbitral proceedings on a worldwide basis and provide arbitration with consensus from the international commercial community and acceptance within most national legal systems.

But the development of an autonomous arbitration system implies also a substantive dimension. Autonomous arbitration supporters foresee that in the not too distant future the development of international arbitration will foster the emergence of an arbitral common law of international transactions¹¹⁶. According to the autonomous arbitration thesis, states have impliedly delegated their law-making authority in the area of transnational commerce to international arbitrators and to the process of private arbitral adjudication. Moreover, most arbitral rules (e.g. ICC Rules, UNCITRAL Model Law) allow international arbitrators to take commercial customs and trade into account in interpreting the applicable law. This invites arbitrators to engage in law-making processes, since they are called upon to set out those principles which reflect the commercial practices and the common sense of the commercial community. Consequently, arbitral awards deciding commercial disputes can progressively acquire the general normative force of legal rules. In other words, the content of arbitral awards can have a precedential value. This arbitral common law of transnational transactions constitutes an applicable set of rules in subsequent arbitral proceedings, unless the

¹¹⁴ T. Carbonneau, *A Definition of and Perspective Upon the Lex Mercatoria Debate*, in T. Carbonneau (ed), *Lex Mercatoria and Arbitration*, cit, p. 13

¹¹⁵ *Ibidem*

¹¹⁶ T. Carbonneau, *A Definition of and Perspective Upon the Lex Mercatoria Debate*, cit, p. 15

agreement to arbitrate specifically excludes its application. On this reading, not only states but also private parties have impliedly waived their autonomy. The agreement to arbitrate, where no otherwise specified, implies party acquiescence to the application of special arbitrator-created commercial law rules. By deciding to submit their dispute to arbitration, parties impliedly agree that the application of any law designated by them should be settled by reference to the general commercial practices of the community of international merchants, which are now progressively formalised into the basic tenets of the *lex mercatoria arbitralis*¹¹⁷. For instance, one can easily identify substantive legal rules in the highly specialised field of maritime arbitration. The sector of maritime industry is characterised by a high degree of uniformity. On the one hand, there is a widespread use of standard contract clauses which ensure high predictability in maritime transactions. Furthermore, maritime arbitration awards have a recognised precedential value, which reinforce the uniform interpretation of such standard- terms. The practice of maritime arbitration suggests that international traders do favour a system of arbitration based on the precedential value of the awards and which generates, through the interpretation of uniform standards, substantive uniform rules, fostering a higher degree of predictability in transactions and disputes¹¹⁸.

But also the analysis of ICC arbitration case law reveals the emergence of a common arbitral law of international contracts. According to Carbonneau, this emerging body of law consists of three different set of rules: universally acknowledged, natural-law type principles (e.g. good faith), national legal principles adapted to international commercial practices (e.g. the strict commitment to the *pacta sunt servanda* principle and the consequent restrictive interpretation of the *rebus sic stantibus* and force majeure principles) and more *sui generis* principles which mirror the specific usages and ethic of the community of international merchants (the general duty to renegotiate, which is not expressly found in any national legal system). Given the high prestige of this institution, which is one of the most effective and most often used forms of institutional arbitration and the consistency with which ICC arbitrators apply such principles, one can identify the emergence of a body of uniform substantive law for international transactions.

Critical accounts of the floating arbitration theory

¹¹⁷ T. Carbonneau, *A Definition of and Perspective Upon the Lex Mercatoria Debate*, cit., p. 21

¹¹⁸ T. Carbonneau, *A Definition of and Perspective Upon the Lex Mercatoria Debate*, cit., p. 16

The autonomist thesis has sparked a considerable wave of criticism. The most important counter-argument is that the so called *lex mercatoria arbitralis* in no way constitutes law, let alone an autonomous legal order. Its alleged sources appear too haphazard and episodic to stand as a viable source for legal rules¹¹⁹. Even awards rendered under the procedures of well-established arbitral institutions retain an inherently private *ad hoc* character: all types of arbitration rest exclusively upon the will of the parties which opt for this alternative adjudication system for the resolution of their own individual dispute. Consequently, in order to become legally binding, arbitral awards need to be enforced in national courts. But enforceability is always subject to criteria laid down in national or public international law, that is to say sources based on state sovereignty. By asserting the legal nature of the *lex mercatoria arbitralis* through an implied waiver of sovereignty, one risks to transpose contract regulation from the well defined realm of municipal law to a regime of vague and indefinite general principles of non-law. In conclusion, although one may, somewhat emphatically and informally, speak of *lex mercatoria arbitralis*, in truth <<no international commercial arbitration exists in the legal sense. Every arbitration is a national arbitration, that is to say, subject to a specific system of national law. Every right or power a private person enjoys is inexorably conferred by or derived from a system of municipal law>>¹²⁰. The alleged *lex mercatoria* only acquires the character of law to the extent that it is recognised and incorporated into a national legal system. By recognising to arbitration the character of an autonomous legal order, one risks to cut all the ropes with reality and let arbitration float freely into the theoretical stratosphere.¹²¹

Autonomous arbitration supporters reply that they are fully aware that arbitration cannot float in a legal vacuum and is ultimately attached to a municipal legal system. They point out in this regard that they mean the notion of autonomy essentially as detachment from the restrictive rules of the *lex fori*. The autonomy arbitrators enjoy in the choice of both procedural and substantive rules makes arbitration independent of the law of the place it is rendered (the so called *lex loci arbitri*). True, as far as enforcement is concerned, arbitral awards still depend upon a national law. But the widespread diffusion of the NYC allows an award to be enforced in nearly any country of the world according to uniform standards. As to the criticism of vagueness and uncertainty, autonomous arbitration supporters reply that many *lex mercatoria* rules are more detailed than state law rules: for example, the rules on letters of credit adopted by the bankers of the world under the auspices of the ICC, as well as c.i.f. or f.o.b. contract clauses can certainly compete with national rules in terms

¹¹⁹T. Carbonneau, *A Definition of and Perspective Upon the Lex Mercatoria Debate*, cit., p. 13

¹²⁰F.A. Mann, *Lex Facit Arbitrum*, in P. Sanders (Ed), *International Arbitration Liber Amicorum* for Martin Domke, Martinus Nijhoff, 1967, p. 157.

¹²¹L.J. Mustill, *Contemporary Problems in International Commercial Arbitration: A Response*, Intl Bus Law, 1989, 17, p. 163

of reasonableness and clarity. On the other hand, there are some legal rules (e.g. the French law of delict, the international law of diplomacy) which are no less vague than the *lex mercatoria* rules. Accordingly, the degree of clarity, universality, generality cannot be considered a useful criteria to distinguish law from non-law. The reluctance to admit the *lex mercatoria* within the catalogue of autonomous systems of law stems from an old-fashioned jurisprudence of positivism, which emphasises legislation as the heart of law and minimises the role of custom and practice in the law-making process¹²².

New developments in the floating arbitration debate

Recently, the debate on the autonomous character of international commercial arbitration seems to have abandoned the features of a religious war between believers and non believers and has accordingly concentrated on a number of specific issues, entailing important practical consequences. The main one is the importance of the place of arbitration in the conduct of the proceedings. How much significance should be attached to the fact that an arbitration is being conducted in a particular jurisdiction?¹²³ Has the legal system of the place of arbitration imperative authority on the validity of the proceedings and on that of the award?¹²⁴ Some commentators take the view that little or no significance should be attached to the claims of the jurisdiction in which the arbitration is being conducted, on the basis that the jurisdiction is chosen by the parties for reasons of convenience. Accordingly, parties' freedom should be given priority and should not be limited by the domestic law of the place of arbitration. The leading case which adopted this view was decided by the Court of Appeal of Paris in 1980¹²⁵. The Court had to decide on the challenge of an award rendered by the ICC in Paris. In dismissing the claim, the Court argued that, although the arbitral proceedings took place in France, the award could not be considered a French award and therefore the French court did not have jurisdiction to set it aside. In reaching this conclusion, the Court

¹²² H.J. Berman & F.J. Dasser, *The "New" Law merchant and the "Old": Sources, Content, and Legitimacy*, in T. Carbonneau (ed), *Lex Mercatoria and Arbitration*, cit., pp. 59-60

¹²³ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, Oxford University Press, 2007, p. 643

¹²⁴ J. Paulsson, *Arbitration Unbound: Awards Detached from the Law of its Country of Origin*, ICLQ, 1981, 30, p. 367

¹²⁵ The *Gotaverken* case, *Journal du Droit International*, 1980, p. 660

considered that neither party was a French national, the contract was neither signed nor performed in France and Paris was chosen for reasons of neutrality and not because parties wished to subject themselves to the French arbitral law¹²⁶. As has been noted, the Paris Court of Appeal's decision did not say that the award at issue was stateless, but merely that, on the basis of the particular circumstances of the case, there was no connection with the French legal order¹²⁷. The mere fact that the arbitration took place in France was not held a sufficient ground to consider the award as French. But if this decision were to be applied universally, it would follow that, unless the parties themselves agree to submit to the procedural law of a particular state, the arbitral proceedings are not be reviewable by any court other than the court of the state in which enforcement is sought¹²⁸. Consequently, the purpose of the floating arbitration view as stated in the *Gotaverken* decision is to shift the attention from the jurisdiction in which the arbitration takes place to the jurisdiction in which enforcement is sought. Instead of subjecting arbitration to a dual system of control, first by the law of the place of arbitration and then by the law and the courts of the place of enforcement of the award, the floating or delocalised arbitration supporters propose that there should be only one point of control: that of the place of enforcement. But this does not mean that arbitration is stateless. True, floating arbitration supporters argue that the binding force of an international award derives from the contractual agreement to arbitrate, without a specific national legal system serving as a foundation. But, in the final analysis the award is always subject to the *post facto* control of the jurisdiction of the place of enforcement.¹²⁹ The international arbitral system would ultimately break down if no national jurisdictions could be called upon to recognise and enforce awards¹³⁰. Floating arbitration opposers see the *Gotaverken* decision differently. In their opinion, this case represents only an example of a more relaxed approach towards international awards followed by domestic courts. An international arbitration, rather than being detached from its country of origin, is provided with a larger extent of autonomy and is subject to fewer constraints, than a domestic arbitration. If the facts of *Gotaverken* are changed slightly, so that the Swedes deliver cocaine rather than tankers, one wonders whether the French court would exhibit a similar *laissez-faire* attitude towards alleged public policy violations.¹³¹ They suggest that subjecting arbitral proceedings only to the law of the place of enforcement entails a number of drawbacks. The first is that this solution

¹²⁶R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit, p. 653

¹²⁷ R. Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, in F.D. Rose (ed), *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds*, LLP Publishing, 2000, p. 245

¹²⁸R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit, p. 653

¹²⁹ J. Paulsson, *Arbitration Unbound*, cit, p. 370

¹³⁰ J. Paulsson, *Delocalisation of international commercial arbitration: when and why it matters*, ICLQ, 1983, 32, p. 54

¹³¹ W.W.. Park, *Arbitration of International Business Disputes: Studies in Law and Practice*, Oxford University Press, 2006, p. 161

presupposes that the arbitral process works in a legal vacuum unless and until enforcement is sought¹³². The second is that the delocalisation theory is not always respectful of party autonomy¹³³. For example, in the *Hilmatron* case¹³⁴, the French courts found that the award was not integrated into the Swiss legal system, although the parties expressly provided that the arbitration shall take place in Geneva under the law of the Canton of Geneva. Similarly, in the *Chromalloy*¹³⁵ case, the US District Court concluded that the award was not grounded in Egyptian law although the contract envisaged that both parties had irrevocably agreed to apply Egypt laws and to choose Cairo as the place of arbitration. The third is that the delocalisation theory may involve litigation in every country in which the respondent has assets¹³⁶, whereas insisting that the validity of an arbitral award is governed by the law of the place of arbitration has the advantage of subjecting the question of validity to a single decision of the court of origin.¹³⁷ Accordingly, exposure to a multiplicity of proceedings in a number of different countries and the consequent high probability of conflicting decisions of different foreign courts undermines what should be one of the purposes of international commercial arbitration, namely to promote efficiency in the settlement of the dispute.¹³⁸ Finally the success of UNCITRAL Model Law reduces the need of developing such a controversial doctrine. The fact that an increasing number of countries around the world are enacting legislation in line with the Model Law reduces the chances of parties being caught out by a hostile local law which is not appropriate for international arbitration.¹³⁹ The gradual convergence enhanced by the Model Law brings national arbitration systems more and more in line with international standards: accordingly, the need to free international commercial arbitration from the law of the place in which it takes place has been reduced. Moreover, the Model Law itself provides that certain important regulatory¹⁴⁰ and control¹⁴¹ functions are to be exercised by the courts of the place of arbitration¹⁴².

¹³² R. Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, cit, p. 257

¹³³ R. Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, cit, p. 259

¹³⁴ *Hilmarton Ltd v Omnium de Traitement et de Valorisation*, YBCA, 1995, XX, p. 663

¹³⁵ *Arab Republic of Egypt v Chromalloy Air Services*, 939 F.Supp 907 DDC 1996

¹³⁶ It may well happen that the respondent against whom an award is made, who manages to have it set aside in front of a given court, is then faced with the prospect of having to relitigate the identical issues before the courts of every country in which he has assets: this can only be described as oppressive.

¹³⁷ R. Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, cit, p. 262

¹³⁸ R. Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, cit, p. 263-264

¹³⁹ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit, p. 662.

¹⁴⁰ Cfr art 6, which allocates a various tasks (for example appointment of arbitrators in case of vacancy) to the local courts

¹⁴¹ Cfr art. 34, which allows a local court to set aside awards rendered in its territory, on certain limited grounds

¹⁴² A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, cit, p. 92

The nature of international commercial arbitration from the perspective of social sciences

Arbitration and autopoiesis

In recent years, a number of scholars have attempted to analyse the issue of the autonomous character of international commercial arbitration from an interdisciplinary standpoint. The best known analysis is undoubtedly Gunther Teubner's essay "Global Bukowina: Legal Pluralism in the World Society", published in the famous book "Global Law without a State"¹⁴³. In discussing the legal nature of the *lex mercatoria*, Teubner also takes into account the role of international commercial arbitration. In particular, he maintains that the interaction between global contracts and international commercial arbitration sets up an autopoietic mode of operation¹⁴⁴ within the *lex mercatoria* system, which makes its functioning similar to that of national legal systems. This occurs through a number of socio-legal phenomena. The first is what Teubner calls the establishment of an internal hierarchy of contractual rules within international contracts¹⁴⁵. They contain not only "primary rules", which regulate the future behaviour of the parties, but also 'secondary rules' which regulate the recognition of primary rules, their identification, their interpretation and the procedures for resolving conflicts. Accordingly, international contracts reproduce what, according to the positivist theory, is one of the most important constitutive element of the legal system and which distinguish it from the social realm: the contemporary presence of primary and secondary rules¹⁴⁶. The second is the temporalization of contractual self-validation, i.e. the capacity of contractual rules of reproducing themselves from their own constitutive elements¹⁴⁷. Each self-regulatory contract goes far beyond the particular commercial transaction and establishes a whole private legal order with a claim of global validity. Each contract extends itself into the past and into the future. It refers to a pre-existing standardisation of rules and it refers to the future of conflict regulation. This makes each single contract an element of an on-going self-production process, in which the network of elements creates the very elements of the system. The third and most important phenomenon is the so-called externalization of the self-referential contract¹⁴⁸. With

¹⁴³ G. Teubner, *Global Bukowina: Legal Pluralism in the World Society* in ID (ed), *Global Law Without a State*, Dartmouth, Aldershot 1997, p. 3-28

¹⁴⁴ For the concept of autopoiesis see *supra* pp. 39 ff

¹⁴⁵ G. Teubner, *Global Bukowina*, cit, p. 15

¹⁴⁶ H.L.A. Hart, *The Concept of Law*, Oxford University Press, 1997, p. 79-99.

¹⁴⁷ G. Teubner, *Global Bukowina*, cit, p. 15

¹⁴⁸ G. Teubner, *Global Bukowina*, cit, p. 15-16

this terminology Teubner refers to the fact that arbitration provides international contracts with an external sanction of validity. By submitting an international contract to arbitration, Teubner observes, the issue of deciding upon the validity of the contract itself is referred to an external institution (the arbitral institution which in some cases even assumes the character of a quasi-legislative institution, as in the case of the International Chamber of Commerce or the International Law Association). This externalization introduces a differentiation within the *lex mercatoria* system between a spontaneous law (the “unofficial law” contained in the contract) and an organized law (the “official law” produced by the arbitral institutions in judging upon the validity of international contracts). On this reading, the provision of rights and duties envisaged in international contracts (unofficial law) is controlled and disciplined by the official law of the arbitral institutions. Thus, Teubner concludes, this distinction between official and unofficial law ends up reproducing that between state law and contracts in the national legal system and a hierarchy of norms and institutions begins to build up.

Arbitration and globalization theories

In recent years a number of scholars have relied on the findings of the state and globalization debate¹⁴⁹ in order to assess the legal nature of international commercial arbitration. Two positions seem to have so far emerged from this interdisciplinary research stream: the first is a radical view which, by building on the so-called “globalist” approach to globalization, considers arbitration as an increasingly autonomous legal order more and more detached by state sovereignty; the second is a more moderate view, which seeks to go beyond the theories conceiving the relation between the state and globalization as a collective-sum game and sees arbitration as a hybrid regime composed of national, international and non-national sources overlapping and intersecting at various points in the arbitration process.

The widest account so far of the first view has been sketched by A. Claire Cutler in the book “Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy”¹⁵⁰. Cutler sees the development of *lex mercatoria* through the lens of a globalist view of

¹⁴⁹ See supra pp. 14 ff.

¹⁵⁰ A.C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*, Cambridge University Press, 2003

globalization. She argues that globalization forces are bringing about profound transformations in local and global political economies and are challenging conventional understandings of the world order¹⁵¹. In particular, Cutler identifies these transformations with the juridification, pluralization and privatization of the global economy. She argues that international commercial transactions are becoming increasingly internationalized and transnationalised, i.e. they more and more cross national borders. Accordingly, the field of international trade law has expanded in scope with the creation of new kinds of commercial activities and legal regulations and the creation of new subjects and sources of law. Moreover, and most importantly, these new actors and sources of law are seriously challenging the state's monopoly over legislative and adjudicative functions in international commerce. The increasing role of private authority in the regulation of international trade is shattering the public sphere into a complex and multilayered network of interacting institutions and bodies, where the boundary between the public and private realms (and consequently public and private authority, public and private law) is increasingly difficult to sustain¹⁵². The incoherence of the private/public distinction can be observed on essentially three grounds, namely empirical, conceptual and ideological. The first suggests that the distinction may at one time have reflected empirical conditions, but it has now ceased to do so. Evidence of this is the growing interpenetration of the two spheres, so that private actors act publicly and public actors act privately. On the one hand, multi-national corporations, private trade associations, private arbitrators impact on matters of national public policy, eroding the policy-making autonomy of states; on the other hand, states act more and more as private commercial actors, for example by negotiating private international contracts or by accepting the jurisdiction of private arbitral tribunals. The second ground refers to the conceptual obscurity of the status of international trade law as an autonomous legal order with a well defined range of sources and principles. As the wide debate over the *lex mercatoria* shows, there is no agreement on its definition, its sources, its content, let alone its very existence¹⁵³. The third alludes to the problematic distinction between state and civil society. The distinction between the public and private realm rests on the ideological foundation that it is possible to conceive of social and economic life apart from government and law. This ideological conviction denies the mutually constitutive nature of the economic and political domains, thus inhibiting belief that institutions ordering social life are the product of human agency and therefore can be altered. In the context of trade relations, it operates to obscure

¹⁵¹ A.C. Cutler, *Private Power and Global Authority*, cit, p. 2

¹⁵² *Ibidem*

¹⁵³ A.C. Cutler, *Private Power and Global Authority*, cit, p. 52-53

the political nature of private trade relations and the role of private trade law in the material and ideological constitution of global capitalism¹⁵⁴.

The most important legal tools fostering the development of global private authority are the new law merchant, the movement for the unification and harmonization of international trade law and international commercial arbitration. Disguised in a purely technical and apolitical regulation, the new *lex mercatoria* provides in fact the basic norms governing property, contract and dispute resolution, exerting in this way distributional functions to the global capitalist elite's advantage¹⁵⁵. Likewise, the movement for the unification and harmonization of international trade law facilitates the global elite's activities by creating national and international regulatory orders which reduce the costs of negotiating and enforcing agreements and minimize barriers to the free flow of goods, services and capital. Significantly, Cutler observes, in the unification and harmonization of international trade, soft law instruments are now increasingly preferred over more costly hard laws and public adjudicatory processes¹⁵⁶: soft law – she argues – is cheaper and easier to achieve, but it is also easier to breach with impunity. It furthermore gives rise to more opportunities for “creative lawyering” and the private shaping of legal regulation¹⁵⁷: it sets up a “soft infrastructure” sensitive to corporate interests and the need to facilitate business strategies¹⁵⁸. By the same token, the rapid growth of international commercial arbitration indicates that private authority is able to influence also the field of dispute resolution. In recent years, there has been such a tremendous expansion of arbitration, that the latter has eclipsed national adjudication as the preferred method for resolving international commercial disputes¹⁵⁹. Matters that were once considered as exclusive domain of national justice, and therefore subject to mandatory law, are being found to be arbitral subject matters, with the consequence that many politically sensitive matters are being removed from public supervision and control in national courts. The trend towards increased recourse to private arbitration is being encouraged by states, which are involved in a regulatory competition to provide a hospitable legal framework for arbitration proceedings and accordingly limit the powers of their national courts to review arbitral awards¹⁶⁰. On this reading, governments are participating in the expansion of the private sphere and the neutralization and insulation of international commercial concerns from public policy review. True, this insulation is incomplete, since states still retain authority to enforce arbitral awards. Nonetheless, states are exercising their authority by enforcing

¹⁵⁴ A.C. Cutler, *Private Power and Global Authority*, cit, p. 53

¹⁵⁵ A.C. Cutler, *Private Power and Global Authority*, cit, p. 4

¹⁵⁶ A.C. Cutler, *Private Power and Global Authority*, cit, p. 29

¹⁵⁷ A.C. Cutler, *Private Power and Global Authority*, cit, p. 23

¹⁵⁸ A.C. Cutler, *Private Power and Global Authority*, cit, p. 31

¹⁵⁹ A.C. Cutler, *Private Power and Global Authority*, cit, p. 225

¹⁶⁰ A.C. Cutler, *Private Power and Global Authority*, cit, p. 225 and 26-27

decisions stemming from private arbitral bodies and in so doing they foster the expansion of private dispute settlement¹⁶¹. As far as international commercial disputes settlement is concerned, state authority remains central, but its role has changed. The state is more and more assuming the role of enforcer or stabilizer of rules and practices established by private authorities¹⁶². The grounds provided to assert arbitration as the preferred method of commercial dispute settlement reflect the growing importance of the privatization of commercial relations and the liberal ideologies concerning the natural, neutral, apolitical, efficient and, hence, superior nature of private regulation. Private arbitration is regarded as the most natural means for resolving international commercial disputes, for it gives maximum scope to the principles of freedom of contract and the autonomy of the contracting parties. Consequently, it is far more efficient, more neutral and more reliable than adjudication in national courts¹⁶³.

Relying on these instruments, private authority is regulating international commercial transactions according to a neo-liberal order aimed at the production of competitive services and industries by conferring privileged rights on corporate capital and subordinating social welfare concerns of equity and justice to the discipline of free market¹⁶⁴. The increasing reliance on soft, discretionary standards and privatized international commercial arbitration is strengthening private institutions and processes, while weakening mechanisms that work toward participation and democratic accountability¹⁶⁵.

Contemporary theories of international relations and law are unable to theorize these phenomena, because they see states as the only subjects, and positive law as the only source of law. However, Cutler argues, today a number of *de facto* non-state subjects (e.g. multi-national corporations) and non-state sources (the new *lex mercatoria*) of law have emerged, notwithstanding their insignificance or invisibility under mainstream theories. State-centric theories of international relations and international law are incapable of capturing these developments, since they are premised upon the liberal “art of separation”, wherein markets and civil society are regarded as separate and distinct from politics, governments and the state¹⁶⁶. Such separation renders the activities of private actors and institutions politically “invisible”, since they are regarded as part of the realm of apolitical and neutral, private economic activity¹⁶⁷. Consequently, international trade law is isolated from the sphere of politics and democratic control as part of the private domain of

¹⁶¹ A.C. Cutler, *Private Power and Global Authority*, cit, p. 226

¹⁶² A.C. Cutler, *Private Power and Global Authority*, cit, p. 237-239

¹⁶³ A.C. Cutler, *Private Power and Global Authority*, cit, p. 226-227

¹⁶⁴ A.C. Cutler, *Private Power and Global Authority*, cit, p. 29

¹⁶⁵ A.C. Cutler, *Private Power and Global Authority*, cit, p. 235

¹⁶⁶ A.C. Cutler, *Private Power and Global Authority*, cit, p. 16

¹⁶⁷ A.C. Cutler, *Private Power and Global Authority*, cit, p. 2

consensual, economic activity¹⁶⁸. Its conception as a law belonging to the private, non-political realm obscures its political nature and distributional functions in determining the allocation of risks of international commercial transactions, in regulating the global market in terms of commercial competition and in enforcing bargains. The rules of international law are so foundational to the global political economy, that they may be usefully regarded as a constitutive element of global capitalism¹⁶⁹. They represent a driving force in the “hyperliberalisation” of the state and world order¹⁷⁰ i.e. a new asset of the world order founded on the establishment of a borderless global economy, the complete denationalization of all corporate procedures and activities and the eradication of economic nationalism¹⁷¹.

However, most author support the second, more moderate view. Katherine Lynch’s book “The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration”¹⁷² is maybe the most important work in this direction. Her analysis is aimed at investigating whether and how the development of a transnational system of international commercial arbitration challenges the traditional conception of national sovereignty whereby the state has a monopoly over law-making and the dispensation of justice¹⁷³. Lynch’s main argument is that economic globalization is certainly transforming and reconfiguring the nation state’s regulatory role within the international arbitral regime, but this does not necessarily result in an erosion of state sovereignty or a decline of the state; rather, one can observe a re-shaping of the centers of governance within the regime¹⁷⁴. Accordingly, international commercial arbitration can be better theorized as a hybrid regime, dualistic in nature, combining both a state-centric system organized around the New York Convention on Recognition and Enforcement of Foreign Arbitral awards and other bilateral, regional and multilateral treaties, and a multi-centric system made up of a complex network of private contracts, non-national norms elaborated by formulating agencies and international arbitral institutions, as well as customs and general principles of law¹⁷⁵. Through the modernization and reform of their national arbitration laws, nation-states have given up some autonomy and control over international commercial arbitrations conducted within their jurisdiction. There has been a significant integration of internationally accepted arbitral principles and standards within national arbitration laws, such as party autonomy with reference to both the

¹⁶⁸ A.C. Cutler, *Private Power and Global Authority*, cit, p. 16-17

¹⁶⁹ A.C. Cutler, *Private Power and Global Authority*, cit, p. 35

¹⁷⁰ A.C. Cutler, *Private Power and Global Authority*, cit, p. 180

¹⁷¹ A.C. Cutler, *Private Power and Global Authority*, cit, p. 181

¹⁷² K. Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*, Kluwer, 2003

¹⁷³ K. Lynch, *op. cit.*, p. 401

¹⁷⁴ K. Lynch, *op. cit.*, p. 403

¹⁷⁵ K. Lynch, *op. cit.*, p. 404

determination of the arbitration procedure and the law applicable to the merits of the dispute, the arbitrators' competence to determine their own jurisdiction, the separation of the arbitration agreement from the underlying contract, and an overall more limited intervention by national courts in the arbitral process¹⁷⁶. The increasing role of party autonomy in the arbitration process has spurred arbitral institutions as well as the specialized formulating agencies to create a large amount of private informal norms of dispute resolution. These self-regulation norms constitute now new sources of law and represent a move away from the concept of law-making as a close state-centric system towards a wider and polycentric notion of law-making, whereby the law is created and evolves by a de-centralized process in which non-state actors have come to play an increasingly central role¹⁷⁷. Legal norms originate more often than not by transnational epistemic communities consisting of scholars, arbitrators, legal practitioners, judges and member of international arbitral institutions and organizations who determine the best and more appropriate rules for the conduct of arbitration; such norms are subsequently enforced by states, by enacting domestic legislation in which they are enshrined. Although the governance system of the international arbitration regime is not primarily state-centric, national states and their legal systems still maintain a crucial regulatory role¹⁷⁸. The lack of any supra-national court or constitutional body exerting control over the regime means that nation-states continue to play an important support and supervisory function at various points in the arbitration process: in the recognition and enforcement of arbitration agreements, in the determination of which disputes can be submitted to arbitration, in the provision of support and supervision of the arbitration process, in particular by ensuring fairness and justice and in the recognition and enforcement of arbitration awards¹⁷⁹. Consequently, the success of international commercial arbitration and its emergence as the pre-eminent means of resolving international commercial disputes would not have been possible without the mechanisms of national judicial controls serving as a safety net and lending assistance during the arbitral process and enforcing arbitration awards¹⁸⁰.

Lynch identifies another important effect of globalization on international commercial arbitration, namely the progressive harmonization of national arbitral laws which tend to evolve in a parallel direction and become more similar as time progresses. However, she also admits that a uniform system among national arbitration laws or a truly transnational arbitral procedure is far from being achieved: although there has been a significant degree of internationalization of arbitration practice and procedure in recent times, the regime is still influenced by nation-specific cultural attitudes and

¹⁷⁶ K. Lynch , *op. cit* , pp. 30-31

¹⁷⁷ K. Lynch , *op. cit.*, p. 410 and p. 79

¹⁷⁸ K. Lynch , *op. cit.*, p. 30

¹⁷⁹ K. Lynch , *op. cit.*, p. 27 and p. 407

¹⁸⁰ K. Lynch , *op. cit.* , p. 167

national laws and practices diverge in many key areas of the arbitration process¹⁸¹. This reflects the inherent tension between the global and local aspects of international commercial arbitration¹⁸².

A similar interdisciplinary approach to arbitration is provided by Dirk Lehmkuhl in the paper “Resolving Transnational Disputes: Commercial Arbitration and the Multiple Providers of Governance Services”¹⁸³. He argues that the debate on floating arbitration resembles the dispute on the existence of a law beyond the state. As the latter, it is usually trapped in the stalemate of the traditionalist and transnationalist theses¹⁸⁴. The traditionalist thesis in the law-globalization debate reads that there can be no such thing as a non-national system of rules for the regulation of international transactions. International transactions can only be regulated by state-law: non-state law can become relevant only in so far as it is recognised by a certain national legal system. By the same token, the traditionalist view in the floating arbitration debate argues that there can be no such thing as autonomous arbitration, since the validity of any arbitration presupposes in the final analysis recognition within a national system. By contrast, the transnationalist thesis in the law and globalization debate reads that only the evolution of an autonomous set of transnational rules detached from state authority can overcome the deficiencies of a plurality of diverging national legal systems applicable to international transactions. By the same token, the transnationalist view in the floating arbitration debate argues that only the development of autonomous rules of international commercial arbitration detached from state authority can overcome the drawbacks of national laws as applied to international commercial disputes. The author argues that neither of these views is able to fully account for the nature of international commercial arbitration. There are both centripetal and centrifugal forces in international arbitration. On the one hand, there are signals towards an increasingly greater autonomy in international arbitration. The growing importance of the arbitration industry has triggered a process of regulatory competition among national legal systems¹⁸⁵. Nation-states have amended their domestic arbitration laws with a view to creating more favourable conditions to arbitration. Such reforms have generally expanded party autonomy and restricted the scope of judicial review of arbitration awards. A second important aspect contributing to the autonomous character of international arbitration is the high degree of voluntary compliance with arbitral awards, which renders enforcement by national courts almost unnecessary, or at least

¹⁸¹K. Lynch, op. cit., p. 409-410

¹⁸²K. Lynch, op. cit., p. 410

¹⁸³Paper presented at the 2003 ECPR (European Consortium for Political Research) Joint Sessions in Edinburgh, Workshop 11: The Governance of Global Issues: Effectiveness, Accountability, and Constitutionalization, March 28 – April 2 2003, available at www.essex.ac.uk/ecpr/events/jointsessions/paperarchive/edinburgh/ws11/Lehmkuhl.pdf (July 2009) and now published with the same title in M. König-Archibugi, Mathias; Zürn, Michael (eds.). *New Modes of Governance in the Global System. Exploring Publicness, Delegation and Inclusiveness*. Basingstoke, Palgrave Macmillan. 2006. pp. 101-124.

¹⁸⁴D. Lehmkuhl, *Resolving Transnational Disputes*, cit. p. 3

¹⁸⁵D. Lehmkuhl, *Resolving Transnational Disputes*, cit. p. 7

not in the ordinary way of ensuring compliance¹⁸⁶. But, on the other hand, there are developments which tend to counter the progressive emancipation of arbitration from national constraints. There are indicators emphasising the increasing role of state law in international arbitration. One is the wide stream of criticism against the autonomous character of arbitration itself, which isolates this system from the applicable mandatory national laws and therefore questions the capacity of arbitration to warrant fundamental requirements of justice, especially in the field of consumer protection¹⁸⁷. On this reading a number of commentators have underlined that all national laws envisage the possibility for national courts to dismiss or even review awards violating national mandatory law. Despite the harmonised regime introduced by the NYC, national legal systems significantly differ with regard to the degree of judicial intervention allowed over arbitral awards. Another indicator pointing towards a limitation of arbitration autonomy is its bureaucratisation. The growing importance of the arbitration market has spurred a regulatory competition not only among national legal system, but also among arbitration institutions. This has triggered a profound transformation in the arbitration world. Arbitration is no longer an alternative way of solving dispute in an amicable manner, but a highly sophisticated professional service dominated by professional entrepreneurs. Each arbitration institution has now its own bureaucracy and its well defined set of procedural rules, which makes it very similar to a national tribunal. This development takes away many of the advantages commonly attached to arbitration over litigation, since arbitration becomes more complex, more time-consuming and more expensive¹⁸⁸. The existence of both centrifugal and centripetal forces in international arbitration demonstrates that neither the traditional nor the transitional thesis can adequately explain its development, which follows a more tortuous, contradictory process.

In order to understand this complex development, Lehrkmull argues that we need to take off our "state- centric blinders", recognise that the traditional, monolithical conception of the state is only a myth, and embrace the theory of the polycentric systems of governance¹⁸⁹, which closely resembles the theory of the disaggregated sovereignty outlined in the introductory chapter¹⁹⁰. The main tenet of this theory is that, in the wake of globalization, the traditional functions of the state are no longer exercised exclusively by the unitary structure of the state itself. The state should now be conceived as a disaggregated entity of multiple centres of authorities, each exercising a facet of state power in

¹⁸⁶ D. Lehmkuhl, *Resolving Transnational Disputes*, cit. p. 8

¹⁸⁷ D. Lehmkuhl, *Resolving Transnational Disputes*, cit. p. 9

¹⁸⁸ D. Lehmkuhl, *Resolving Transnational Disputes*, cit. p. 9-10

¹⁸⁹ Cfr M. D McGinnis (ed), *Polycentric Governance and Development. Readings from the Workshop in Political Theory and Policy Analysis*, The University of Michigan Press, 1999 and ID, *Rent-seeking, redistribution, and reform in the governance of global markets*, in A. Prakash and J. A. Hart (eds), *Globalization and Governance*, London/New York, Routledge, 1999, p. 54-76.

¹⁹⁰ See *supra* pp. 23 ff.

competition with alternative providers of governance¹⁹¹. In other words, in exercising its traditional functions, the state needs now to interact with a number of non-state actors (individuals, groups of individual non-governmental organizations), each specialized in the provision of a particular service of governance. But this interaction is very complex and contradictory. As Santos has put it, this interaction is <<inherently contradictory, and animated by dialectical tensions between deterritorialisation and reterritorialisation of social relations, globalization and localization, harmonization and differentiation, boundary maintaining and boundary transcending>>¹⁹². In this interaction, Lehmkuhl observes, the different providers of governance services are simultaneously competing (since they fulfil equivalent functions) and complementing themselves (since they mutually influence and support each other)¹⁹³. On this reading, arbitration is viewed as a system of governance providing a particular service in the global market: the service of security and certainty in international transactions. Accordingly, centripetal and centrifugal forces in international commercial arbitration are indicators of this contradictory interaction among state and non-state actors in the provision of this service of governance. On the one hand, there are aspects that increase the relevance and autonomy of arbitration, or, to put it differently, that favour private arbitration, without government involvement: the fact that arbitration laws have become an object of regulatory competition among states, the voluntary weakening of domestic public policy provisions by national legal authorities, and the courts' acceptance of trade norms governing arbitration decisions. On the other hand, there are tendencies that counter this: the emergence of parochial thinking in court decisions and the re-politicisation of arbitration – for example, in questions of consumer protection .

Another account of the floating arbitration debate from a global governance perspective is provided by Peer Zumbansen in the paper “Piercing the Legal Veil: Commercial Arbitration and Transnational Law”¹⁹⁴. He argues that the study of transnational law cannot be separated from questions concerning the relationship between state and society, and the conditions and possibility of governance beyond the nation state. On this reading, *lex mercatoria* and arbitration¹⁹⁵ reflect an ongoing search for more varied and differentiated forms of governance beyond the nation state, which does not imply a lost, but rather a changed statehood¹⁹⁶. These new form of governance

¹⁹¹ M. D McGinnis, *Rent-seeking, redistribution, and reform in the governance of global markets*, cit, p. 54, quoted by D. Lehmkuhl, *Resolving Transnational Disputes*, cit. p. 14

¹⁹² B. de Sousa Santos, *Toward a New Common Sense. Law, Science and Politics in Paradigmatic Transition*. New York. 1995, p. 375, quoted by D. Lehmkuhl, *Resolving Transnational Disputes*, cit. p. 13

¹⁹³ D. Lehmkuhl, *Resolving Transnational Disputes*, cit. p. 15

¹⁹⁴ P. Zumbansen, *Piercing the Legal Veil: Commercial Arbitration and Transnational Law*, EUI Working Paper LAW No. 2002/11, subsequently published in *ELJ* 2002, 8, 3, p. 400-432

¹⁹⁵ In his analysis, the author does not seem to distinguish between the two phenomena: they are grouped together as the new form of governance for transnational economic transactions.

¹⁹⁶ P. Zumbansen, *Piercing the Legal Veil*, cit, p. 3

entail not only a higher degree of self-regulation, but also more cooperation and interaction between state and non-state actors¹⁹⁷. He rejects the claims of an alleged autonomous character of *lex mercatoria* and arbitration. Such claims reflect an outdated, *laissez faire* perception of an apolitical market society on one side and the state on the other, which in turn entails an ostensibly pure private law, free from political intervention and influence¹⁹⁸. But already in the nineteenth century, with the rise of the interventionist welfare state, Zumbansen observes, this view was inadequate to explain the state's systematic involvement in the market. Nonetheless, the idea of the non-interventionist state continues to guide the interpretation of transnational phenomena, regardless of the lessons stemming from the Westphalian experience, which marked the mutual involvement of public law and private law as an irreversible phenomenon¹⁹⁹. By the same token, legal doctrine, dominated as it is by positivism, appears inadequate to account for these new governance phenomena. The concept of international law is still centred on states relations, in spite of the abundant proliferation of transnational economic transactions among states and private parties²⁰⁰. Likewise, the realm of private law is still that of economic transactions among equal market participants, in spite of the "publification" (sic) of private law by labour and social law and interventionist policy²⁰¹. Lacking an adequate conceptual framework, *lex mercatoria* and arbitration continue to be theorized in terms of an autonomous private law, which needs to be kept separated from the public sphere²⁰². An interdisciplinary research agenda – Zumbansen concludes - is therefore needed, able to go beyond the rifts between public and private law and to re-formulate the concepts of law and society on which *lex mercatoria* is based²⁰³.

Application of norm diffusion theories to the law of international commercial arbitration

Application of the legalization paradigm

The application of the legalization paradigm²⁰⁴ to the main sources of international commercial arbitration (the New York Convention on the Recognition and Enforcement of Foreign Arbitral

¹⁹⁷ P. Zumbansen, *Piercing the Legal Veil*, cit, p. 13

¹⁹⁸ P. Zumbansen, *Piercing the Legal Veil*, cit, p. 23

¹⁹⁹ *Ibidem*

²⁰⁰ P. Zumbansen, *Piercing the Legal Veil*, cit, p. 24

²⁰¹ P. Zumbansen, *Piercing the Legal Veil*, cit, p. 25

²⁰² P. Zumbansen, *Piercing the Legal Veil*, cit, p. 26

²⁰³ P. Zumbansen, *Piercing the Legal Veil*, cit, p. 34

²⁰⁴ See *supra* pp. 69ff

Awards, the UNCITRAL Model Law on International Commercial Arbitration and the UNIDROIT Principles of International Commercial Contracts) shows that also within the field of the law of international commercial arbitration the distinction between hard and soft law is blurry. The New York Convention, which from a legal standpoint is to be considered as a hard law instrument, does not reach the full level of legalization: its provisions are legally binding, but they often lack precision, since key concepts such as “arbitration agreement” and “award” are not defined²⁰⁵; on the other hand, it provides a full level of delegation, since its interpretation and application is left to state courts. By contrast, the UNCITRAL Model Law and the UNIDROIT Principles – both soft law instruments from a legal standpoint – are not legally binding, but on the other hand have a comparable level of precision (or imprecision) with respect to the New York Convention (they represent a systematic set of rules in which many key concepts such as “good faith” or “commercial arbitration” are not precisely defined) and a lower (albeit still significant) level of delegation, because their interpretation and application is largely left to arbitral tribunals, which enjoy a certain degree of autonomy from state courts.

Nonetheless, the regulation of the enforcement of foreign arbitral awards at global level could not have been achieved but through a legally binding treaty, since only legally binding rules would have represented a credible commitment on national courts and parties to arbitrations. Here, we face a situation in which the costs of non-compliance are particularly relevant: if any party challenging an award could rely on opportunistic arguments favouring its self-interest, the credibility of the whole arbitration system would be a stake. Accordingly, and despite their imprecision in defining a number of key concepts, non-compliance with the New York Convention provisions must be justified through legal discourse, i.e. traced back to the limited grounds for refusal of enforcement envisaged by the Convention itself.

The particular features of the UNCITRAL Model Law and the UNIDROIT Principles (non- legally binding nature, moderate precision and delegation) allow to combine some of the advantages of hard law with those of soft law; at the same time, the high level of delegation permits to overcome, at least in part, the main disadvantages of soft law. Their non-binding character and moderate level of precision has allowed the drafters to reach a consensus in a relatively short period of time on a systematic set of norms, covering a large part of the arbitral process and the subject-matter of international commercial contracts respectively; this has also permitted the adoption of “best solutions”, not necessarily reflecting the rules common to all the legal systems of the world²⁰⁶. The high level of delegation has allowed to overcome the disadvantages related to the lack of precision,

²⁰⁵ See in more detail *infra* pp. 377ff

²⁰⁶ See in more detail *infra* pp. 203ff and pp. 333ff

by fostering a process of mutual learning among legislatures, courts and arbitrators aimed at filling the gaps within the rules of these harmonisation tools and testing the impact of the “best solutions” in practice.

As the following chapters will show, the international commercial arbitration regime is characterised by a strong hybridation between hard and soft law instruments. After 50 years, two provisions of the New York Convention have been *de facto* modified by a soft law instrument, the “Recommendation regarding the interpretation of Article II(2) and Article VII(1) of the Convention”, in order to update them to current arbitration practice²⁰⁷. Nonetheless, the diffusion of the liberal interpretation suggested by the Recommendation will depend on the successful interaction between the Convention, the Model Law and the various national arbitration laws: on the one hand the Recommendation shall allow an interpretation of the written form requirement envisaged by the Convention in light of less stringent national law; on the other hand, the reform of art. 7 of the Model Law shall encourage national legislators to adopt updated provisions on the written form requirement of the arbitration agreement in their national arbitration laws. Likewise, the wide number of national arbitration legislations largely based on the Model Law on International Commercial Arbitration has given rise to hybrid forms of laws, which have been formally adopted through national law-making procedures, but whose content has been almost entirely determined by a non-national source²⁰⁸. Accordingly, the wide diffusion of the Model Law is an example of a soft law instruments which develops into hard national legislation. The application of the UNIDROIT Principles as means to interpret and supplement national and international legislation (which has so far proved to be the most successful use of the Principles) has fostered a creative interpretation of unclear or outdated provisions more in line with international practice: in particular, they have been an important instrument to promote the acceptance of the principle of good faith in common law jurisdictions²⁰⁹.

Finally, it should be noted that, although the distinction between hard and soft law is becoming increasingly blurry, it is still important to identify which norms in the international system are meant to be binding and which are not. After all, much of the work of lawyers and judges still consists in administering the law/non-law boundary by deciding on which side of it various alleged norms and conduct fall²¹⁰. Moreover, the aim of most global governance is to achieve enforceable hard obligations: a fully legalised treaty bestowed with coercive sanctions is still the best means to

²⁰⁷ See *infra* pp. 418ff

²⁰⁸ See *infra* pp. 221ff

²⁰⁹ See *infra* pp. 354ff

²¹⁰ R.B. Bilder, *Beyond Compliance: Helping Nations Cooperate*, in D. Shelton (ed), *Commitment and Compliance: The Role of Non-Binding Norms in The International Legal System*, Oxford University Press, 2000, p. 71

ensure cooperation among states and non-state actors generally strive to get non-binding principles transformed into hard law so as to be able to enforce the norms they champion²¹¹.

Application of the constructivist “norm life cycle”

The constructivist account of norm diffusion²¹² opens up new insights into the analysis of the harmonisation of the law of international commercial arbitration. As we will see in more detail in the following chapters, this harmonisation process can be seen as a process of diffusion of uniform norms in the field of international commercial arbitration following the constructivist “norm life cycle” in at least two of its three stages, namely norm emergence and norm cascade. Formulating agencies like UNCITRAL, UNIDROIT and the International Chamber of Commerce can be considered as epistemic communities or norm entrepreneurs, challenging the existing logic of appropriateness with which the arbitral process was conducted in the various states, characterised by a mistrust vis à vis this method of dispute resolution in favour of the more traditional litigation in national courts, and trying to foster the emergence of a common culture of arbitration, i.e. the gradual convergence in norms procedures and expectations of participants in the arbitral process.²¹³ Constructivists observe that an emergent norm, in order to move towards the second stage of norm cascade, needs to be institutionalised in specific sets of international rules and organisations, so as to clarify what the norm exactly is and what constitutes a violation or a departure thereof. This is what is currently happening in the field of the harmonisation of international commercial arbitration: over the past twenty years there has been an evident move toward the codification or restatement of general principles of law or commonly accepted practices (e.g. the UNCITRAL Model Laws on International Commercial Arbitration and Conciliation, the UNCITRAL Arbitration Rules, the rules of procedures of the various international arbitral institutions, such as the International Chamber of Commerce and the London Court of International Arbitration) and the vague notion of *lex mercatoria* is being progressively replaced by written codifications such as the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law and the CENTRAL database. Once a “critical mass” of states have been persuaded to adopt the new norms, constructivists say that these have reached a threshold or tipping point, since from this moment on they start to bring about change in the prevalent beliefs and values within the international system..

²¹¹M.E. O'Connell, *The Role of Soft Law in a Global Order*, in D. Shelton (ed), *Commitment and Compliance*, cit., p. 111.

²¹² See *supra* pp. 73 ff.

²¹³A.J. Van den Berg, *International Dispute Resolution: Towards an International Arbitration Culture*, Kluwer, 1998, p. 31-34.

Two of the main harmonisation tools in the field of international arbitration seem to have reached this threshold: the first is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been adopted by most states in the world and therefore seems to have achieved even the final stage of internalization; the second is the UNCITRAL Model Law on International Commercial Arbitration, which has reached or is reaching the tipping point, since nearly 50 States around the world have so far enacted a legislation based on this instrument and among them feature many of the world's main trading nations, such as some Canadian and US states, Germany, Hong Kong, and the United Kingdom. In the norm-cascade phase, constructivists envisage three major motivations pulling other states to respond to the pressure stemming from “state leaders” and ultimately adhere to the new rules: legitimization, that is the concern with international approval (in the sense that not complying with internationally accepted standards may undermine their reputation and credibility)²¹⁴; conformity, whereby states comply with norms to demonstrate that they have adapted to the social environment they belong; esteem, whereby state leaders conform to norms in order to avoid disapproval stemming from violation of internationally accepted standards and thus enhance national consensus (and, as a result their own prestige)²¹⁵. These motivations appear too general and do not take into account the peculiarities of the international trade context. More convincing seems the explanation that states decide to conform their national laws to international trade standards because they want to convey a “signalling effect” to the international business community: they want to make their national laws dealing with international trade matters immediately familiar and recognisable to the foreign practitioner, so as to attract as many foreign investments and arbitrations as possible within their territory. In the specific context of international commercial arbitration, this signalling effect can also be interpreted with reference to the nationals of the state concerned. As arbitration is largely founded on party autonomy, parties are free to choose the place of arbitration and therefore the procedural law governing their dispute. If a given country has an outdated arbitration law, it will rarely be selected as place of arbitration; consequently, even its nationals will be forced to go abroad to solve their disputes and thus will have to deal with a foreign arbitration law with which they may not be familiar.

²¹⁴ M. Finnemore and K. Sikkink, *International Norm Dynamics and Political Change*, cit. p. 903

²¹⁵ M. Finnemore and K. Sikkink, *International Norm Dynamics and Political Change*, cit. p. 904

Legitimacy in international commercial arbitration

Interdisciplinary approaches to international commercial arbitration have been mainly adopted with a view to addressing the issue of its autonomous character with respect to state order. Very few attempts have been made to assess its legitimacy. One of the rare examples in this sense is represented by Banakar's essay "Reflexive Legitimacy in International Arbitration"²¹⁶. Building on Teubner's discourse²¹⁷, this author provides a number of arguments supporting the autonomy and legitimacy of international commercial arbitration. Banakar's central thesis is that arbitration has six characteristics which make it an autopoietic and therefore autonomous and self-legitimized system²¹⁸. In the first place, it is bestowed with a contractual character, since it is based on the agreement of the parties. Secondly, it is a system characterized by a high degree of informality, since its private nature entails that the arbitrator is not obliged to stick to the lengthy and complicated procedural rules of court litigation. Thirdly, arbitration has an intercultural dimension, in the sense that the arbitrator can usually speak the language of both parties and is familiar with their laws and procedures. Fourthly, arbitration is to some extent independent of municipal courts, since parties are free to choose both substantive and procedural rules. Fifthly, arbitration is a transnational global phenomenon, which has the potential to transcend geographical and national boundaries traditionally used to determine jurisdiction in every legal culture. Sixthly, arbitration is being progressively institutionalized, that is it is beginning to have its own proper institutions and well-defined procedural rules and therefore is increasing its autonomy from the national level. These particular characteristics allow arbitration to facilitate the internal social integration of the business community, by enhancing the regulated autonomy of the customs and usages of merchants. Arbitration is a self-reflexive system in the sense that it regulates self-regulation²¹⁹: it establishes procedural rules to foster the development of a self-regulated area of the market (i.e. international

²¹⁶ R. Banakar, *Reflexive Legitimacy in International Arbitration*, in V. Gessner and A.C. Budak, *Emerging Legal Certainty: Empirical Studies on the Globalization of Law*, Ashgate, 1998, p. 347-398

²¹⁷ See *supra* pp. 38 ff

²¹⁸ R. Banakar, *Reflexive Legitimacy in International Arbitration*, cit, p. 373

²¹⁹ Teubner introduces the concept of reflexive system as a consequence of the operative closure of the various social systems. Autopoiesis implies that social systems are operatively closed, that is they function according to their own internal logic and do not allow external interference in their internal normative operations. Accordingly, no single social system can, by way of controlling the normative operations of the others, control the whole of the society. It follows that society assumes a polycentric structure: it is impossible to steer it from a single control centre and the only alternative is to rely on the self-regulation of social systems. On this reading, reflexive systems are those systems which establish norms of procedures, organization, membership and competence of the other social systems: they regulate self-regulation, they further the development of reflexive structures within the other social sub-systems. Cfr G. Teubner, *Substantive and Reflexive Elements in Modern Law*, *Law & Society Review*, 1983, 17, p. 239-285; R. Banakar, *Reflexive Legitimacy in International Arbitration*, cit, p. 360-361.

commercial transactions)²²⁰, it sets up a favorable environment in which the business community can strengthen its own self-regulation²²¹.

Nonetheless, Banakar's assessment of the legitimacy of international commercial arbitration relies only on a particular view of this notion (i.e. Teubner's concept of self-legitimation); thus far there has been no detailed analysis of how legitimacy in this field may be justified under the various theories envisaged by the social sciences literature. It is not possible here to tackle this issue in all its respects; yet, some broad considerations can be made. As outlined in the introductory part of this work, there are in the literature two main different approaches to the notion of legitimacy: a normative and a descriptive approach²²². From a normative standpoint, the issue of the legitimacy of international commercial arbitration depends on how the issue of its autonomous character is addressed. Supporters of the globalist approach to arbitration, who consider arbitration as an increasingly autonomous legal order more and more detached by state sovereignty may either emphasise its dangerous lack of legitimacy²²³ or rely on autopoiesis in order to emphasise the self-legitimation of this regime²²⁴. On the other hand, scholars seeing arbitration as a hybrid regime composed of national, international and non-national sources may argue that in this field there are enough links with state sovereignty to make it accountable to its addressees. Governance of international commercial arbitration occurs through the interaction between states and a restricted number of intergovernmental organisations (such as UNCITRAL and UNIDROIT) and non-state actors (such as the various arbitral institutions). Accountability is assured through the instrument of delegation: the increasing use of soft law and the large scope of party autonomy in arbitration are indicators that states are delegating to international organisations and non-state actors the task of determining the most appropriate standards for the conduct of arbitration, but that at the same time they retain the power of supervising the arbitration process. As observed *supra* by Lynch, state law is still a fundamental source of international commercial arbitration, although the content of many national arbitration laws is even more determined by model laws elaborated by transnational epistemic communities. Moreover, the increasing role of party autonomy in the arbitration process has spurred arbitral institutions as well as the specialized formulating agencies to create a large amount of private informal norms of dispute resolution; yet, in the absence of a supra-national arbitration tribunal, national courts and laws continue to play an important support and supervisory function at various points in the arbitration process: for example, in the recognition and

²²⁰ R. Banakar, *Reflexive Legitimacy in International Arbitration*, cit, p. 361

²²¹ R. Banakar, *Reflexive Legitimacy in International Arbitration*, cit, p. 393

²²² See *supra* pp. 54 ff.

²²³ See Cutler above pp. 186ff

²²⁴ See Banakar above

enforcement of arbitration agreements, in the determination of which disputes can be submitted to arbitration, and in the recognition and enforcement of arbitration awards.

The legitimacy problem of this form of governance lies in the restricted number of actors taking part to the decision-making process. Nonetheless, in recent years there has been a steep increase in the participation of non-state actors as observers to the working sessions of the main formulating agencies in the field, i.e. UNCITRAL and UNIDROIT. The fact that these observers are not members and therefore have no right to vote is of little significance, since, as we have seen above, these formulating agencies typically reach their decisions by consensus, rather than by voting: during working sessions, all efforts are made in order to take into account all concerns raised and to reach a final text which is acceptable to all²²⁵. The involvement of a wide range of outside experts and stakeholders not belonging to the state or formulating agency's bureaucracy in the drafting process of UNCITRAL and UNIDROIT is therefore an attempt to strengthen the legitimacy of their harmonisation tools and facilitate their reception in practice.

The particular decision-making process followed by UNCITRAL and UNIDROIT is also the main indicator of the legitimacy of international commercial arbitration from a descriptive perspective. Despite their status as inter-governmental bodies, these formulating agencies usually follow a decision-making process based on consensus, rather than on voting and veto mechanisms, which closely resembles the logic of communicative action²²⁶ and allows the adoption of widely acceptable solutions founded on rational arguments rather than on a trade-off among the various stakeholders²²⁷. Accordingly, they represent an example of legitimate governance in habermasian terms, i.e. a decision-making process aimed at reaching a reasoned consensus among actors and in which the various stakeholders' interests are taken into consideration

²²⁵ See *supra* pp. 132ff.

²²⁶ On the concept of communicative action see *supra* pp. 77 ff

²²⁷ J. Honnold, *The United Nations Commission on International trade Law: Mission and Methods*, Am. J. Comp. L. 1979, 27, p. 210-211, who explains further how the consensus is reached within UNCITRAL. Much depends on the skills of the chairman: when he senses that the debate has produced the basis for consensus, he will invite the group to accept the result. When differences persist, he may appoint a small working group which discusses the different points of view and finds an acceptable solution. When objections still remain, a member of the commission may ask that the records show that he “reserves his position” on the point. This dissenting opinion shows that the state representative was loyal to his government’s instructions and “fought the good fight”. A similar decision-making process has been followed by UNIDROIT Working Group during the drafting of the UNIDROIT Principles. The Working Group appointed among its members some rapporteurs for each of the different chapters of the Principles, who were entrusted to prepare, after the necessary comparative studies, a first draft, together with comments. These preliminary drafts were discussed by the Group as a whole and then revised again by the rapporteurs in light of the comments expressed during the Group sessions. The revised drafts were circulated, together with a list of the most controversial issues, among a wider group of experts, mostly law professors, throughout the world. In addition, they were examined at the annual sessions of the UNIDROIT Governing Council, which provided its advice, especially in those cases where the Working Group had not reached a consensus. All the observations and proposal for amendment received were submitted to the Working Group, so as to enable it to take them into account when proceeding to the third and final reading of the drafts.

CHAPTER FOUR: THE HARMONISATION OF ARBITRATION PROCEDURE – DRAFTING AND DIFFUSION OF THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION

SECTION I: THE UNCITRAL MODEL LAW ON INTERNATIONAL COMMERCIAL ARBITRATION- LEGISLATIVE HISTORY AND MAIN FEATURES

The legislative history of the UNCITRAL Model Law on International Commercial Arbitration

The legislative history of the Model Law on International Commercial Arbitration can be traced back to 1978, when UNCITRAL Secretariat held a consultative meeting in Paris with representatives of various international organisations involved in international arbitration (Asian-African Legal Consultative Committee, International Council for Commercial Arbitration, the Arbitration Commission of the International Chamber of Commerce)¹. The purpose of the meeting was to explore new ways to improve the overall framework of international arbitration². The participants to this meeting shared the common view that it would be in the interest of international commercial arbitration if UNCITRAL would initiate steps leading to the establishment of uniform standards of arbitral procedure³. It was also observed that, since most national laws on arbitral procedures were drafted to meet the needs of domestic arbitration, there were often divergences between the latter and international arbitration practice. Some national laws, for example, did not recognize the competence of the arbitral tribunal to decide about its jurisdiction, or restricted the power of the parties to determine the applicable law, or imposed judicial control over the

¹Secretariat Note A/cn.9/169 11 May 1979, in H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 1173

² Holtzmann and J.E. Neuhaus, *op. cit*, p. 9

³ Secretariat Note A/cn.9/169 11 May 1979, in H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 1174

composition of the arbitral tribunal and sometimes even over the application of substantive law⁴. It was therefore necessary to conceive an harmonisation tool which would take into account the specific features of international commercial arbitration⁵, so as to fill in the gap between modern arbitration practice and old-fashioned national laws⁶. Moreover, it was also suggested that harmonisation of arbitral procedural rules, by eliminating certain local particularities in national laws, would be helpful in limiting the grounds of judicial setting aside of arbitral awards.

The conclusions reached in Paris were reported by the Secretariat to the UNCITRAL Commission at its 1979 session. The first important preliminary issue the Commission had to face was whether the harmonisation of arbitration law should be accomplished by a model law or a convention. The choice for the model law was based essentially on practical reasons, namely the advantage of avoiding the costly and time-consuming processes of inducing a diplomatic conference of all UN member states, negotiating an international text on the basis of consensus and achieving the ratifications by individual states. Moreover, since arbitration laws constitute only a part of the state's procedural law, it was recognised that a model law could be easier to be absorbed into a state's procedural system than a convention, whose provisions could be varied only with the cumbersome device of reservations. Once approved by UNCITRAL, the text of the model law would be available to state legislators without the need of any further ratification process; the text could be adapted to the language, structure and needs of the various legal systems.

Accordingly, at the end of its session the Commission adopted the formal decision to request the Secretariat to prepare, in consultation with interested international organisations, and after scrutinizing the provisions of national legislations relating to arbitral procedure, a preliminary draft of a model law on international arbitral procedure.⁷ In carrying out this task, the Secretariat should restrict the scope of the draft to international commercial arbitration and take into account the provisions of the New York Convention and the UNCITRAL Arbitration Rules⁸.

Pursuant to this request, the Secretariat began collecting materials on national laws pertaining to arbitral procedure. In 1981 the Secretariat issued its first report on the possible features of the model law. In this report one finds clearly stated the main purposes underlying the future model law. The Secretariat emphasised that, were the model law to facilitate international commercial arbitration and ensure its proper functioning and recognition, it would need to provide solutions to the manifold defects or pitfalls encountered in arbitration practice. One of the most important purposes envisaged from the outset by the Secretariat was the need to strike a reasonable balance between the

⁴ Secretariat Note A/cn.9/169 11 May 1979, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 1174

⁵ Secretariat Note A/cn.9/169 11 May 1979, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 1174

⁶ H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 10

⁷ 1979 Commission Report A/34/17 (15 August 1979), in H.M. Holtzmann and J.E. Neuhaus, *op. cit.* p. 1188

⁸ 1979 Commission Report A/34/17 (15 August 1979), in Holtzmann and J.E. Neuhaus, *op. cit.* p. 1189

freedom of the parties to determine the procedure and the need for mandatory national provisions ensuring fair and just proceedings⁹. A major complaint in arbitration practice was indeed that parties' agreements on procedure were often frustrated by mandatory provisions of the applicable law. For example, parties often felt that their freedom was unduly restricted with regard to the types of disputes to submit to arbitration, the method of selection and appointment of arbitrators, and the arbitrator's competence to decide on his own competence or the applicable procedural rules¹⁰. These restrictions, stemming from national laws, raised criticism if not hostility towards mandatory provisions of law. However, the solution should not be understood as conferring total freedom to the parties and refusing all mandatory provisions in international commercial arbitration. Parties' freedom should be limited by mandatory provisions designed to prevent any denial of justice or violation of due process in the procedure established by the parties. On this reading, the model law would provide a "constitutional framework" which would recognise parties' freedom and at the same time guarantee the validity of their agreements based thereon¹¹. With the latter argument, the Secretariat took implicitly a stand over the debate on the "floating arbitration"¹²: refusing all mandatory rules, the Secretariat admitted, would amount to consider international arbitration as "supranational", in the sense of fully detached from any national law. Instead, the underlying idea of the report was the necessity to envisage a certain link between arbitration proceedings, including the awards, and a national law which would give recognition and effect to the award and would also provide for some form of adequate assistance by national courts. This in turn would imply a precise demarcation of the scope of possible intervention and supervision by national courts¹³.

In view of the complexity of the issues and the work required for the preparation of a draft model law, the Secretariat suggested that this task should be conferred to a working group which could rely on its technical support¹⁴. Following the Secretariat's suggestion, the Commission conferred to the Working Group on International Contract Practices the task of preparing the draft model law: the secretariat would prepare the background studies and provide the Working Group with assistance¹⁵. Although the working group was initially composed of 15 States, its first session was also attended by 27 States as observers and six international organisations. This level of interest

⁹ 1981 Commission Report A/36/17 (20 July 1981) in H.M. Holtzmann and J.E. Neuhaus, *op. cit.* p. 1200

¹⁰ First Secretariat Note : Possible features of a Model Law A/CN.9/207 (14 May 1981) in Holtzmann and J.E. Neuhaus, *op. cit.* , p. 1193

¹¹ First Secretariat Note : Possible features of a Model Law A/CN.9/207 (14 May 1981) in H.M. Holtzmann and J.E. Neuhaus, *op. cit.* , p. 1195

¹² On this point see *supra* pp. 177 ff

¹³ First Secretariat Note : Possible features of a Model Law A/CN.9/207 (14 May 1981) in H.M. Holtzmann and J.E. Neuhaus, *op. cit.* , p. 1196

¹⁴ First Secretariat Note : Possible features of a Model Law A/CN.9/207 (14 May 1981) in H.M. Holtzmann and J.E. Neuhaus, *op. cit.* , p. 1198

¹⁵ 1981 Commission Report A/36/17 (20 July 1981) in H.M. Holtzmann and J.E. Neuhaus, *op. cit.* , p. 1201.

remained constant throughout the following sessions, so that in 1983 the Commission decided to enlarge the Working Group to include all 36 of its member states. Instead of concentrating immediately on the drafting, the Working Group addressed first a number of background questions which had been submitted to its attention by the Secretariat in its Second Note¹⁶. The issues dealt with ranged from the scope of application of the future model law (e.g. whether it should apply also to ad hoc arbitration)¹⁷, to the need for a definition of crucial terms such as “arbitration”, “international” and “commercial”¹⁸, to the need for envisaging provisions regarding the validity of the arbitration agreement¹⁹, or the arbitrability of the disputes²⁰, the principle of separation of the arbitral clause²¹, the qualifications required to the arbitrators²². By providing answers to these issues, the Working Group outlined the basic features and policies of the future Model Law.²³ In 1984, after five sessions and five preliminary drafts, the Working Group completed its task by submitting to the Commission the final draft of the Model law, which was transmitted to all UN states and to interested international organisations for comments. In addition, ICCA organised in Lausanne a special meeting to discuss the draft Model Law, to which almost 550 practitioners and scholars in the field of international arbitration from 39 countries took part. The draft was reviewed at the 1985 session of the Commission and at the end of the same session the final text of the Model Law was approved. The Report of this session²⁴, together with its summary records²⁵, constitute the most important part of the Model Law's *travaux préparatoires*.²⁶ Finally, on December 11 1985 the General Assembly of the United Nations adopted the resolution approving the Model Law.

The scope of application of the Model law

¹⁶ Second Secretariat Note, A/CN.9/WG.II/WP. 35 (1 december 1981)

¹⁷ Report of the Working Group on International Contract Practices on the work of its third session A/CN.9/216 (16-26 February 1982), par. 15-16 available at www.uncitral.org

¹⁸ Report of the Working Group on International Contract Practices on the work of its third session, cit., par. 16-21

¹⁹ Report of the Working Group on International Contract Practices on the work of its third session, cit., par. 22

²⁰ Report of the Working Group on International Contract Practices on the work of its third session, cit., par. 30

²¹ Report of the Working Group on International Contract Practices on the work of its third session, cit., par. 34

²² Report of the Working Group on International Contract Practices on the work of its third session, cit., par. 42

²³ H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 12

²⁴ A/40/17. This is the Commission's Report to the UN General Assembly of the session at which the Model Law was adopted (H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 20)

²⁵ A/CN.9/SR305-333. These are the summaries of what was said during the Commission's session. (H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 19).

²⁶ P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, Sweet and Maxwell, 2005, p. 10

Article 1, concerning the Model law scope of application, is the article with the longest legislative history ²⁷. The necessity of defining the scope of application of the Model law as exactly as possible emerged very clearly during the *travaux préparatoires*: it was recognised from the outset that the Model Law was a text which, once enacted by the states, would form only a part of their national legislation. Since the Model Law was to co-habit with states' other laws, it was necessary to determine as precisely as possible its sphere of application.

Article 1 establishes three main limitations to the scope of application of the Model Law. The main purpose of this article is to determine which types of arbitration are governed by this harmonisation instrument.. The first limitation is of a substantive nature, stating which matters are governed by the Model law: it applies only to international commercial arbitration, as defined by the law itself ²⁸. The second limitation is of a territorial character: the Model Law applies only to arbitrations whose place is in a state adopting the law. The third limitation concerns public policy: the Model law does not affect other rules of the state governing arbitrability or special arbitration procedures.

As to the first limitation, article 1 provides four alternative tests to determine when an arbitration should be considered international, but on the other hand provides only a non-exhaustive lists of examples of what constitutes a commercial arbitration²⁹. Furthermore, no definition of the term arbitration is provided.

²⁷ P. Sanders, *Unity and Diversity in the Adoption of the Model Law*, Arbitration International, 1995, 11, p. 7; H.M. Holtzmann and J.E. Neuhaus, *op. cit* , p. 27

²⁸ The decision to limit the application of the model law to international commercial arbitration was based essentially on two grounds. The first was the argument that it was in international trade disputes that diversity among national arbitration laws produced its worst effects on the smooth functioning of the arbitral process. The second was the practical consideration that harmonisation was easier if limited to international arbitration, because the resistance of states towards the maintenance of their own particular procedures was less strong than in purely domestic disputes. H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 28 Seventh Secretariat Note – Analytical Commentary on Draft Text (A/CN.9/264) 25 March 1985, in H.M. Holtzmann and J.E. Neuhaus, *op. cit* ,p. 71

²⁹ The list is not contained in the main text of the article but in an attached footnote.

The “international” character of the arbitration

In order to determine the international character of the arbitration, the Working Group preferred to provide a number of alternative tests, rather than a general formula such as that envisaged by the French Code of Civil Procedure³⁰. The French definition is wider and simpler, but on the other hand it was feared that because of its breadth it might lead to divergent interpretations in the courts of the various states adopting the Model Law³¹. The first test (art. 1 par. a) refers to the most usual situation³² and was inspired by the 1961 European Convention on International Commercial Arbitration. It provides that an arbitration is deemed international if the parties have their place of business in different states; where the parties have more than one place of business, the latter is that with the closest relationship to the arbitration agreement³³. The second group of criteria (art. 1 par. b) qualify an arbitration as international where one particular element thereof is situated in a state other than that in which the parties have their place of business: 1) the place of arbitration, if determined in the arbitration agreement; 2) the place of arbitration, if determined pursuant to the arbitration agreement³⁴; 3) any place in which a substantial part of the obligations underlying the dispute is to be performed; 4) any place with which the dispute is most closely connected.

Finally, according to the last criterion envisaged by article 1 par. c, an arbitration is international if the parties have expressly agreed that the subject matter of the arbitration agreement refers to more than one country. By this provision, parties can “opt-in” the Model Law, i.e. they can subject an otherwise domestic arbitration to the model law, provided that the subject matter of their dispute

³⁰ Art 1492 of the French Code of Civil Procedure (as revised in 1981) establishes that an arbitration is international when it involves the interests of international trade: << Est international l’arbitrage qui met en cause des interets du commerce international>>.

³¹ H.M. Holtzmann and J.E. Neuhaus, *op.cit.*, pp. 28-29, Second Secretariat Note- Possible Features of a Model Law: Questions for Discussion (A/CN.9/WG.II/WP.35) 1 December 1981, in H.M. Holtzmann and J.E. Neuhaus, *op cit*, p. 44-45. The French definition was also considered as a tautology because it did not include a definition of the term « international ». An example of the practical disadvantages of the French definition is quoted by Sanders (P. Sanders, *The Work of UNCITRAL on Arbitration and Conciliation* , Kluwer, 2001, p. 58), who observes that French courts had to decide whether an arbitration between a French company and a French subsidiary, wholly owned by a foreign company, was international

³² P. Sanders, *The Work of UNCITRAL*, cit., p. 58 <<most cases are international because the parties have their place of business in different States at the time of concluding their agreement to arbitrate>>.

³³ The Working Group preferred the term place of business to the more common one of « seat » for two reasons. First, it believed that it would better reflect general business practice, since normally parties refer their interests to the place most closely connected to the transaction; second, this notion had already been adopted by the CISG, another important UNCITRAL instrument.

³⁴ The first two cases refer to the situation in which parties with the place of business in the same state agree to arbitrate in a foreign Model Law country. The expression « pursuant to » has given rise to two divergent interpretations: one limits this term to the cases where the place of arbitration, although not expressly determined by the parties, can nonetheless be implied from the content of the agreements; the other encompasses also those cases (envisaged under art. 20 of the Model Law) where, failing an agreement by the parties, the place of arbitration is determined by the arbitral tribunal. The Commission failed to reach an agreement on which interpretation should prevail, therefore the conflict remains. Cfr Sixth Secretariat Note- Analytical Compilation of Government Comments (A/CN.9/263), 19 March 1985, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 64

relates to more than one country. However, article 1 provides for an important limitation to this freedom: the Model Law cannot apply to disputes which cannot be subject to arbitration under the law of the enacting state. This limitation refers to the so-called “arbitrability” of the dispute: the Model Law leaves to the enacting state the power of determining which dispute may be subject to arbitration.

The commercial character of the arbitration

The Working Group did not manage to reach a comprehensive definition of the term “commercial”, although it recognised that it was widely used in practice and had acquired a sufficiently clear meaning³⁵. Yet, it was deemed undesirable to leave the matter entirely to individual states, without providing some guidance for uniform interpretation. Therefore, the Working Group agreed on an intermediate solution: drafting a non-exhaustive list of examples of commercial relationships. But a second question came to the fore: which form should this list assume? Should it be part of the text of the Model Law or should it constitute an annex to article 1? The prevailing view was to draft the list in a footnote annexed to article 1, mainly because such a list was contrary to the legislative techniques in a number of legal systems and because the examples could be interpreted as exhaustive despite its express illustrative nature. Moreover, the list was considered too wide and too vague, with the risk of turning out being more harmful than helpful³⁶. Nonetheless, it was finally decided that the list, despite its shortcomings, would provide some guidance and help to prevent too restrictive interpretations to be found in some national laws and legal doctrine. This is the reason why the final version of the footnote warns that term “commercial” should be given a wide interpretation³⁷. In particular, the Working Group has repeatedly emphasised³⁸ that the term should not be interpreted according to some particular national definitions, which restrict its scope to those relationships dealt with in commercial codes or to transactions between merchants. This concerns

³⁵ First Secretariat Note (A/CN.9/207), in H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 41.

³⁶ Third Working Group Report A/CN.9/233 28 March 1983, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 51

³⁷ Cfr UNCITRAL Model Law article 1 footnote 2: <<The term “commercial” should be given a wide interpretation so as to cover matters arising from all relationships of a commercial nature, whether contractual or not. Relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods or services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other forms of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road>>.

³⁸ Cfr e.g. Seventh Secretariat Note, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 71

stemmed from the experience with the New York Convention, which allows the interpretation of the term “commercial” according to national standards³⁹ and which often resulted in excessively narrow interpretations from an international standpoint. The call for an extensive interpretation of the term “commercial” does not mean that this term should have a boundless scope. During the *travaux préparatoires* the Working Group has identified a number of cases which were not meant to be included within the term, namely labor, employment, family, and consumer disputes. Moreover, the scope of the term is in any case restricted by the general limitation of arbitrability stated in art 1(5), according to which no matter may be subject to arbitration according to the Model Law, if it is not arbitrable under the enacting state's municipal law.

The definition of “arbitration”

The Working Group decided not to provide a comprehensive definition of the term “arbitration”, because it would involve the difficult task of drawing the line between arbitrations falling under the scope of the Model Law and those which did not. What is more, the Secretariat noted that national statutes and international conventions widely use the term “arbitration” without providing any definition: therefore, defining the term in the Model Law was considered both a complicated and unnecessary task.⁴⁰ Nonetheless, it was agreed to include a clarification, rather than a comprehensive explanation of meaning, in order to specify that the Model Law covers both institutional and ad hoc arbitration. However, in the *travaux préparatoires* one may find useful guidance as to the intended scope of the term. The Working Group stated that the Model Law was designed for consensual arbitration, i.e. arbitration based on a voluntary agreement between the parties and therefore some types of arbitrations, such as compulsory arbitrations imposed by statute, should automatically fall outside its scope. In addition, the Working Group agreed that the Model Law should not apply to some types of free arbitration, such as *arbitrato irrituale* in Italian law, the Dutch *bindend advies*, and the German *Schiedsgutachten*, which commonly result in decisions that are binding only as contractual provisions and not as arbitral awards. Yet, the Working Group concluded that such limitations should not be expressed in the Model Law, since it was thought difficult to distinguish the various types of free arbitration from those under the Model Law.

³⁹ Art 1(3) of the New York Convention allows States to restrict the Convention to awards arising out of legal relationships which are considered as commercial under the national law of the State making the restriction.

⁴⁰ Second Secretariat Note, *cit*, in H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 157

However, the Working Group noted that states could refer to these limitations, where necessary, in enacting the Model Law⁴¹.

The territorial scope of the Model Law

According to art. 1(2), the Model Law applies only if the place of arbitration is in the adopting State⁴². This principle was the result of a wide debate within the Working Group, in which two opposite criteria were faced: the territorial criterion, according to which the place of arbitration was the sole connecting factor for the Model Law's territorial application and the autonomy criterion, according to which the place of arbitration should not be the only determining factor, the Model Law also applying to arbitrations taking place in another country, if the parties had chosen to be governed by the procedural law of a state adopting the Model law. Had the latter criterion prevailed, parties would have been free, with the only restriction of public policy and rules of court competence inherent to each national system, to choose the arbitration law of a state other than that of the place of arbitration. Nevertheless, the Commission decided not to adopt the autonomy criterion: it was argued that the territorial criterion was already widely accepted by existing national laws and where the latter allowed parties to adopt the autonomy criterion, this was rarely used. Moreover, it was pointed out that the Model Law allows the parties wide freedom in shaping arbitral proceedings, including the power to agree on procedural rules of a foreign law, provided that they do not conflict with the mandatory provisions of the Model Law. Accordingly, the wide degree of freedom recognised to the parties reduces the need for providing them with the choice of a foreign law in lieu of the law of the place of arbitration⁴³.

⁴¹ First Working Group Report, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 157

⁴² The Model Law envisages four exceptions to this principle: art 8 (when a party brings the dispute object of an arbitration agreement before a court), 9 (request for interim measures by a court before or during the arbitration proceedings), 35 and 36 (recognition and enforcement of arbitral awards). These articles apply even if the place of arbitration is outside the enacting state.

⁴³ Commission Report A/40/17 21 August 1985, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 129

The Model Law as lex specialis

The remaining limitations to the Model law's scope envisaged by article 1 concern the relationship between the Model Law and other legal provisions of the enacting state. The first limitation concerns treaty law: as stated in art 1(1), bi- or multi- lateral treaties signed by the adopting state prevail over the national arbitration statute adopting the Model Law⁴⁴. This limitation may appear superfluous, since the priority of treaty law descends in every legal system from the hierarchy of the sources of law. Nonetheless, it was decided to retain this clarification in order to emphasise the fact that the Model Law would not harm the effectiveness of the treaties already in force in the adopting state⁴⁵.

As concerns the relationship between the Model Law and other provisions of national law in conflict with the Model Law itself, the general view within the Working Group was to grant the Model Law the character of *lex specialis*: the Model Law was designed to establish a special regime for international commercial arbitration and therefore should prevail over any other municipal law on arbitration. However, it was decided not to include an express reference to the special character of the Model Law, because this principle could not apply to any aspect of international arbitration. There were some issues, such the capacity of the parties to enter an arbitration agreement, or the enforcement by the courts of interim measures granted by the arbitral tribunal, which were not settled by the Model Law: therefore, it would not always be an easy task to determine whether a specific issue is governed by the latter, albeit implicitly, or not dealt with therein and thus governed by other provisions of national law⁴⁶. The most important exception to the special character of the Model Law is the issue of arbitrability, embodied in art. 1(5): the Model Law does not affect other laws of the enacting state by virtue of which certain disputes may not be submitted to arbitration or may be submitted to arbitration only according to provisions of other laws. The issue of determining which disputes can be subject to arbitration is left to the legislation of each individual state, since there is so far no consensus on this point at the international level.

General features of the Model Law

⁴⁴ P. Binder, *op. cit.* p. 21

⁴⁵ Seven Secretariat Note, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.* p. 69

⁴⁶ Fourth Secretariat Note par. 3-5, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.* p. 138.139

The “Magna Charta” of international arbitration

The most important principles of the Model Law are embedded in articles 18 and 19, which the Secretariat defined as the “Magna Charta” of arbitral procedure⁴⁷: the latter establishes the principle of autonomy of the parties and arbitrators in governing the proceedings, whereas the former establishes the principle of equal treatment of the parties. In striking a balance between these two fundamental principles, both articles set up a “liberal framework”⁴⁸ granting autonomy to the parties and, failing agreement, helping with default rules and conferring discretionary powers to the arbitrators, within the limits necessary to secure fair proceedings⁴⁹. The two principles enshrined in art 18 and 19 directly address a question emerged since the early preparatory works of the Model Law: how to provide the parties with the freedom to agree on the procedures to be followed in the arbitration and at the same time guaranteeing fairness in the proceedings⁵⁰. Article 19 contains two fundamental rules. The first is the freedom of the parties to agree on the arbitral procedure to be followed, the “rules of the game” tailored to their specific needs⁵¹, subject to the mandatory provisions of the national law. The second is the power, recognised to the arbitral tribunal if such agreement is lacking, to conduct the arbitration in the way it considers appropriate, subject to both the mandatory and non-mandatory provisions of the Model Law. This general rule is further specified in other provisions: art. 19 (2)⁵² identifies the issues in which such power can be exercised; art. 17 confers the power to order interim measures of protection; art. 25 authorises the arbitral tribunal to continue or terminate the proceedings upon certain kinds of default of a party; art 26 empowers the arbitral tribunal to nominate its own expert. Yet, the freedom of the parties and of the arbitral tribunal cannot be unlimited. In order to ensure due process and fairness of the proceedings, the Model Law contains a number of mandatory provisions limiting the autonomy of the parties and the discretionary powers of the arbitral tribunal. Art. 18, establishing that each party must be treated equally and be given full opportunity to present its case, constitutes the most important of these provisions, the other articles providing detailed mechanisms by which the goals

⁴⁷ Seventh Secretariat Note par. 1

⁴⁸ Seventh secretariat Note par. 1 in H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 583

⁴⁹ G. Herrmann, *The UNCITRAL Model Law on International Commercial Arbitration. Introduction and General Provisions*, in P. Sarcevic (ed.), *Essays on International Commercial Arbitration*, Martinus Nijhoff, 1989, p. 15

⁵⁰ H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 568. See *supra* pp. 203ff

⁵¹ First Secretariat Note, par. 17, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.* p. 571

⁵² Art 19(2) specifies that the power conferred to the arbitral tribunal includes the power to determine the admissibility, relevance, materiality and weight of any evidence. Of course, this provision is not mandatory and therefore subject to parties' will. Contrary to this provision, they can agree on particular rules of evidence, for example that certain evidence should be deemed inadmissible, or that a certain kind of document be the exclusive evidence,. In this case, the arbitral tribunal should abide by that choice. H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 566

of equality and fair procedure are to be achieved⁵³. The principle of equal treatment between parties means that no party shall be given an advantage over the other, for example by allowing it to choose more tribunal members than the other party. The Model Law provides also an important sanction in case of breach of these fundamental principles. This sanction is implied from art. 34, which envisages the setting aside of the award on grounds of procedural injustice, and expressly mentions the situation where a party is unable to present its case⁵⁴.

Default rules and the principle of completeness

In preparing the draft provisions of the Model Law, one of the questions the Secretariat asked the Working Group was to what extent supplementary rules on arbitral procedure should be included⁵⁵. In answering the key question of how detailed the Model Law should be, it adopted a middle ground between two extreme approaches: neither has it limited the provisions to a single statement allowing the arbitral tribunal to conduct the proceedings as it wishes, subject to any agreement of the parties and the need to guarantee equal treatment, nor has it drawn up a fully detailed set of procedures⁵⁶. Rather, the Working Group agreed that the Model Law should be sufficiently complete by including a “skeleton set of rules”⁵⁷, a set of basic provisions to govern the commencement and functioning of arbitration proceedings, even where parties had not agreed on the necessary procedural rules, but that it need not cover every detail of procedure⁵⁸. Thus, the Model Law provides a sort of “emergency kit”⁵⁹ of default rules which apply in the frequent cases where the parties did not include in their agreement to arbitrate any provisions concerning the procedures, or any reference to a set of arbitration rules and which deal with the most basic issues of arbitration, such as how to commence the arbitration, where it will take place, its language, and what happens if one party fails to participate. These rules, albeit supplementary, can constitute a limitation to the arbitral tribunal's discretionary power to conduct the procedure in the way it deems appropriate, since art. 19 (2) subjects this power to both mandatory and non mandatory provisions of the Model Law.

⁵³ H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, Commentary on art 18, p. 550

⁵⁴ P. Binder, *op. cit.*, p. 183-184; G. Herrmann, *The UNCITRAL Model Law*, cit, p. 13

⁵⁵ A/CN.9/WG.11/WP.35, par. 25

⁵⁶ H.M. Holtzmann, *Report V: The Conduct of Arbitral Proceedings*, in P. Sanders (ed), *UNCITRAL' s Project for a Model Law on International Commercial Arbitration*, Kluwer, 1984, p. 130

⁵⁷ G. Herrmann, *The UNCITRAL Model Law*, cit, p. 11

⁵⁸ First Working Group Report A/CN.9/216, par. 58

⁵⁹ G. Herrmann, *The UNCITRAL Model Law*, cit, p. 11

Certainty about court intervention

Art. 5 delimits the scope of court intervention to those provisions contained in the Model Law, so as to provide certainty that all instances of court influence on arbitral procedure can be found in the Model Law itself, without the need to search outside it and screen all the other laws of the land where arbitration takes place⁶⁰. The enacting state can of course widen the cases of court intervention, nonetheless it is obliged to include all these cases in the enacting law, in order to increase certainty for parties and arbitrators as regards court intervention⁶¹. Yet, article 5 expressly makes clear that this certainty is ensured only in matters governed, either expressly or impliedly by the Model Law. Where an issue involving arbitration is not regulated by the Model Law, the question of court intervention needs to be solved with reference to the other rules of the law of the place of arbitration.

During the *travaux préparatoires* it was repeatedly made clear that the purpose of art 5 was not to imply that court intervention was undesirable or should be kept to a minimum, but rather to oblige the enacting legislator to include all the cases of court intervention in the arbitration process within the provisions of the arbitration law. Accordingly, by drafting art 5 no position was taken as to the proper role of courts in arbitral proceedings, since its purpose was not to establish the extent of court intervention, but merely to provide parties and arbitrators with certainty about the instances in which court supervision or assistance was to be expected⁶².

The debate on art. 5 focussed primarily on how to identify which matters were governed by the Model Law and which were not. The article has been criticised for not providing a clear answer to a question of fundamental importance, namely whether in a given situation court intervention is available or excluded⁶³. The Commission shared the view that this problem was common to any *lex*

⁶⁰ G. Herrmann, *The UNCITRAL Model Law*, cit, p. 25

⁶¹ If a State enacts the Model Law without adding any further instance of court intervention, its courts are enabled to intervene in the following situations: decision on validity of arbitration agreements (art 8.1); granting of interim measures (art. 9); assistance in the taking of evidence (art. 27); recognition and enforcement of arbitral awards (art. 35 and 36); functions listed in art. 6 (see *infra*).

⁶² Cfr Fifth Working Group Report A/CN.9/246 6 March 1984, par. 185-187, in H.M. Holtzmann and J.E. Neuhaus, cit p. 222-223; Seventh Secretariat Note, Analytical commentary on Draft Text, A/Cn.9/264 25 March 1985 par. 2, in H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 228

⁶³ See A/CN.9/263/ADD.2 UK Comments 21 May 1985, in H.M. Holtzmann and J.E. Neuhaus, *op. cit* p. 224-228 and Lord Mustill's intervention in Summary Record A/CN.9/SR.309, 302 par. 1-5, in H.M. Holtzmann and J.E. Neuhaus, *op. cit* p. 230-231; Commission Report A/40/17 21 August 1985, par. 59, in H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 237-238

specialis and to all harmonisation instruments of international law, which do not cover every aspect of a subject matter. In all these cases, it was necessary, though admittedly often difficult, to determine the scope of the text through the ordinary rules of statutory interpretation. The debate also provided some guidelines which may be useful in identifying the matters governed by the Model Law. The Working Group pointed out that the term «matters governed by the Model law» was narrower than «international commercial arbitration» which defines the scope of the Model Law, since there may be matters referring to international commercial arbitration, which are not in fact governed by the Model Law⁶⁴. These matters include, among the others, the capacity of the parties to conclude the arbitration agreement, the impact of state immunity, the competence of the arbitral tribunal to adapt contracts, enforcement by courts of interim measures ordered by the arbitral tribunal and the question of arbitrability.

Another general rule relating to court intervention is art. 6, which calls upon each enacting state to designate which court or other competent authority is to perform certain functions under the arbitration law: deciding on the appointment of an arbitrator (art. 11), or his challenge (art. 13), or the termination of his mandate (art 14), ruling on the jurisdiction of an arbitral tribunal (art. 16), deciding on the setting aside of an award (art 34). It is believed that this provision will help the smooth functioning of the proceedings on essentially two grounds. First, because it achieves centralisation, so that foreign parties may easily identify the competent court or authority; second, because it allows the designated authority to specialise and gain experience in international commercial arbitration⁶⁵.

Not all court tasks envisaged by the Model Law are included in article 6. For example, court assistance in taking evidence (embodied in art. 27) and recognition and enforcement of awards (provided in arts 35 and 36) are not mentioned, because these functions cannot be assigned to courts in advance according to the general criterion of the place of arbitration: they depend on more variable criteria, such as the location of evidence or the location of assets of the losing party, so that the designation of the competent court cannot be determined in advance⁶⁶. Article 6 expressly provides that also a non judicial authority may be designated: this rule was added to the original draft because in some countries the functions envisaged by this article are carried out by specialised bodies, such as chambers of commerce or arbitral institutions⁶⁷.

⁶⁴ Fourth Secretariat Note Comments and Suggestions on the Fourth Draft A/CN.9/WG.II/WP.50 16 December 1983, par.5, in H.M. Holtzmann and J.E. Neuhaus, *op. cit* p. 222; Fifth Working Group Report, cit, par. 188, in H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 223

⁶⁵ G. Herrmann, *The UNCITRAL Model Law*, cit, p. 25; H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 240

⁶⁶ P. Binder, *op. cit*, p. 56; H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 240

⁶⁷ H.M. Holtzmann and J.E. Neuhaus, *op. cit* p. 241

Compliance with international instruments

From the very inception of the Model Law project, the Commission decided that the draft uniform law should take into account the provisions of two fundamental United Nations harmonisation tools in the field of international commercial arbitration: the New York Convention on Recognition and Enforcement of Foreign Arbitral Awards and the UNCITRAL Arbitration Rules⁶⁸. Since the main purpose of UNCITRAL was to harmonise the law of international trade, it was of crucial importance that the national arbitration laws enacting the Model Law did not stand alone, but that they should be closely related to a unified legal framework including contracts, arbitration rules, and enforcement conventions⁶⁹. The close relationship with the Arbitration Rules is reflected in the bulk of the Model Law's supplementary provisions, which are closely modelled on the former. Nonetheless, especially in the field of evidence, some Arbitration Rules provisions have not been included in the Model Law. For example, art. 25(5) of the Arbitration Rules, which establishes that parties may present evidence of witnesses in the form of written statements, was not included in the Model Law, because it was preferred to leave this specific issue to the agreement of the parties or the discretion of the arbitral tribunal. This choice was in line with the purpose of the Model Law's supplementary provisions to envisage only a skeleton of rules and not a body of rules regulating every detail of the procedure. Another example is art 24(1) of the Arbitration Rules, which states that each party has the burden of proving the facts underlying its claim or defense. In this case, it was preferred not to regulate the matter of the burden of proof, since it was feared that it might interfere with the broad freedom in the conduct of arbitration granted by the Model Law in art. 19⁷⁰. Before embarking in the drafting of the Model Law provisions, the Secretariat conducted a preliminary study on judicial decisions applying and interpreting the New York Convention⁷¹. This survey showed the remarkable success of this international instrument, which had been adopted by a considerable number of states and had given rise to few divergencies in its application and interpretation⁷². Accordingly, the Commission shared from the outset the view that, given the

⁶⁸ H. M. Holtzmann, *Report V*, cit, p. 130

⁶⁹ H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 9

⁷⁰ Cfr Commission Report A/40/17 par. 328-329

⁷¹ Secretariat Study on the New York Convention A/CN.9/168 in H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 1065-1070. The Secretariat essentially relied on the case-law published on various issues of the Yearbook of Commercial Arbitration.

⁷² 1979 Commission Report A/34/17 par. 77, in H.M. Holtzmann and J.E. Neuhaus, *op. cit*, p. 1071

success of the NYC, aligning the Model Law with the Convention would foster the unification of the law in the field of recognition and enforcement of arbitral awards.⁷³ The issue of compliance with the NYC emerged especially in the legislative history of articles 34, 35 and 36 which concern recognition, enforcement and the setting aside of arbitral awards. The most debated issue was whether the grounds for setting aside an award should be limited to those grounds for refusing recognition and enforcement envisaged in the NYC. During the discussion, numerous other possible grounds were taken into consideration, but the view which ultimately prevailed was to adopt the NYC's grounds, with some minor modifications. It was for instance suggested to add the case of newly discovered facts or evidence, but this option was discarded, since it would run against the basic principle of rapid and final settlement of the dispute; another option was the case in which the award was improperly procured by the other party (as a result, for example, of fraud, bribery, etc), but this was considered as a violation of due process, which was already covered by the existing provisions⁷⁴. In the end, it was felt that relying on the NYC's grounds would facilitate predictability and expeditiousness in arbitration and also help to establish a harmonised system of limited recourse against awards and their enforcement⁷⁵.

Not only does the Model Law deal with the issue of setting aside, but also with that of the recognition and enforcement of the awards. Despite the initial reservations⁷⁶, the Commission decided to introduce in the Model Law provisions concerning recognition and enforcement of arbitral awards, which of course mirror the NYC ones. Eventually, this choice proved very useful, since such provisions establish a uniform regime for international awards, which applies both to foreign and domestic awards⁷⁷. By so doing, the Model Law takes the harmonisation of the discipline of recognition and enforcement a step further, since the NYC is limited only to foreign awards.⁷⁸ Moreover, it goes towards the delocalisation of arbitration, by reducing the importance of the place of arbitration in the conduct of international commercial arbitration⁷⁹: all international awards are treated in a uniform manner, irrespective of their place of origin. With the regime

⁷³ H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 1056

⁷⁴ Second Draft art 41 (art 34 final text) par. 28 –28, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.*, p. 932-933

⁷⁵ Third Working group Report A/CN.9/233 par. 187

⁷⁶ The main problem was the fact that the New York Convention had already successfully handled the matter and therefore there was no need for further provisions. States which had not adhered to the NYC would be unlikely to adopt the identical provisions of the Model Law, mainly because the Convention granted its member states the reciprocity reservation, limiting the application to countries which are also member of the Convention and this option was not envisaged in the Model Law. Cfr Fifth Working Group Report A/CN.9/246 par. 142, in H.M. Holtzmann and J.E. Neuhaus, *op. cit.* p. 1032; Second Working Group Report A/CN.9/232 par. 129.

⁷⁷ In the context of the Model Law, domestic awards are those awards issued in international commercial arbitrations taking place in the enforcing or recognising state.

⁷⁸ G. Herrmann, *The Role of the Courts under the UNCITRAL Model Law Script*, in J.D.M. Lew (ed), *Contemporary Problems in International Arbitration*, Centre for Commercial Law Studies Queen Mary College, 1986, p. 169

⁷⁹ Seventh Secretariat Note art 35 par. 3

introduced by the Model Law, the distinction between foreign and domestic international awards, which is relevant under the NYC, loses much of its importance: the only relevant distinction is between international and non-international (i.e. purely domestic) awards⁸⁰.

The 2006 reform

In 2006 a small reform of the Model Law was endorsed in order to bring it more in line with current international trade practice. However, this reform did not affect the whole structure and the general features of the Model Law, since only few articles were emended, namely art. 7, concerning the form of the arbitration agreement; art. 17, dealing with interim measures of protection and art. 35(2), concerning the requirements for enforcement of the award. The revised version of article 7 is intended to address evolving practice in international trade and technological developments. In amending article 7, two options were adopted, which reflect two different approaches on the question of definition and form of the arbitration agreement⁸¹. The first approach is closer to the original 1985 text. It widens the written requirement of the arbitration agreement by recognizing the arbitration agreement as being in writing if its content is recorded in any form, whether or not the arbitration agreement has been concluded orally, by conduct, or by other means. On this reading, the arbitration agreement no longer requires necessarily signatures of the parties or an exchange of messages between them: the agreement to arbitrate may be entered into in any form (e.g. including orally) as long as the content of the agreement is recorded⁸². In addition, the first approach recognizes as written the arbitration agreement concluded by means of electronic communication and provides a definition of the latter, which is inspired from the 1996 UNCITRAL Model Law on Electronic Commerce and the 2005 United Nations Convention on the Use of Electronic Communications in International Contracts⁸³. The second approach defines the arbitration agreement in a manner that omits any form requirement⁸⁴. This very broad definition of arbitration

⁸⁰ *ibidem*

⁸¹ United Nations Commission on International Trade Law, Explanatory Note by the UNCITRAL Secretariat on the 1985 Model Law on International Commercial Arbitration as amended in 2006, United Nations publication, 2008, par. 19

⁸² *ibidem*

⁸³ *ibidem*

⁸⁴ *Ibidem*. Cfr art 7 option II “Arbitration agreement” is an agreement by the parties to submit to arbitration all or certain disputes which have arisen or which may arise between them in respect of a defined legal relationship, whether

agreement was introduced because it was noted that, in those jurisdictions which had removed the written form requirement for arbitration agreements, that removal had not given rise to significant disputes as to their validity. It was also observed that in such jurisdictions the provision contained in the revised draft article 7 would be unlikely to be adopted and that therefore an alternative proposal should be envisaged⁸⁵.

The extensive revision of art. 17 on interim measures required the inclusion of a new chapter (chapter IV a) in the Model Law. This chapter lays down the conditions which must be satisfied in order for the arbitral tribunal to grant interim measures; it envisages a detailed procedure for the granting, modification, suspension and termination of such measures and finally it envisages a regime for their recognition and enforcement in front of national courts. In the light of the more flexible written requirement of the arbitration agreement introduced by the reform, the new art 35(2) simplifies the requirement for enforcement of the award: presentation of a copy of the arbitration agreement is no longer required; in addition, when the award is made in a foreign language, submission of a certified translation is no longer mandatory, but subject to the court's request.

Finally a new article 2 A has been introduced, which lays down some rules of interpretation. This provision mirrors article 7 of the 1980 United Nations Convention on Contracts for the International Sale of Goods and is designed to facilitate interpretation by reference to internationally accepted principles⁸⁶. Art 2 A (1) states that in the interpretation of the Model Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith. Art 2 A (2) provides that questions concerning matters governed by the Model Law which are not expressly settled in it are to be settled in conformity with the general principles on which the Model Law is based.

contractual or not.

⁸⁵ Report of the United Nations Commission on International Trade Law on the Work of its thirty-ninth session, 19 June-7 July 2006, A/61/17, par. 165.

⁸⁶ United Nations Commission on International Trade Law, Explanatory Note by the UNCITRAL Secretariat, cit, par. 4.

SECTION II: THE IMPACT OF THE UNCITRAL MODEL LAW ON NATIONAL ARBITRATION LAWS

Different approaches to the adoption of the Model Law

The first comprehensive study¹ on the diffusion of the UNCITRAL Model Law is the article by Sanders “Unity and Diversity in the Adoption of the Model Law”², which introduced the expression “Model Law country”. This, although vaguely defined, has become very common in the literature: according to professor Sanders, a Model Law country is a country whose arbitration law contains a considerable number of provisions reflecting or at least based on the Model Law³. More importantly, this study identifies a useful framework to describe the various approaches followed by the states in introducing the Model Law regime into their national arbitration legislation. In particular, five different approaches are identified: assimilation, extension to domestic arbitration, opting-in, opting-out, adoption as *lex specialis*. As we will see, these approaches do not exclude one another: a state may adopt two or more of them at the same time. The first approach consists in enacting a new law for international commercial arbitration which is identical to the Model Law, or almost identical⁴. For example, Cyprus' s law of 1987 contains 36 articles corresponding, except for minor modifications, to the 36 articles of the Model Law; Connecticut has totally incorporated the Model Law into its new law while adding a further article 37: “This Act may be cited as the UNCITRAL Model Law in International Commercial Arbitration”; Hong Kong and Bermuda

¹In 1993 an earlier work by Isaak Dore (I. Dore, *The UNCITRAL Framework for Arbitration in Contemporary Perspective*, Kluwer, 1993) analysed the impact of UNCITRAL Model Law on national legislations during the first five years of its existence and therefore was limited to the analysis of its impact in the United States, Canada, the Netherlands, as well as to the debate on its adoption in the United Kingdom.

² P. Sanders, *Unity and Diversity in the Adoption of the Model Law*, Arbitration International, 1995, 11,1, pp.1-37. This study surveyed the national laws of the 22 countries which had so far adopted the Model Law: although the number of Model Law countries has now more than doubled, the general framework outlined in this survey is still valid today.

³P. Sanders, *Unity and Diversity in the Adoption of the Model Law*, cit, pp. 1-2. See also A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, 2004, p. 633, who identify three criteria qualifying a given country as a “Model Law country”: 1) when reading the national statute, the impression must be given that the legislator took the Model Law as basis and made certain amendments and additions, but did not simply take the Model Law as one among various models or follow only its principles; 2) the bulk of the Model Law provisions must be included (70 to 80 percent) and in particular its fundamental provisions and principles; 3) the law must contain no provision incompatible with modern international commercial arbitration (e.g. foreigners may not be arbitrators, no excludable appeal on errors of law)

⁴ P. Sanders, *Unity and Diversity in the Adoption of the Model Law*, cit, p. 3

annexed the Model Law to their new arbitration acts and added some provisions dealing with the interpretation and application of the Model Law. Likewise, Scotland in its 1990 Law Reform (Miscellaneous Provisions) Scotland Act, annexed the Model Law in Schedule 7 with certain modifications to adapt it for application in Scotland⁵.

The second approach consists in extending the Model Law regime also to domestic arbitration. This possibility was expressly envisaged during the *travaux préparatoires* of the Model Law: although this harmonisation tool was designed for international commercial arbitration, this would not prevent states from adopting its model provisions also for domestic arbitrations, so as to avoid the problematic dichotomy between domestic and international arbitration⁶. This road has for instance been followed by Germany, Canada, Quebec, Bulgaria, Mexico and Egypt. States adopting the third approach may, by enacting the Model Law, envisage the possibility for the parties to opt in its regime for domestic arbitration⁷: this has been done for example in Hong Kong⁸, Scotland⁹, and Nigeria¹⁰; by contrast, states can also provide for the opposite possibility of allowing the parties to opt-out the Model regime and have their international arbitration governed by the rules for domestic arbitration: in Australia parties to an international arbitration taking place in Australia can exclude the application of the Model Law by an agreement in writing¹¹; likewise, in Bermuda parties may agree in the arbitration agreement or any other document in writing that any dispute that has arisen or may arise between them is not to be settled in accordance with the Model Law¹²; by the same token, in Hong Kong the parties to an international arbitration agreement may agree in writing that the agreement is, or is to be treated, as a domestic arbitration agreement¹³. According to the last approach (adoption of the Model Law as *lex specialis*), international commercial arbitration is considered as a special type of arbitration and therefore is regulated by a plurality of different regimes: a set of common rules applicable to all types of arbitrations, domestic arbitration provisions (which sometimes may constitute the standard regime) and the special rules for international commercial arbitration (which enact the Model Law). In Nigeria, for example, the

⁵See *infra* pp. 292ff

⁶Commission Report of 15 August 1979 in H.M. Holtzmann and J.E. Neuhaus, *A Guide to the UNCITRAL Model Law: Legislative History and Commentary*, Kluwer, 1989, p. 40

⁷P. Sanders, *Unity and Diversity in the Adoption of the Model Law*, cit, p. 5.

⁸S. 2L of the Arbitration Ordinance of Hong Kong allows parties to a domestic arbitration to agree, when a dispute has arisen, that part IIA of the law (i.e. the Model Law regime) is to apply.

⁹S. 66(4) of the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990 permits the parties, without requiring that a dispute has effectively arisen, to agree that the Model Law as set out in Schedule 7 shall apply notwithstanding that the arbitration would not be an international commercial arbitration within the meaning of art. 1 of the Model Law

¹⁰S. 57(2)(d) of the 1988 Nigeria Arbitration and Conciliation Decree provides that the parties may expressly agree, despite the nature of the contract, that the dispute shall be treated as an international arbitration.

¹¹s. 21 of 1989 Australia International Arbitration Act

¹²s. 29 of Bermuda International Conciliation and Arbitration Act 1993

¹³s. 2M of 1989 Hong Kong Arbitration Ordinance

Model Law has been introduced in part III of its 1988 arbitration law, which bears the title of “Additional Provisions relating to International Commercial Arbitration and Conciliation”: this part applies in addition to the other provisions of the law. The 1993 Tunisian law of arbitration is divided into three chapters: chapter one contains common provisions, chapter two deals with domestic arbitration and chapter three enacts the Model Law for international arbitration, this last chapter referring in many articles to provisions contained in the preceding two. Georgia's Statute on arbitration deals in part II with arbitration on international transactions: this part supplements the general provisions contained in part I and shall be applied concurrently with the latter. This approach is the most problematic: beside the difficulties in establishing the cases in which the special rules for international commercial arbitration should prevail over the common provisions, it does not seem to comply with the so-called principle of user-friendliness, whereby the foreign reader must be able to clearly identify in a single text the whole discipline applying to international arbitration.

As we have seen, states may choose to apply more than one approach at the same time. The most flexible country in this respect appears to be Hong Kong which has adopted the assimilation together with the opting-in and opting out systems. By virtue of this multiple approach, Hong Kong has enacted the Model Law in its entirety, but has at the same time provided the parties with the widest discretion as to its adoption: the Model Law is the default regime for international arbitration, but on the one hand the parties can agree to opt out of it and apply the domestic rules to their international arbitration, and on the other hand they may decide to opt in the Model Law and thus extend its regulation to their domestic arbitration.

Modifications made in the adoption process

When introducing the Model Law into their legislation, states have hardly ever mirrored every single article, but have made some modifications with a view to adapting its standard regime to the specificities of the national environment. By comparing the national arbitration laws of the various Model Law countries, it is possible to identify those Model Law articles which have been most frequently subjected to modification during the enactment process.

Scope of application

Art. 1, which is the article with the longest legislative history¹⁴ is not surprisingly also the most frequently and most substantially changed provision. This article is concerned with the delimitation of the Model Law's scope of application through the definition of international commercial arbitration. As far as the definition of international arbitration is concerned, it essentially lays down three criteria: the parties' place of business is in different States (par. 3a); the place of arbitration, the place of performance of the contract or the place of the subject-matter of the dispute is outside the State where the parties have their places of business (par. 3b); the parties expressly agree that the subject-matter of the arbitration agreement relates to more than one country (par.3c). Some countries have adopted a simplified version of art. 1 by implementing only the most common situation qualifying an arbitration as international, i.e. where the parties have their place of business in different states: according to art. 1(2) of Bulgarian arbitration law (as amended in 1993), the international commercial arbitration resolves civil property disputes arising from foreign trade relations as well as disputes about filling gaps in a contract or its adaptation to newly arisen circumstances, if the domicile or the seat of at least one of the parties is not in the Republic of Bulgaria. Other countries have even broadened the concept of international arbitration: in addition to the criteria enumerated in the UNCITRAL text, the 1988 California International Arbitration and Conciliation Code defines as "international" any arbitration in which the subject-matter is otherwise related to commercial interests in more than one state¹⁵, with the result that the code applies to almost all arbitrations taking place in California that are commercial and have any of the broad statutorily defined international links¹⁶. But the most interesting innovation has been enacted by Tunisian arbitration law: after repeating the criteria envisaged in art. 1(3) of the Model Law, it adds the definition of international arbitration of art. 1492 of the French Code of Civil Procedure: <<if it generally concerns international trade>>¹⁷. In fact, the Tunisian law contains two definitions of international arbitration: the Model Law and the French one, which was rejected by the Working Group of UNCITRAL¹⁸. Finally, some other countries refrained from a definition of international arbitration and preferred to delimit the scope of the law by focussing on the types of disputes falling

¹⁴ See *supra* p. 206

¹⁵ Sec. 1297.13(d) of the 1988 California International Conciliation and Arbitration Code

¹⁶ I. Dore, *The UNCITRAL Framework for Arbitration in Contemporary Perspective*, cit., p. 136

¹⁷ Art. 48(d) of the Tunisian Law n. 93-42 of 26 April 1993 on the enactment of the Arbitration Code

¹⁸ P. Sanders, *Unity and Diversity in the Adoption of the Model Law*, cit, p. 9

within its application¹⁹. This is the case of Russia, whose law of 14 August 1993 envisages two categories of disputes which may be referred to international commercial arbitration: 1) disputes resulting from contractual and other civil law relationships arising in the course of foreign trade and other forms of international economic relations, provided that the place of business of at least one of the parties is situated abroad; 2) disputes arising between enterprises with foreign investment, international associations and organisations established in the territory of the Russian Federation; disputes between the participants of such entities, as well as disputes between such entities and other subjects of the Russian Federation²⁰. This is also the approach followed by some of the US states which adopted the Model Law: sec. 684.03 of the 1986 Florida International Arbitration Act states that the provisions of the Act apply to the arbitration of disputes between two or more persons at least one of whom is not a resident of the US, or, if they are residents, if the subject-matter of the arbitration is located outside the US, or involves a contract to be performed or enforced (in whole or in part) outside the US, or if it bears some other relation to one or more foreign countries; likewise, sec. 9.9.31 of the Georgia Arbitration Code establishes that the part 2, regulating the arbitration of disputes arising out of international transactions, applies if at least one of the parties is domiciled or established outside the United States, or if the dispute bears some relation to any property or activity outside the United States.

The Model Law contains a limited opt-in provision, embodied in art. 1(3)(c), which allows the parties to extend the Model Law's scope of application to arbitrations which would otherwise be domestic, by expressly agreeing that the subject-matter of the arbitration agreement relates to more than one country. However, this provision permits to extend the Model Law regime only to arbitrations having some international character and not to wholly domestic arbitrations: accordingly, a state willing to provide for the possibility of bringing a purely domestic arbitration under the Model Law regime has to envisage a special opting-in provision²¹. Moreover, it has been criticised by the UNCITRAL Secretary General itself as being accompanied by a large degree of imprecision²² : therefore, it is not surprising that there are no reported examples of parties concluding such agreement and several enacting countries (e.g. Russia and Ukraine) have deleted this provision²³.

Since the Working Group could not agree on a common definition of the term “commercial”, it was eventually decided to provide in a footnote to art. 1 a non-exhaustive list of transactions falling

¹⁹I. Dore, *The UNCITRAL Framework for Arbitration in Contemporary Perspective*, cit., p. 142; P. Sanders, *Unity and Diversity in the Adoption of the Model Law*, cit, p. 8

²⁰Art. 1 of the Law of the Russian Federation of 14 August 1993 on International Commercial Arbitration

²¹P. Sanders, *Unity and Diversity in the Adoption of the Model Law*, cit, p. 10

²²Analytical Commentary 25 March 1985 (UN Doc A/CN.9/264), par. 31

²³P. Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*, Kluwer, 2001, p. 26

within this term which should be given wide interpretation. In the adoption process several states (e.g California, Cyprus, Egypt, Nigeria, Scotland and Ukraine) were not satisfied with this solution and have decided to insert the footnote into the text of the law itself, while others (most Canadian provinces, Peru, Florida and Georgia) omitted it and did not insert a definition of “commercial” in the text ²⁴. Accordingly, in these latter countries the law is applicable to international arbitrations regardless of whether they are commercial.²⁵

Interim measures

Before the 2006 reform the UNCITRAL Model Law provided a very scant regulation of interim measures of protection, which was limited to only two short provisions: art. 9 (court-ordered interim measures), establishing the court's power to grant at the request of a party an interim measure of protection before and during arbitral proceedings; and art. 17 (arbitral tribunal ordered interim measures), conferring upon the tribunal, unless otherwise agreed by the parties, the power to order interim measures always at the request of a party. This discipline left two important issues unsolved: whether interim measures ordered by the tribunal could be qualified as awards and whether they could be enforced by the courts. These issues have been autonomously regulated by some states in the adoption process, so that no common solution has been worked out: Australian law provides that parties may agree that Chapter VIII of the Model Law (on enforcement of awards) may apply to orders under art. 17²⁶. Scotland expressly states that an order under art. 17 shall take the form of an award²⁷. Likewise, the Canadian province of British Columbia defines in sec. 2 of its International Commercial Arbitration Act an arbitral award as any decision of the arbitral tribunal on the substance of the dispute, including an interim award made for the preservation of property. By the same token another Canadian province, Ontario, states in s. 9 of its International Commercial Arbitration Act that an order under art. 17 Model Law is treated as if it were an award. By contrast, Quebec reserves interim measures before or during the arbitration proceedings to the

²⁴P. Sanders, *Unity and Diversity in the Adoption of the Model Law*, cit, p. 10; P. Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*, cit, p. 27

²⁵I. Dore, *The UNCITRAL Framework for Arbitration in Contemporary Perspective*, cit, p. 142

²⁶s. 23 of Australia International Arbitration Act

²⁷Art 17(2) Schedule 7 1990 Law Reform (Miscellaneous Provisions) Scotland Act

court. Tunisia²⁸ and California²⁹ provide for court assistance if a party does not comply with an order under art. 17. Finally, as we will see in more detail in the following chapter, Germany provides a special regime for the enforcement of interim measures ordered by the arbitral tribunal which allows the court to recast, repeal or amend such measures

As we have seen above³⁰, the 2006 reform has introduced a new chapter IV a in the Model Law, which has replaced the art. 17 of the original 1985 version. This chapter lays down very detailed provisions dealing with both court-ordered and arbitral tribunal-ordered interim measures. In particular, as far as the issue of the qualification of interim measures as arbitral award is concerned, the new art. 17(2) defines an interim measure of protection as any temporary measure “whether in the form of an award or in another form”; this wording allows to maintain the two opposing approaches to this issue adopted by the jurisdictions which had enacted art. 17 in its original version: on the one hand, those countries which have expressly provided that an interim measure should be issued as a formal award; on the other hand, those countries which have allowed interim measures only in the form of an order³¹. As the Working Group explicitly made clear, this wording should not however be misinterpreted as taking stand in respect of the controversial issue as to whether or not an interim measure issued in the form of an award would qualify for enforcement under the New York Convention.³² Finally, the new articles 17 H and 17 I provide a detailed regulation of the recognition and enforcement by the competent court of interim measures ordered by the arbitral tribunal: this regime is similar to that of the enforcement of arbitral awards found in arts. 35 and 36, taking into account the alterations necessary to the specific nature of and the particular issues related to interim measures³³. For example, art. 17 H (1) provides that an interim measure issued by an arbitral tribunal shall be recognized as binding and unless otherwise provided by the arbitral tribunal, enforced upon application to the competent court. This rule represents a compromise over the issue whether enforcement of interim measures should be subject to the approval of the arbitral tribunal: the mid-ground position was found by replacing the direct reference to the necessity of approval with the wording that the interim measure should be recognized as binding “unless otherwise provided by the arbitral tribunal”³⁴.

²⁸Art. 62 of the Tunisia Law n. 93-42 of 26 April 1993 on the Enactment of the Arbitration Code

²⁹s. 1297.171 of the California International Conciliation and Arbitration Code

³⁰See pp. 219ff

³¹UN Doc A/CN.9/508 par. 67

³²UN Doc A/CN.9/547, par. 72

³³UN Doc A/CN.9/524, par. 20

³⁴P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, Sweet and Maxwell, 2005, p. 178

Provisions on the arbitral tribunal

The rules concerning the jurisdiction, appointment and challenge of the arbitral tribunal have substantially been complied with by the enacting states, with only a number of minor modifications. Only few states made amendments to art. 16 Model Law, which lays down the *Kompetenz-Kompetenz* rule³⁵: Tunisia omitted the provision in art 16(3) that the arbitral tribunal, pending court appeal, may continue the proceedings and envisaged that the court shall give its decision in any case within three months. In Bulgaria the arbitral tribunal decides with a ruling or with the award on the plea that the arbitral tribunal does not have jurisdiction and the possibility for immediate court review envisaged in art. 16(3) Model Law is excluded: if the arbitral tribunal rejects the plea and renders a final award, this award may be set aside on the ground that there was no valid arbitration agreement³⁶.

The most important amendment related to the appointment of the arbitral tribunal concerns the default number of arbitrators in case of lack of agreement between the parties: whereas art. 10(2) Model Law, in line with international practice, lays down the default rule of the three-arbitrator tribunal, common law countries such as Scotland, Florida, North Carolina and Ohio have provided for the sole arbitrator. Art. 10 Model Law has been criticised for not envisaging a rule preventing the possible deadlock which may arise where parties agree on an even number of arbitrators and the latter fail to reach a majority³⁷. Egypt³⁸ and Tunisia³⁹ avoid the deadlock by requiring that the arbitral tribunal shall consist in any case by an uneven number of arbitrators; Brazilian arbitration law⁴⁰ provides that if the parties appoint an even number of arbitrators, the latter are authorised to appoint immediately an additional arbitrator and in case of disagreement among the arbitrators the parties shall request the court to appoint such additional arbitrator.

Art. 12 (1) of the Model Law imposes on the arbitrator the duty to disclose any circumstances likely to give rise to justifiable doubts as to his impartiality or independence. Almost all adopting states have employed the same terms “impartiality” and “independence”, without further defining them. Only the arbitration statutes of California, Oregon and Texas have specified which circumstances an

³⁵ On the *Kompetenz-Kompetenz* rule see in more detail *infra* pp. 256 ff and 307 ff

³⁶ Art. 20 of Bulgarian Law on International Commercial Arbitration of 5 August 1988

³⁷ P. Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*, cit, p. 34; see also the discussion on this point in the chapter on English arbitration

³⁸ Art. 15(2) of the 1994 Egyptian Law enacting a Law concerning Arbitration in Civil and Commercial Matters

³⁹ Art. 55(1) of the Tunisian Law n. 93-42 of 26 April 1993 on the Enactment of the Arbitration Code

⁴⁰ Art. 13 of the 1996 Brazilian Arbitration Law

arbitrator must disclose when accepting an appointment. For example, art. 1297.121 of the California Code of Civil procedure provides that the designated arbitrator shall disclose to the parties any information which might cause his impartiality to be questioned including, but not limited to, *inter alia* whether the arbitrator has a personal bias or prejudice concerning a party, or he served as an arbitrator or conciliator in another proceeding involving one or more of the parties to the proceedings. In any case, both the American Arbitration Association and the International Bar Association have drafted a set of ethical guidelines for commercial arbitrators which contain similar provisions on the duty of disclosure and, although not directly binding upon the arbitrators or the parties, they are generally recognised worldwide⁴¹.

The Model Law provides in art. 13 a detailed procedure for the challenge of arbitrators. In par. 1 it is stated that the parties are free to agree on the procedure for challenge; failing such agreement, par. 2 provides that the decision on the challenge will be made by the arbitral tribunal including the challenged arbitrator; finally, par. 3 lays down the mandatory rule whereby if the challenge, either under the procedure agreed upon by the parties or under the procedure of par. 2, is not successful, the challenging party may request the court to decide on the challenge with a decision not subject to appeal; furthermore, while such request is pending, the arbitral tribunal, including the challenged arbitrator, may continue the arbitral proceedings and render the award. In the adoption process, states have generally followed this pattern, while enacting only minor modifications on single aspects of the procedure. Peru has excluded the challenged arbitrator from the decision on his challenge⁴². Tunisia has deleted the decision by the arbitral tribunal on the challenge and therefore, if the challenged arbitrator does not withdraw from his office or the other party does not agree on the challenge, the decision will be taken by the Court of Appeal⁴³. Germany has omitted the exclusion of appeal of the court's decision in par. 3⁴⁴. Egypt has added to art. 13 a fourth paragraph stating that if the arbitrator is successfully challenged, whether by a decision of the arbitral tribunal or by the court reviewing the challenge, the arbitral proceedings already conducted shall be considered null and void, including the arbitral award⁴⁵ : this deviates from art. 15 Model Law, which provides in such case for the appointment of a substitute arbitrator. Finally, British Columbia⁴⁶ and Oregon⁴⁷ have added the possibility for the court to refuse to decide on the challenge if the party making the request had an opportunity to have his challenge decided by an

⁴¹P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, cit, p. 119

⁴²Art. 25 of the Peru Decree Law no. 25935 of 7 November 1992 enacting the General Arbitration Law

⁴³Art. 58(3) of the Tunisian Law n. 93-42 of 26 April 1993 on the Enactment of the Arbitration Code

⁴⁴Sec. 1037(3) of the 1998 German Arbitration Law

⁴⁵Art. 19 of the 1994 Egyptian Law enacting a Law concerning Arbitration in Civil and Commercial Matters

⁴⁶S. 13(5) of the British Columbia International Commercial Arbitration Act

⁴⁷S. 36.478 of the 1991 Oregon International Commercial Arbitration and Conciliation Act

entity other than the arbitral tribunal: this may be the case where the parties have agreed on a decision on the challenge by an arbitral institution.

Rules applicable to the substance of the dispute

Art. 28 is one of the most frequently changed articles of the Model Law in the national transposition process. This provision establishes a number of guidelines as to the choice of the rules applicable to the merits of the dispute. Par. 1 states that the arbitrator shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute. The term “rules of law” is commonly given a wider interpretation than “law”, allowing the parties to choose also non-national rules, such as the UNIDROIT Principles and the *lex mercatoria*⁴⁸. In addition, the same paragraph provides that any designation of the law of a given state shall be construed, unless otherwise expressed, as directly referring to the substantive law of that state and not to its conflict of laws rules: the so-called *voie directe* to the determination of the law applicable to the substance of the dispute. By contrast, par. 2 establishes the so-called *voie indirecte*, where the parties have not chosen the rules applicable to the merits: failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable. Finally, par. 3 allows the tribunal to decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorised him to do so. Whereas par. 1 was left substantially unchanged, a wide number of states have modified the *voie indirecte* envisaged in par. 2 and opted for the *voie directe*: failing any determination by the parties, the arbitral tribunal shall apply, instead of the conflict of law rules which it considers applicable, the law of the state it considers most closely connected with the dispute⁴⁹. This has for example been the solution adopted in Egypt⁵⁰, Germany⁵¹, Oman and Mexico. Accordingly, one may wonder whether this latter solution has not become the standard rule in international practice⁵². Other countries, in opting for the *voie directe*, have conferred upon the tribunal the same discretion enjoyed by the parties in par. 1: failing any designation by the

⁴⁸See the section on German arbitration law for a more detailed discussion on the issues related to this article of the Model Law (pp. 246ff).

⁴⁹The rule of the closest connection has been borrowed from art. 4 of the 1980 Rome Convention on the Law Applicable to Contractual Obligations.

⁵⁰Art. 39(2) of the 1994 Egyptian Law enacting a Law concerning Arbitration in Civil and Commercial Matters

⁵¹Sec. 1051(2) of the German Arbitration Law

⁵²Cp P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, cit., p. 235: <<More than half of the adopting jurisdictions fail to subject the tribunal's choice of law to the “conflict of laws rules”, which demonstrates a clear rejection of the model law's principle of restricting the tribunal's choice to such rules>>.

parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances of the case. This rule has been adopted by all the Canadian provinces, and some US states, namely California⁵³, Ohio⁵⁴ and Oregon⁵⁵. In addition, it has been adopted by a number of countries which have not enacted the Model Law, but have a long tradition in arbitration, namely Switzerland⁵⁶, France⁵⁷ and the Netherlands⁵⁸.

Finally, it should be noted that art. 28(3), which allows the tribunal to decide *ex aequo et bono* or as *amiable compositeur*, has been maintained in virtually every Model Law country. This is particularly significant as far as common law countries are concerned, because these concepts are unknown in their legal tradition and their inclusion in the Model Law has often been considered as an obstacle to the diffusion of this harmonisation tool in such countries⁵⁹. The fact that none of the common law countries deleted art. 28(3) when adopting the Model Law demonstrates quite the contrary.

Grounds for the setting aside of the award: violation of public policy

As we have seen in the previous chapter, the grounds for setting aside an award envisaged by art. 34(2) of the Model Law are virtually the same as those of art. V of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards. In the adoption process states did not make many modifications to the grounds envisaged in art. 34(2). Only in respect to the violation of public policy did some countries (e.g. Australia⁶⁰, Bermuda⁶¹ and Zimbabwe) add a clarification: they specified, for the avoidance of any doubt, that an award induced or affected by fraud or corruption constitutes a case of violation of public policy. Scotland even added an extra ground for setting aside the award when procured by fraud, bribery or corruption and in respect of the time

⁵³S. 1297.283 of the California International Conciliation and Arbitration Code

⁵⁴S. 2712.53 of the Ohio Arbitration Code

⁵⁵S. 36.508 of the Oregon International Commercial Arbitration and Conciliation Act

⁵⁶See the 1987 Swiss Private International Law Act, art. 187

⁵⁷See art. 1496 of the Code of Civil Procedure as amended in 1981

⁵⁸See art. 1054 of the Netherlands Arbitration Act 1986

⁵⁹See Lord Mustill, *A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law*, Arbitration International, 1990, 6, 1, p. 27.

⁶⁰S. 19 of the Australia International Arbitration Act

⁶¹S. 27 of the Bermuda International Conciliation and Arbitration Act 1993

limit for introducing the action of setting aside added to art. 34 that the time-limit of three months does not apply in this case⁶².

Unsettled issues: post setting aside and exclusion of setting aside

The Model Law, similarly to other national laws not based on the Model Law, does not contain a provision on the consequences when the application to set aside the award has been successful. The post-setting aside situation is therefore an underdeveloped area of arbitration law, with some issues still left unsolved: has the jurisdiction of the court revived after the award has been set aside? Or is the arbitration agreement still operative? should the dispute be submitted to arbitration and new arbitrators be appointed? Few countries have so far regulated the post-setting aside situation. The Netherlands, which is not a Model Law country, opted for the revival of court jurisdiction, unless otherwise agreed by the parties⁶³. On the contrary, Germany provided that in the absence of any indication to the contrary, the setting aside should result in the arbitration agreement becoming operative again in respect of the subject-matter of the dispute⁶⁴. Tunisia established that if the court sets aside the award either wholly or partially, it may, as the case may be and on application of all the parties, decide on the merits⁶⁵.

A number of non-Model Law countries provide for the exclusion by agreement of the parties of the setting aside of the award, either totally or only with respect to some of the grounds for setting aside: this is the case for example of Switzerland, whose 1987 Private International Law Act permits parties, if none of them has its domicile, habitual residence or business establishment in Switzerland, expressly to agree in writing to exclude the setting aside or limit it to one or several grounds envisaged in the Act itself. In the absence of an express provision in the Model Law on this point, Tunisia has added in its arbitration law a similar rule: the parties who have neither domicile,

⁶²Art. 34(3) Schedule 7 1990 Law Reform (Miscellaneous Provisions) Scotland Act.

⁶³Art. 1067 of the Netherlands Arbitration Act

⁶⁴Sec. 1059(5) of the German Arbitration Law

⁶⁵Art. 78(5) of the Tunisian Law n. 93-42 of 26 April 1993 on the Enactment of the Arbitration Code

principal residence nor business establishment in Tunisia, may expressly agree to exclude totally or partially all recourse against an arbitral award⁶⁶.

Recognition and enforcement of awards

The Model Law regime of recognition and enforcement of arbitral awards (envisaged in its chapter VIII) is borrowed from the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards; however, the Model Law goes further than the latter, since its enforcement regime applies also to domestic awards. Yet, in the adoption process many countries have made the radical choice of omitting chapter VIII from enactment. Its similarity to the New York Convention, widely adhered to by states from all parts of the world, induced these countries to consider this part of the Model Law as redundant and therefore not worth adopting: this is the case of Australia⁶⁷ and Bermuda⁶⁸, whose arbitration acts provide that where both chapter VIII of the Model Law and the New York Convention would apply, chapter VIII does not apply. Hong Kong formulates this differently, by establishing that international arbitrations falling within the scope of its act are regulated by chapters I to VII of the Model Law, thus excluding ch. VIII⁶⁹. Also in the USA many states adopting the Model Law refrained from including chapter VIII, since they felt that their arbitration act would be pre-empted by the Federal Arbitration Act, which in chapter 2 implements the New York Convention. Accordingly, they provided a special enforcement regime of arbitral awards which partially corresponds to and partially deviates from the Model Law. For example, California and Texas statutes contain no provision on enforcement of awards (the California Code only contains provisions on enforcement of interim awards which do not fall within the scope of the New York Convention). According to the Georgia Arbitration Code, enforcement of an arbitral award related to an international transaction is grounded on the principle of reciprocity, which is to be determined in accordance with applicable federal law and international treaties in force, such as the 1958 New York Convention implemented by the Federal Arbitration Act⁷⁰. In addition, enforcement may be refused if the award is contrary to public policy and other such grounds which could nullify domestic awards, such as fraud, corruption, partiality of an arbitrator appointed as

⁶⁶Art. 78(6) of the Tunisian Law n. 93-42 of 26 April 1993 on the Enactment of the Arbitration Code

⁶⁷S. 20 of the Australia International Arbitration Act

⁶⁸S. 28 of the Bermuda International Conciliation and Arbitration Act 1993

⁶⁹S. 34C of the Hong Kong Arbitration Ordinance

⁷⁰S. 9.9.42 of the Georgia Arbitration Code

neutral and the tribunal exceeding its authority. The grounds for refusing enforcement laid down in Florida International Arbitration Act are comparable to those envisaged in art 36 Model Law, except for two additional grounds not expressly included in the Model Law or the New York Convention: that the tribunal had previously decided the dispute to be not arbitrable and that the neutral arbitrator had a material conflict of interest⁷¹.

Additions made in the adoption process

During the *travaux préparatoires* the UNCITRAL Working Group discussed several matters which eventually did not lead to a provision in the Model Law. Nevertheless, some states, when adopting the Model Law, considered some of these matters worth including in their new Model Law- based arbitration legislation.

Consolidation

Consolidation is one of the most important issues stemming from multi-party arbitrations, i.e. arbitrations with multiple parties on one side or on both sides. In this situation two fundamental questions arise⁷²: whether, in the absence of agreement of all the parties potentially involved in the multi-party dispute, the arbitrator or the state court are entitled to order a compulsory consolidation of the arbitrations and whether, if the parties fail to reach an agreement, the court may appoint the arbitral tribunal for the consolidated proceedings.

The UNCITRAL Working Group was of the view that there was no real need to include a provision on consolidation in the Model Law; nonetheless, many common law countries included provisions on consolidation when adopting the Model Law. These regimes may be divided into two groups: court-ordered and arbitral tribunal-ordered consolidations. To the first group belongs Canada, which was the first country to adopt the Model law in 1986. The International Commercial Arbitration

⁷¹SS. 684.24-25 of the Florida International Arbitration Act

⁷²For a more detailed discussion on the topic see the section on German arbitration law (pp. 246 ff).

Acts of the Canadian provinces (with the exception of Quebec, which adopted the Model Law as such) contain the same standard provision on consolidation of arbitration proceedings: on application of one party with the consent of all other parties, the court may order consolidation on the terms it considers just; where the parties to the consolidated arbitration proceedings cannot agree as to the choice of the arbitral tribunal, the latter shall be appointed by the court; where the parties to the consolidated arbitration proceedings cannot agree on any other matter necessary to conduct the consolidated arbitration, the court is entitled to make any other order it considers necessary. Almost identical provisions have been subsequently repeated in California⁷³, Oregon⁷⁴, Texas⁷⁵, North Carolina⁷⁶ and Ohio⁷⁷. To the second group belongs Australia, whose International Arbitration Act provides in sec. 24 that the application for consolidation shall be made not to the court (as it is the case in domestic arbitration), but to the arbitral tribunals concerned which deliberate jointly on the application; if they are unable to agree, the related proceedings shall proceed as if no application has been made. Sec. 24 is however an optional provision applying if the parties so agree in writing; on the other hand, parties to an international arbitration may opt out of the international regime into the domestic regime, which provides as we have just seen for court-ordered consolidation. New Zealand envisages a similar consolidation regime with the important difference that, if the different arbitral tribunals involved cannot agree on which one shall conduct the consolidated arbitral proceedings, this decision will be made by the High Court⁷⁸. Finally, Florida provides a rather unclear regulation: disputes may be consolidated by an arbitral tribunal if all the affected parties agree to the consolidation and the tribunal feels that the consolidation will serve the interests of justice and the expeditious solution of the disputes. The proceedings are conducted under such rules as the parties agree upon or, in the absence of an agreement, as determined by the arbitral tribunal⁷⁹. This provision does not state clearly whether it is the arbitral tribunal chosen by the parties that shall order consolidation and does not specify what happens in case that the parties do not make such choice.

Costs of the arbitration

⁷³S. 1297.272 of the California International Conciliation and Arbitration Code

⁷⁴S. 36.506 of the Oregon International Commercial Arbitration and Conciliation Act

⁷⁵S. 249.27 of the Texas International Arbitration Act

⁷⁶S. 1-567.57 of the North Carolina International Commercial Arbitration Act

⁷⁷S. 2712.52 of the Ohio Arbitration Code

⁷⁸S. 9(1) Second Schedule of the New Zealand Arbitration Act 1997

⁷⁹S. 684.12 of the Florida International Arbitration Act

In its First Note to the Working Group, the UNCITRAL Secretariat suggested the inclusion in the Model Law of a provision allowing the arbitral tribunal to request a deposit from the parties for fees and costs and to fix its own fees, subject to any different agreement between the parties and, as the case may be, court review⁸⁰. Although eventually the Working Group did not follow this suggestion, in adopting the Model Law a wide number of states have included provisions on this topic. Following the pattern of art. 38 of UNCITRAL Arbitration Rules, national regulations of costs and fees generally provide that, unless otherwise agreed by the parties, the costs of an arbitration are at the discretion of the arbitral tribunal and include not only the fees and the expenses of the arbitrators, but also the legal fees and expenses of the parties, their legal representatives, the witnesses and expert witnesses and the administrative fees and expenses of the arbitral institution. This has been for example the solution adopted in Australia⁸¹, Bermuda⁸², Nigeria⁸³, British Columbia⁸⁴, and most US states adopting the Model Law. By contrast, the Russian Federation and Ukraine regulated the matter by simply adding a second paragraph to art. 31 Model Law (dealing with form and contents of the award), providing that the award shall state the amount of the arbitration, fees and costs and their apportioning⁸⁵. Some states have also introduced a system of court control on the costs and fees established by the arbitral tribunal: Mexican law states that the arbitrators shall fix their fees after consultation with the court in case a party so requests and the court agrees to perform this function⁸⁶. New Zealand's Arbitration Act provides that on application of a party who deems that the amount or allocation of costs or expenses is unreasonable, the High Court may make an order varying the costs or allocation, or both.⁸⁷ Irish law distinguishes between an agreement of the parties on the costs of the arbitration and no such agreement; in the latter case any party may apply to the High Court for determination of these costs on the basis it thinks fit⁸⁸. Finally, fewer states deal with two important issues related to the costs of arbitration: the omission of arbitrators to decide on fees on costs and the deposits on costs. As to the first issue, Australia's⁸⁹ and Hong Kong's⁹⁰ laws establish that if no provision is made in the award with respect to the costs any party may apply to the arbitral tribunal to amend the award by adding a declaration on costs

⁸⁰Commentary on matters not addressed in the final text, in H.M. Holtzmann and J.E. Neuhaus, *A Guide to the UNCITRAL Model Law on International Commercial Arbitration*, cit., pp. 1118-1119

⁸¹S. 27 of the Australia International Arbitration Act

⁸²S.32 of the Bermuda International Conciliation and Arbitration Act 1993

⁸³SS. 49-50 of the Nigeria Arbitration and Conciliation Decree

⁸⁴S. 31 of the British Columbia International Commercial Arbitration Act

⁸⁵Art. 31(2) of the Law of the Russian Federation of 14 August 1993 on International Commercial Arbitration and art. 31(2) of the Ukraine Law of 24 February 1994 on International Commercial Arbitration

⁸⁶Art. 1454 of the Mexican Arbitration Law

⁸⁷S. 6(3) Second Schedule of the New Zealand Arbitration Act 1997

⁸⁸S. 11 of the Irish International Commercial Arbitration Act

⁸⁹S. 27(4) of the Australia International Arbitration Act

⁹⁰S. 2 GJ of the Hong Kong Arbitration Ordinance

after hearing any party who wishes to be heard. New Zealand's Arbitration Act states that in the absence of fixing and allocating the costs each party shall be responsible for the legal and other expenses of that party and for an equal share of the fees of the arbitral tribunal⁹¹. Greek law envisages that if the arbitral tribunal has not established the costs at the termination of proceedings it may establish and divide them by a separate award⁹². As to the second issue, Mexico⁹³ and Nigeria⁹⁴ provide a regulation along the lines of art. 41 of the UNCITRAL Arbitration Rules: the arbitral tribunal, on its establishment, may request each party to deposit an equal amount as an advance for the costs of the arbitration; when a party so requests and the court consents to perform the function, the arbitral tribunal shall fix the amounts of any deposits only after consultation of the court.

Most of the states which added provisions on costs added at the same time a provision on interest. This has generally been done by envisaging a very simple provision, such as “unless otherwise agreed by the parties, the arbitral tribunal may award interest” (cp. British Columbia⁹⁵, California⁹⁶, North Carolina⁹⁷, Ohio⁹⁸, Oregon⁹⁹, Texas¹⁰⁰, Hong Kong¹⁰¹, which nonetheless in 1996 repealed this provision because considered as unnecessary). Other countries have envisaged a more elaborated discipline, distinguishing between interest payable up to the date of the award and interest payable from the date of the award: for example, Australian arbitration law contains two optional provisions in respect of interest. Sec. 25 deals with interest up to the making of the award which may be awarded at such reasonable rate as the tribunal determines, excluding interest on interest; sec. 26 allows the tribunal to award interest from the day of the making of the award or such later day as the tribunal specifies at the rate it considers reasonable. A similar discipline is provided by Bermuda International Conciliation and Arbitration Act 1993 in s. 31.

⁹¹S. 6(1) Second Schedule of the New Zealand Arbitration Act 1997

⁹²Art. 32 of the Greek Arbitration Law

⁹³Art 1456 (1) of the Mexican Arbitration Law

⁹⁴S. 50 of the Nigeria Arbitration and Conciliation Decree

⁹⁵S. 31(7) of the British Columbia International Commercial Arbitration Act

⁹⁶S. 1297.317 of the California International Conciliation and Arbitration Code

⁹⁷S.1-567.61(f) of the North Carolina International Commercial Arbitration Act

⁹⁸S. 2712.61 of the Ohio Arbitration Code

⁹⁹S. 36.514(6) of the Oregon International Commercial Arbitration and Conciliation Act

¹⁰⁰S. 249-31(7) of the Texas International Arbitration Act

¹⁰¹S. 34D of the Hong Kong Arbitration Ordinance

Conciliation

Conciliation is a form of alternative dispute resolution (ADR) in which a person or panel of persons assists the parties in an independent and impartial manner in their attempt to reach an amicable settlement of their dispute¹⁰². Conciliation mainly differs from arbitration because in the former the parties are still masters of the proceedings and do not relinquish control of their dispute as they do in arbitral or judicial proceedings. Accordingly, a party may terminate conciliation proceedings at any time he considers they are no longer useful, whereas in an arbitration a party cannot unilaterally terminate the proceedings, but he is bound to continue until the decision of the arbitrator, unless the other party agrees on termination. Unlike the arbitral tribunal, in no way can the conciliator decide the dispute on behalf of the parties, but he can only help them to reach an agreement on the settlement of the dispute¹⁰³. Yet, there are some connections between arbitration and conciliation: during the arbitral proceedings the parties may agree on the settlement of the dispute and request the arbitral tribunal to incorporate their settlement in an award on agreed terms (cp. Art 30 Model Law); moreover the parties may establish a link with conciliation in the arbitration clause by drafting a so-called “escalation clause” and providing that before resorting to arbitration they should first make a serious attempt to settle the dispute amicably.

On account of these connections, during the *travaux préparatoires* the suggestion was made to refer in the preamble of the Model Law to conciliation as an additional method of dispute resolution, or even to include some provisions on conciliation. Neither of these proposals was ultimately adopted, because it was felt that conciliation was so heavily dependent on the will of the parties that there was no necessity to create legislative rules¹⁰⁴. However, several states adopting the Model Law for their national arbitral legislation used this opportunity to deal with conciliation as well: some have simply included a single provision making a general reference to conciliation and encouraging the parties to resort to this type of dispute resolution, other have included a more or

¹⁰² UNCITRAL, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use*, United Nations Publication, 2002, par. 5 (available at www.uncitral.org/pdf/english/texts/arbitration/ml.../ml-conc-e.pdf). The term “conciliation” as used in the Model Law is very broad and includes notions such as “mediation”, “neutral evaluation”, “mini trial” or similar terms. Practitioners draw distinctions among these expressions in terms of the methods used by the third person to help the parties reaching the agreement on the settlement of their dispute or the degree to which the third person is involved in the process. Nonetheless, the drafters of the Model Law were of the opinion that from the viewpoint of the legislator no distinction needed to be made and therefore relied on a broad definition of the term “conciliation” (see *Id.*, par. 7).

¹⁰³ P. Sanders, *The Work of UNCITRAL on Arbitration and Conciliation*, cit., p. 69.

¹⁰⁴ P. Binder, *International Commercial Arbitration and Conciliation in UNCITRAL Model Law Jurisdictions*, cit., p. 297; UNCITRAL, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use* 2002, par. 10.

less complete discipline of the matter¹⁰⁵. The first group of states has envisaged a sort of policy statement in their arbitration law, by declaring that it is not incompatible with arbitration to encourage the settlement of a dispute by conciliation: this is the case of Canada¹⁰⁶, Peru and Brazil, which added a slightly more detailed provision, imposing on the arbitral tribunal the duty at the beginning of the procedure of trying to conciliate the parties and render, in case that the attempt to settle is successful, an award on agreed terms. The second group of states have regulated conciliation in a more complete fashion. Hong Kong¹⁰⁷ and Singapore¹⁰⁸ have envisaged a similar discipline in two sections of their respective Arbitration Acts dealing with the appointment of a conciliator in case the arbitration agreement provides for conciliation, the power of an arbitrator to act as conciliator and the duty of the arbitrator to disclose confidential information obtained during the unsuccessful conciliation before resuming the arbitral proceedings. Other states within this group have regulated conciliation in still further detail and included the term “Conciliation” in the title of their statutes. This approach is followed by the Bermuda International Conciliation and Arbitration Act 1993¹⁰⁹, the Nigeria Arbitration and Conciliation Decree 1988¹¹⁰ and the India Arbitration and Conciliation Ordinance 1996¹¹¹, which provide a discipline largely based on the UNCITRAL Conciliation Rules which the parties may opt in and whose text is annexed to all statutes.

Also in the USA conciliation has generally been referred to by the states adopting the Model Law. The only exceptions are Connecticut, which has enacted the Model law as such, and Georgia. The other US states either limit themselves to a general policy statement (cp. North Carolina, whose arbitration code provides in sec. 1-567.60 that the arbitral tribunal may use mediation, conciliation or other procedures at any time during the arbitral proceedings to encourage settlement), or provide a complete set of conciliation rules dealing with many aspects thereof, such as the conciliator's

¹⁰⁵ P. Sanders, *UNCITRAL's Model Law on International Commercial Conciliation*, Arbitration International, 2007, 23, 1, pp 105-106

¹⁰⁶ All International Arbitration Acts of the Canadian provinces contain the same standard formula: “for the purpose of encouraging settlement of a dispute, an arbitral tribunal may, with the agreement of the parties, employ mediation, conciliation or other procedures at any time during the arbitration proceedings and, with the agreement of the parties, the members of the arbitral tribunal are not disqualified from resuming their roles as arbitrators by reason of the mediation, conciliation or other procedure”.

¹⁰⁷ Ss. 2A and 2B of the Hong Kong Arbitration Ordinance

¹⁰⁸ Ss 16 and 17 of Singapore International Arbitration Act

¹⁰⁹ See ss 3-21 of the Bermuda International Conciliation and Arbitration Act 1993

¹¹⁰ See ss. 37-42 of the Nigeria Arbitration and Conciliation Decree

¹¹¹ See ss. 61-82 of the Indian Arbitration and Conciliation Ordinance

appointment, immunity and duties of disclosure (cp. the statutes of California¹¹², Ohio¹¹³, Oregon¹¹⁴ and Texas¹¹⁵).

The fact that so many states adopted laws on conciliation, prompted UNCITRAL to reconsider its approach on this matter: it was realized that such states were doing so in order to respond to the concerns by practitioners that contractual solutions alone did not meet completely the needs of the parties; accordingly, a legislative framework was required which, while preserving the flexibility of conciliation, could at the same time provide the parties with certain guarantees which the contractual solution was not able to ensure, such as the admissibility of certain evidence in subsequent judicial or arbitral proceedings and the enforceability of the settlement agreement¹¹⁶. In order to address these concerns UNCITRAL decided to prepare a model law on the topic, to support the increased use of conciliation. Adopted by UNCITRAL on 24 June 2002, the Model Law on International Commercial Conciliation provides uniform rules in respect of the conciliation process, to encourage the use of conciliation and ensure greater predictability and certainty in its use. To avoid uncertainty resulting from an absence of statutory provisions, the Model Law addresses procedural aspects of conciliation, including appointment of conciliators, commencement and termination of conciliation, conduct of the conciliation, communication between the conciliator and other parties, confidentiality and admissibility of evidence in other proceedings, as well as post-conciliation issues, such as the conciliator acting as arbitrator and enforceability of settlement agreements. Since the Model Law on International Commercial Conciliation has been adopted when all main trading nations of the world had already included provisions on conciliation in their arbitration laws, this harmonisation tool has not so far had a diffusion comparable to that of the Model Law on International Commercial Arbitration. Legislation based on the UNCITRAL Model Law on International Commercial Conciliation has been enacted in Canada (2005), Croatia (2003), Hungary (2002), Nicaragua (2005) and Slovenia (2008). In addition, in the United States the Model Law has influenced the drafting of the Uniform Mediation Act, adopted in 2001 by the National Conference of Commissioners on Uniform State Law and enacted by the states of Illinois, Iowa, Nebraska, New Jersey, Ohio and Washington¹¹⁷.

¹¹²See Ch. 7 Title 9.3 of the California International Conciliation and Arbitration Code

¹¹³See ss. 2712.74-90 of the Ohio Arbitration Code

¹¹⁴See ss. 36.528-558 of the Oregon International Commercial Arbitration and Conciliation Act

¹¹⁵See ss. 249-34-43 of the Texas International Arbitration Act

¹¹⁶UNCITRAL, *UNCITRAL Model Law on International Commercial Conciliation with Guide to Enactment and Use*, cit, par. 11

¹¹⁷ See http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/2002Model_conciliation_status.html

Liability of arbitrators

In view of the fact that the issue of the liability of arbitrators was highly controversial, the UNCITRAL Working Group decided not to deal with this matter in the Model Law¹¹⁸. However, this issue has in recent years received much attention in international practice and therefore some states, especially of common law tradition, when reforming their arbitration laws on the Model Law pattern have used this opportunity to add a provision on the liability of arbitrators. This has generally been done by establishing as a general rule the principle of the immunity of the arbitrator: the arbitrator is not liable for negligence in respect of anything done or omitted to be done in the capacity of arbitrator. Many states have also added to this general rule a provision specifying the extent of the arbitrator's liability: Australia¹¹⁹ and Sri Lanka¹²⁰ provide that the arbitrator is liable for fraud in respect of anything done or omitted in his capacity; Bermuda that he may be liable for the consequences of conscious and deliberate wrongdoing¹²¹; Malta that he is liable where his action or omission is attributable to malice and fraud¹²²; Ireland that he is liable for anything done or omitted in bad faith¹²³; Hong Kong¹²⁴ that he is liable for anything done or omitted to be done dishonestly. Finally, Hong Kong and Ireland extend the arbitrator's liability and immunity to his agents, employees, advisors, as well as persons or other institutions which appoint arbitrators or perform any other function of an administrative nature in connection with the arbitral proceedings.

Towards a uniform arbitration procedure?

Over the past thirty years there has been a tremendous growth of international commercial arbitration. In just twelve years (1979-1990), the International Chamber of Commerce received the same amount of arbitration cases (i.e. 3500), as it did in the first 55 years of its existence (1923-1978)¹²⁵. In the 1990s, this growth has even intensified: in 1999 only there were 529 requests

¹¹⁸See First Secretariat Note 14 May 1981 and First Working Group Report 23 March 1982 in H.M. Holtzmann and J.E. Neuhaus, *op.cit.*, pp. 1148-1149

¹¹⁹ S. 28 of the Australia International Arbitration Act

¹²⁰ S. 45 of the Sri Lanka Arbitration Act

¹²¹ S. 34 of the Bermuda International Conciliation and Arbitration Act 1993

¹²² S. 20(3) of Malta Arbitration Act

¹²³ S. 12 of the Irish International Commercial Arbitration Act

¹²⁴ S. GM(1) of the Hong Kong Arbitration Ordinance

¹²⁵C.N. Brower, *Introduction*, in R.B. Lillich and C.N. Brower (eds), *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity ?*, p. ix.

submitted to the ICC Secretariat¹²⁶ and these figures have remained constant over the past few years¹²⁷. Accordingly, it is now widely recognised that arbitration is the usual way of settlement of international commercial disputes¹²⁸.

The proliferation of international commercial arbitration has entailed two fundamental consequences¹²⁹. The first is the increasing “judicialisation”, whereby arbitrations tend to be conducted more frequently according to procedural formalities, and parties tend to adopt an adversarial approach, relying on dilatory tactics which are typical of litigation in courts. As a result, arbitration has been criticised by some as having become almost indistinguishable from litigation, which it was at one time intended to supplant¹³⁰. The second consequence is the ineluctable trend towards uniformity of rules and laws governing international commercial arbitration¹³¹. Especially in the wake of the wide diffusion of the UNCITRAL Model Law, national arbitration laws are becoming increasingly harmonised¹³². In particular, a comparative survey of the most important arbitration laws shows the emergence of a consensus on at least three overriding principles: party autonomy in matters of procedure, due process, and limited judicial review over arbitral awards¹³³. These principles are laid down in arts 19, 18 and 34 of the Model Law respectively, but they are also found in the arbitration laws of many other countries which have not adopted legislation based on the Model Law¹³⁴.

Procedural autonomy granted under most arbitration laws has allowed arbitration practice to develop a set of rules which have progressively developed into a standard arbitration procedure¹³⁵. These standards have two main advantages¹³⁶. Firstly, they represent an amalgam of different

¹²⁶ W.L. Craig, W.W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, Oceana Publications, 2000, p. 3.

¹²⁷ The ICC Secretariat receives around 600 new requests for arbitration every year: see the website

¹²⁸ See e.g. P. Lalive, *Transnational (or Truly International) Public Policy and International Arbitration*, in P. Sanders (ed.), *Comparative Arbitration Practice and Public Policy in Arbitration*, Kluwer, 1987, p. 257; J. H. Carter, *The International Commercial Arbitration Explosion: More Rules, More Laws, More Books: So What ?*, Mich. J. Intl. L., 1994, 15, p. 785; M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, 2008, p. 1.

¹²⁹ C.N. Brower, *Introduction*, in R. B. Lillich and C.N. Brower (eds), *International Arbitration in the 21st Century: Towards “Judicialization” and Uniformity ?*, Transnational Publishers, 1994, p. ix.

¹³⁰ F.S. Nariman, *The Spirit of Arbitration: the Tenth Annual Goff Lecture*, *Arbitration. International.*, 2000, 16, p. 262.

¹³¹ C. N. Brower, *W(h)ither International Commercial Arbitration ?*, *Arb. Int.*, 2008, 24, 2, p. 183.

¹³² G. Kaufmann-Kohler, *Globalization of Arbitral Procedure*, *Va. J. Trans. L.*, 2003, 36, 4, p. 1320.

¹³³ G. Kaufmann-Kohler, *Globalization of Arbitral Procedure*, cit., p. 1321; A. Scott Rau and E.F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, *Tex. Intl L. J.*, 1994, 30, 89, p. 24.

¹³⁴ See e.g. the 1981 French *Nouvel Code de Procedure Civile*, which in art. 1494 provides the greatest possible freedom for the exercise of party autonomy: the arbitration agreement may, directly or by reference to a set of arbitration rules, define the procedure to be followed in the arbitral proceedings; it may also subject them to a given procedural law. An almost identical provision is envisaged by art. 182 of the 1987 Swiss Private International Law Act. The principle of due process is contained in art. 1502(4), which imposes observance of “adversarial process” (*principe de la contradiction*); finally, art. 1502 provides a limited right of recourse against an award, on grounds similar to those envisaged by art. 34 of the Model Law.

¹³⁵ G. Kaufmann-Kohler, *Globalization of Arbitral procedure*, cit., p. 1323.

¹³⁶ K.P. Berger, *Private Dispute Resolution in International Business*, Kluwer, 2006, p. 330.

procedural cultures¹³⁷, thereby developing a “best practice” standard of international commercial arbitration, transcending the various legal traditions. Secondly, because such standards establish a number of basic principles shared by global consensus, they provide more predictability for the conduct of the arbitral procedure and relieve the parties from the difficult task of agreeing on procedural issues in their arbitration agreement.

The most important sets of rules which, within the general framework provided by harmonised national laws, are fostering the emergence of a uniform arbitration procedure, are the UNCITRAL Arbitration Rules, the International Bar Association (IBA) Rules on the Taking of Evidence and the IBA Guidelines on Conflicts of Interests. Drafted in 1976 for ad hoc arbitrations, the UNCITRAL Arbitration Rules have had wide diffusion, having being used as a model for the procedural rules of a number of arbitral institutions, including the Rules of Procedure of the Inter-American Commercial Arbitration Commission (IACAC), the International Arbitration Rules of the American Arbitration Association, the Rules for Arbitration of the Kuala Lumpur Arbitration Centre and the Cairo Arbitration Centre, the Swiss Rules of International Arbitration. Given their broad similarity to the UNCITRAL Model Law¹³⁸, their role in the creation of a uniform arbitral procedure is now particularly important in those countries, such as Switzerland and the US, which have not adopted the Model Law in their legislation, but whose main arbitral institutions have conformed their procedural rules to the Arbitration Rules: in these countries, institutional arbitrations are therefore conducted under the uniform procedural standards laid down by UNCITRAL. The 1999 IBA Rules on the Taking of Evidence in International Commercial Arbitration provide uniform rules aimed at conducting the evidence phase of international arbitration proceedings in an efficient and cost-effective manner¹³⁹. They primarily restate and generalize practices that were already in use in international arbitration and address such issues as document production, written witness statements and witness examinations, expert evidence, inspections, admissibility of evidence, and conduct of evidentiary hearings. The idea underlying their drafting is the search for compromise solutions taking into account both common law and civil law approaches to evidence. Since most arbitral rules do not deal in detail with issues of evidence, parties may agree on the application of the IBA Rules in the arbitration clause¹⁴⁰, or later at the outset of the arbitration itself. Even in the absence of an agreement on their application, arbitral tribunals and counsel often look to the Rules for

¹³⁷ A. Scott Rau and E. F. Sherman, *Tradition and Innovation in International Arbitration Procedure*, Tex. Intl L. J., 1994, 30, 89, p. 95.

¹³⁸ See *supra* pp. 163 ff

¹³⁹ Foreword to the IBA Rules of Evidence

¹⁴⁰ Indeed, in the Foreword to the IBA Rules of Evidence, the drafters have included a model clause which parties may use if they wish to refer to the Rules in their arbitration agreement: <<In addition to the (rules chosen by the parties), the parties agree that the arbitration shall be conducted according to the IBA Rules of Evidence>>.

guidance, because they strike a fair balance between civil and common law approaches to the taking of evidence¹⁴¹. Hence, their influence goes beyond their formal application.

The IBA Guidelines on Conflicts of Interests are another set of rules, elaborated by the International Bar Association, which provide uniform rules on one of the most disputed issue of international arbitration: the independence and impartiality of the arbitrator. Most arbitration laws and rules require arbitrators to disclose without delay any circumstances likely to give rise to justifiable doubts as to their impartiality and independence¹⁴². Nonetheless, many arbitrators find it difficult to know in practical terms what should be disclosed and have concerns about “overdisclosing”, i.e. unjustified challenges raised by the parties simply to delay procedures¹⁴³. The IBA Guidelines attempt to deal with these issues. They are made up of two parts: Part I lays down the best international practice with regard to the arbitrator's independence, impartiality and obligations of disclosure; part II provides a number of examples of how the general standards of part I should be applied. In particular, part II envisages three groups of situations which may lead to a conflict of interests: the Red List (the most serious examples of conflict of interests, in which the arbitrator must not accept the appointment), the Pink List or waivable Red List (situations in which the conflict is still serious, but if informed parties expressly agree on the arbitrator, the latter can accept the appointment), the Orange List (situations in which parties are deemed to have accepted the arbitrator if, after disclosure, no timely objection is made by them); the Green List (situations which do not raise questions of impartiality or independence and therefore require no disclosure). The IBA Guidelines have been criticised for having relaxed existing practice, so that partners from large international law firms involved in complex and intertwined relations with multinational corporations will not be prevented from serving as arbitrators¹⁴⁴. Nonetheless, they have been frequently referred to in arbitration practice as a carefully balanced system of grounds for the challenge of arbitrators¹⁴⁵.

In conclusion, harmonisation of arbitration procedure occurs primarily under national arbitration laws¹⁴⁶: thanks to the broad party autonomy which modern national legislation grants to parties and arbitrators, international commercial arbitration is now conducted in many respects in a uniform manner throughout the world. Yet, important procedural divergences remain, especially with

¹⁴¹ Cp. M. L. Moses, *op. cit.*, p. 165: <<Most parties and arbitrators prefer that the IBA Rules of Evidence remain in the category of guidelines, rather than being imposed on the arbitrators by party agreement. This permits flexibility as needed to make the arbitral process responsive to the needs of the particular case. (...) some arbitrators, on the other hand, prefer for the IBA Rules of Evidence to be adopted as binding, because they believe there is less discussion about evidentiary issues if the Rules are considered binding>>.

¹⁴² Cp art 12(1) Model Law

¹⁴³ M. L. Moses, *op. cit.*, p. 131; K.P. Berger, *Private Dispute Resolution in International Business*, cit., p. 442.

¹⁴⁴ M. L. Moses, *op. cit.*, p. 136.

¹⁴⁵ K. P. Berger, *Private Dispute Resolution in International Business*, cit., p. 443.

¹⁴⁶ G. Kaufmann-Kohler, *Globalization of Arbitral Procedure*, cit., p. 1333

reference to the degree of court intervention before and during the arbitration process. The diffusion of the Model Law and the New York Convention has brought about uniformity in the role of courts after the conclusion of the arbitral process with respect to the award, by harmonising the grounds for setting aside and refusal of recognition and enforcement of arbitral awards. Also countries which have not adopted the Model Law have followed this restrictive approach towards judicial review of arbitral awards. Yet, no uniformity exists in the role of the courts before and during the course of arbitral proceedings. For example, whereas in Model Law countries the arbitrator may rule on its own jurisdiction, in many countries which have not adopted the Model Law it is up to the court to determine the arbitral tribunal's jurisdiction¹⁴⁷. Even less uniformity can be found in the degree of court intervention during arbitration procedures. Here positions range from the detailed provisions contained in sections 42-44 of the 1996 English Arbitration Act, to the absence of any provision in this respect under the arbitration rules of the French Code of Civil Procedure. The original version of the Model Law simply enumerated the cases in which a court may intervene in the arbitral process, without specifying the procedures and limits of this intervention. Consequently, crucial issues, such as the enforcement by courts of procedural orders issued by the arbitral tribunal, were left unanswered. A first attempt to provide a uniform discipline in this regard has been carried out with the 2006 reform of the UNCITRAL Model Law, by introducing a more detailed regulation of interim measures of protection¹⁴⁸, arguably the most important case of court intervention during arbitral proceedings. It remains to be seen whether Model Law countries will adopt this proposed amendment in their legislation¹⁴⁹ and whether countries whose arbitration law is not based on the Model Law will continue to take different approaches to interim measures.

¹⁴⁷ This is the case, for example, of the 1994 Arbitration Law of the People's Republic of China, which does not recognise the principle of *Kompetenz-Kompetenz*: according to art. 20 of the Law, the validity of the arbitration agreement (and therefore the arbitral tribunal's jurisdiction) is determined either by an arbitration commission (generally CIETAC, China's main arbitration institution), or by the People's court (an English translation of China's Arbitration Law is available at www.cietac.org).

¹⁴⁸ See *supra* p. 220

¹⁴⁹ A number of countries, in enacting the Model Law in its original version, have envisaged their own regime concerning interim measures: this is the case for example of Germany, Australia and Scotland (see pp 263ff.).

SECTION III: THE RECEPTION OF THE UNCITRAL MODEL LAW IN GERMANY

In order to illustrate the impact of the UNCITRAL Model Law on national legislations, the following sections single out two exemplary case studies: the 1998 German Arbitration Law and the 1996 English Arbitration Act. The first represents probably the Model Law country on which most literature has focused, whereas the second is an interesting example of a national arbitration law which, although the *travaux préparatoires* expressly excluded the option of enacting the Model Law, relied - as the drafters have acknowledged - whenever possible on the Model Law structure, language and spirit.

Germany's “inferiority complex” vis à vis arbitration

The German business community has always suffered a sort of “inferiority complex” with regard to international arbitration. Despite Germany's leading role in international trade¹, only a small number of international arbitrations took place in its territory: though an elephant in international trade, Germany has always been a dwarf in international arbitration². The statistics of the ICC showed this clearly: in 1987 the ICC chose Germany as the place of arbitration only in 3 cases out of a total of 237 held under its auspices³. Data also showed that German nationals figured among the most frequently appointed arbitrators (after UK, Swiss, US and French nationals) and that German law was among the most

¹Cfr Statistiken vom Statistischen Bundesamt im Jahrbuch 1998 für das Ausland, 92, 269, quoted by P.S. Heigl, *Das Deutsche Schiedsverfahrensrecht von 1998 im Vergleich zum English Arbitration Act 1996*, Peter Lang Publisher, 2000, p. 19: in 1996 Germany lag shortly behind the leading USA with a share of 10% of the whole worldwide export, ahead of France and Great Britain respectively

²O. Sandrock, *International Arbitration in the Federal Republic of Germany: A Hitherto Missed Opportunity*, Am. Rev. Int'L Arb, 1990, 1, p. 49

³These data are quoted by K. P. Berger, *International Economic Arbitration in Germany: A New Era*, Arb Int, 1993, 8, 2, p. 102

frequently chosen substantive laws⁴. Nonetheless, Germany was very rarely selected as the place of arbitration. Consequently, even though many German lawyers figured among the members of the international arbitrators' elite, they often needed to go abroad to carry out their offices. They represented an exception to the practice of factual territoriality, according to which the chairman of the arbitral tribunal (or the sole arbitrator) usually comes from the country of the place of arbitration and therefore applies his national arbitration procedural law⁵. This resulted in a competitive disadvantage with respect to their Swiss, English, Austrian, or Swedish colleagues, since German lawyers acting as arbitrators were almost always forced to deal with foreign arbitration procedures with which they may not have been completely familiar⁶.

There were three most important grounds accounting for this paradoxical situation. The first was that Germany represented in a sense a victim of tradition. Parties were used to choosing always the same traditional cities as place of arbitration (Zurich, Paris, Stockholm, London, Vienna and The Hague) and they were reluctant to change their habit. These places had from a long time been selected as seats of arbitration and accordingly enjoyed a sort of rent which was difficult to avert. At the beginning, they were chosen because of their neutrality. But after the end of the Cold War, the argument of neutrality lost much of its weight⁷. Nevertheless, their reputation as traditional arbitration centres remained: parties kept selecting them as places of arbitration, because they cherished tradition⁸. The second reason was that Germany had for a long time been the victim of its own inertia. Before the 1998

⁴Cp data quoted by P.S. Heigl, *Das Deutsche Schiedsverfahrensrecht von 1998 im Vergleich zum English Arbitration Act 1996*, cit, pp. 20-21

⁵K. P. Berger, *International Economic Arbitration*, Kluwer, 1993, p. 43

⁶The argument of the inferiority complex contradicts the common refrain of states as transmission belts (see *supra* pp. 15 ff). As it will be explained better in the following paragraphs, Germany's need to conform to international standards can be read also in terms of national pride. Germany has arguably used the standards embodied in the Model Law as means to increase its power. It is thus not a story of lost statehood, but rather of changed statehood. Sovereignty does not mean independence from external actors, but ability to cooperate and interact with them.

⁷Cp Bundestags-Drucksache n. 13/5274 of July 12, 1996 at p. 2: <<Das neue, von der Auflösung der Ost-West Konfrontation gekennzeichnete welt-politische Klima lässt jedoch den Gesichtspunkt der politischen Neutralität mehr und mehr in den Hintergrund treten>> and P.S. Heigl, *Das Deutsche Schiedsverfahrensrecht von 1998 im Vergleich zum English Arbitration Act 1996*, cit, p. 23: <<das Neutralitätsargument ist jedoch äußerst fragwürdig, denn die Tatsache, dass ein Staat jahrhundertlang nicht in einen Krieg verwickelt war und keinem Verteidigungsbündnis angehört, sagt nichts über die Güte dieses Staates als Schiedsort aus>>.

⁸German scholars frequently provide another ground which has contributed to make Germany the victim of tradition: the general mistrust against Germany stemming from its recent history (i.e. negative perceptions stemming from the Nazi legacy and the Second World War), although they generally recognise that the influence of this factor is difficult to assess. In any case, they have considered the reception of an internationally accepted text like the UNCITRAL Model law as a chance to dispell this bias and to launch a signal to the world that German law complies with international standards and does not hide unexpected drawbacks. Cfr e.g. G. Lorcher, *Schiedsgerichtbarkeit: Übernahme des UNCITRAL Modellgesetzes?*, ZRP 1987, p. 231 and P.S. Heigl, *Das Deutsche Schiedsverfahrensrecht von 1998 im Vergleich zum English Arbitration Act 1996*, cit, p. 25; R. H. Kreindler and T. Mahlich, *A Foreign Perspective on the New German Arbitration Act*, Arb Int, 1998, 14, 1, p. 74

reform, Germany's law of arbitration dated back to 1877: it was a very old-fashioned law⁹, not in line with the modern needs of arbitration practice¹⁰. It dealt with arbitration only in a rudimentary manner, since it followed the typical 19th century vision of the arbitration process as a sort of surrogate of court's litigation. The regulation of arbitration process was limited to 27 short paragraphs and thus many aspect thereof were left to the case law of the courts. By conferring the task of developing and updating arbitration law to the courts, the German legislator ended up diminishing the attractiveness of Germany as a place for international arbitration¹¹. Although the courts adopted a very modern and liberal approach¹², showing their willingness to take into account the specificities of the arbitral process, foreign parties were normally not aware of the important work carried out by them. Since foreign parties were normally not familiar with the German language, let alone with the whole bulk of German case law, the only source which was immediately and easily accessible to them was the scant statutory law of arbitration, which showed a distorted image of an old-fashioned piece of legislation¹³. Accordingly, the German legislator's inertia constituted the most important obstacle to the development of the country as a flourishing arbitration centre. In order to overcome this legislative inertia, the German business and academic community took a very active role in the epistemic community which formed both within the framework of UNCITRAL and the working commissions in charge of reforming German arbitration law. Its purpose was to change Germany's perception of international arbitration, a matter which was no longer to be conceived as a surrogate of litigation, but as a crucial factor in order to enhance Germany's leading role in international trade. Acting both at the national and

⁹ Germany and its old arbitration law has been expressly referred to by the UNCITRAL Working Group during the drafting of the Model Law as an example of an industrialised country whose legislation is antiquated and obsolete with respect to the practices of modern international commercial arbitration. Cfr A/CN.9/263 par. A.1(b)

¹⁰K. H. Bockstiegel, *An Introduction to the New German Arbitration Act based on the UNCITRAL Model Law*, Arb Int, 1998, 14, 1, p. 20

¹¹Cfr Bundestags-Drucksache n. 13/5274 of July 12, 1996 at p. 2 <<Das in seinem normativen Bestand veraltete Schiedsverfahrensrecht der ZPO wird in Fachkreisen als eine wesentliche Ursache dafür angesehen, dass die Bundesrepublik Deutschland als Austragungsort für internationale Schiedsstreitigkeiten eine im Vergleich zu anderen europäischen Ländern kaum nennenswerte Rolle spielt>>.

¹²German courts started applying the Model Law long before the 1997 reform came into force. Since the publication of the Model Law in 1985, German courts – and especially the Federal Supreme Court – have shown a tendency to refer to the Model Law as the implicit standard of their decisions. Accordingly, the Model Law was used as an instrument to update the old provisions of the 1877 Act, so that by the time the new arbitration law came into force in 1998, German courts could already rely on a body of case law complying with international standards. Cfr H. Raeschke-Kessler, *The New German Arbitration Act v. Old German Case law: Which Case Law of the of the Bundesgerichtshof (German Federal Supreme Court) is to be Applied to the New Act?*, Arb Int, 1998, 14,1, p. 47.

¹³Cfr K. Schumacher, *Fragen zum Anwendungsbereich des künftigen deutschen Schiedsverfahrens Recht*, Festschrift Glossner, Heidelberg 1994, p. 341 :<<Dass das deutsche Schiedsverfahrensrecht von daher “sicherlich zu den liberalsten der Welt” gehört, erschliesst sich aber nur wenigen mit der Materie vertrauten Experten, nicht dagegen dem Laien und auch nicht ausländischen Anwälten, welche die Präferenz für einen bestimmten Schiedsort massgeblich von der Akzeptanz und Vertrautheit der *lex fori* abhängig machen>>.

international level, the German members of this epistemic community engaged in a “two level arguing” process and were ultimately able to press the German legislator to adopt a text which was drafted entirely outside the traditional national legislative process. By embracing the Model Law, the new arbitration law is only formally adopted by the German legislative body, its contents being determined essentially by the UNCITRAL's transnational epistemic community. Germany's complete adhesion to the Model Law has been possible thanks to the double-track-activity of some German nationals who played a prominent role first within UNCITRAL and then within the German reform commissions in charge of adopting the new arbitration law.

The third obstacle to the development of a flourishing arbitration practice in Germany was the lack of what may be termed an adequate “arbitration infrastructure”.¹⁴ As a result of its poor reputation as an arbitration centre, Germany could not develop an adequate network of arbitration specialists and research centres, providing German lawyers with the necessary expertise to tackle the highly sophisticated issues related to international commercial arbitration. In comparison to the traditional arbitration centres, fewer law firms specialised in arbitration practice established their offices in Germany. In addition, German national courts were not able to develop the expertise necessary to guarantee fairness and equal treatment in the arbitration proceedings, achieved by their foreign counterparts, such as the Swiss Federal Tribunal, the English Court of Appeal, or the Paris Cour d'Appel¹⁵

Overcoming the inferiority complex

The “small” arbitration law reform of 1986

¹⁴K. P. Berger, *International Economic Arbitration in Germany: a New Era*, cit., p. 103

¹⁵K.P. Berger, *International Economic Arbitration*, cit, p. 44

The 1877 German arbitration law, contained in the 10th book of the Code of Civil Procedure, was left untouched for almost a century: it was not until 1986 that a partial reform entered into force, which amended only some details of the arbitral proceedings¹⁶

In particular, the reform concerned the rules on the validity of the award in case of signature refusal by one of the arbitrators. While under the old law an arbitrator, often influenced by the party who had appointed him, could prevent the conclusion of the arbitration and the award from becoming final simply by refusing his signature, § 1039 of the new code let the signatures of the majority suffice, provided that the presiding arbitrator mentioned in the award that the signature of one of the arbitrators could not be obtained¹⁷. The reform also allowed the parties to agree on different ways of notification of the award instead of the formal service through state organs (§1039.2) and provided for the competence of the court in whose district the arbitration was being or had been held for all decisions relating to the designation or challenge of arbitrators (§1045)¹⁸. Finally, the reform introduced a minor change in the terminology of the grounds for the setting aside of awards: the old reference to “public policy” was replaced by the expression “a result that is manifestly incompatible with essential principles of German law, in particular with fundamental rights” (§1041 and §1044). Despite these improvements, the reform did not affect the whole structure of the law and did not overcome many other major drawbacks which discouraged foreign parties from choosing Germany as the place for their arbitration. The most evident flaw was the so-called procedural-theory rule advocated by German courts, according to which an arbitration was considered as German if it had been conducted according to German arbitration law, even if the place of arbitration was not in Germany. This was in blatant contrast with the territorial principle followed by most modern arbitration laws, where the *lex loci arbitri* applies to all arbitrations taking place in the territory of the respective country¹⁹. The contrast between the German system, which stuck to the procedural theory, and all other modern arbitration laws, which applied the territorial criterion, entailed the risk of frequent conflicts of jurisdiction between the German and the other national courts. The German courts, as well as the courts where the

¹⁶ Federal Republic of Germany: Act on the Revision of the Private International Law, in *International Legal Materials*, 1988, p. 28-29

¹⁷ K. P. Berger, *International Economic Arbitration in Germany: a New Era*, cit, p. 104

¹⁸ This new provision was significant because the old law provided for the competence of the court which was designated in the arbitration agreement or which would be competent for the claim in the absence of an arbitration agreement. In this latter case, the German code of civil procedure, like many other legal systems, provides that the court's territorial competence should be determined, as a general rule, according to the respondent's habitual residence. Accordingly, this rule was difficult to comply with in the field of international arbitration: if the respondent resided abroad, as it was usually the case, this implied a denial of jurisdiction by the German courts. K. P. Berger, *International Economic Arbitration in Germany: a New Era*, cit, p. 104-105.

¹⁹ K. P. Berger, *International Economic Arbitration in Germany: a New Era*, cit, p. 107

arbitration had its seat, could claim jurisdiction over the arbitration and this would undermine the smooth progress of the arbitration itself. Another major defect concerned the composition of the arbitral tribunal, which, according to the German Code of Civil Procedure, had to be composed by two members, whereas in modern arbitration practice the three-member tribunal had become an established customary rule²⁰. Finally, a third pitfall was a number of provisions running counter to the general international practice of preserving the validity of the arbitration agreement as far as possible. The German law established that the arbitration agreement became invalid if the arbitrators declared they had reached a deadlock, or if the party-nominated arbitrator died, resigned, refused to act, became invalid or incapable of acting for other reasons. In all these cases, most modern arbitration laws laid down rules allowing the arbitrator to be replaced, in order to save the validity of the arbitration agreement.

Given the modest extent of the 1986 reform, it came as no surprise that the number of arbitrations decided in Germany had not increased since then. What is more, after this anodyne attempt of modernisation, the national legislature lost sight of arbitration as a subject for reform. It seemed to underestimate the growing importance of arbitration in international trade and the repercussions a modern arbitration law might have on the national economy and prestige.

Improvement of the arbitration infrastructure

The development of an adequate arbitration infrastructure was the main reason why the 1998 reform was far more successful than the previous one occurred in 1986. A pivotal element of this infrastructure was represented by the German Arbitration Institution (Deutsche Institution für Schiedsgerichtsbarkeit, DIS), which was founded in 1992 as a merger of the German Arbitration Committee (GAC) (Deutscher Ausschuss für Schiedsgerichtswesen) and the German Institute for Arbitration (Deutsches Institut für Schiedsgerichtswesen). The GAC was founded in 1920 and its main activity had been the production of a number of institutional arbitration rules. Founded in 1974, the German Institute for Arbitration was

²⁰K. P. Berger, *International Economic Arbitration in Germany: A New Era*, cit, p. 106. The rules envisaged by the old arbitration law on the composition of the arbitral tribunal could easily lead to a deadlock. Not only did they establish that each party should appoint an arbitrator, but also that if an agreement could not be reached and if the parties had not made special provisions for such a case, the arbitral agreement would cease to have effect (art. 1033(2) ZPO). Cfr G. Lörcher, *The New German Arbitration Act*, Journal of International Arbitration, 1998,15,2, p. 89.

mainly concerned with the scientific study and promotion of arbitration in Germany and it also served as an institution to provide information on the practice of arbitration to German industry and the bar. In order to enhance their efficiency, the general assemblies of both institutions at their meeting of October 30, 1991, decided to merge into the newly created German Arbitration Institution from January 1, 1992.²¹ The DIS has its seat in Bonn and has branches in Berlin and Munich. It serves mainly two purposes: the first is to administer arbitral proceedings under its own set of arbitration rules, which it has inherited from the former institutions and which are now also available in an English and French version²². These rules are still primarily used for domestic arbitration, even if they have been revised in order to adapt them to the Model Law. The second is to spread the culture of arbitration in Germany, by organising seminars and issuing publications on this subject. In particular, the DIS administers a database providing the full text of nearly all arbitration-related German court decisions, as well as an English abstract of the most important ones²³. Moreover, it co-operates to the publication since 2003 of the German Arbitration Journal (*Zeitschrift für Schiedsverfahren* - “SchiedsVZ”).

The legislative history of the 1998 reform

After the disappointing 1986 reform, the issue of a totally renewed arbitration law was rekindled by the German Institute for Arbitration, which presented in 1989 a first draft of a “Model Law for Germany”²⁴. This report analysed all the articles of the UNCITRAL Model Law with a view to determining whether they were compatible with the framework of German arbitration and general procedural law. The result of this study was very encouraging: the UNCITRAL Model Law was not regarded as being in contrast with the guiding principles of German arbitration and procedural law.

²¹K. P. Berger, *International Economic Arbitration in Germany: a New Era*, cit, p. 117. This event was also largely advertised by the German media. The press conference held in Bonn on January, 21, 1992, with which the foundation of the DIS was announced, was featured in the main German newspapers and on German television.

²²K. H. Bockstiegel, S.M. Kroll, P. Nacimiento, *Germany as a Place for International and Domestic Arbitrations – General Overview*, in ID (eds), *Arbitration in Germany: The Model Law in Practice*, Kluwer Law, 2007, p. 14. In addition, the DIS serves as the competent authority for the duties of the ICC in Germany and regularly acts as appointing authority for UNCITRAL or other ad hoc proceedings or gives general advice on the selection of arbitrators.

²³Given the confidentiality of arbitration, it has not been possible to set up a similar database for arbitral awards. However, a limited collection of German arbitral awards, or at least reports thereof, can be found in the specialised publications, such as the *Zeitschrift für Schiedsverfahren* (from 2003), *Recht und Praxis der Schiedsgerichtsbarkeit* (until 2001), *Recht der Internationalen Wirtschaft* and the *Yearbook of Commercial Arbitration*.

²⁴Deutsches Institut für Schiedsgerichtswesen, *Übernahme des UNCITRAL-Modellgesetzes über die Internationale Handelsschiedsgerichtsbarkeit in das Deutsche Recht*, 1989, hrsg vom Deutschen Institut für Schiedsgerichtswesen

Accordingly, the publication of this report changed the course of the debate on the reform of the German arbitration law into one direction: German should adopt the UNCITRAL Model Law. Moreover, it supported the idea that a new German arbitration law should be limited to international arbitrations, as defined in art.1 of the UNCITRAL Model Law. The argument provided in favour of this view was that the underlying features of domestic arbitration were so different from international one, that there must be also different set of rules for each kind of arbitration.

Despite the publication of this influential report, the issue of the arbitration law reform was overwhelmed by German reunification in 1989, which entailed the promulgation of an enormous body of statutes on all issues related to the unification process. It was resumed in 1992, after the foundation of the German Institution of Arbitration (DIS). The establishment of an influent epistemic community within the DIS has been an important catalyst for the rapid adoption of a national arbitration law based on the UNCITRAL Model Law. In particular, the DIS has played a pivotal role as an intermediary between German arbitration practitioners and the German Ministry of Justice in the drafting process of the German arbitration law²⁵. Moreover, it has greatly contributed to the creation of an arbitration doctrine, which has remedied the lack of expertise in the field suffered by the German legal community. The drafting process which led to the adoption of the new German Arbitration Act based on the UNCITRAL Model law was characterised by a close cooperation among arbitration practitioners, academia and the German Ministry of Justice. In particular, two drafting commissions were established. One was set up by the Ministry of Justice and was composed of nine members coming from judicial administration, the judiciary, the German bar, academics and practitioners of arbitration²⁶. This Commission had the task, directly conferred by the Minister of Justice, of developing proposals for reforming the German law of international and domestic arbitration²⁷, paying particular attention to the UNCITRAL Model Law. The other was formed at the DIS and involved ten members, mostly arbitration practitioners and academics. On February, 1 1994 the Commission of the Ministry of Justice published its draft, together with a report on each individual provision of the draft. Relying on this report, the experts of the Ministry of Justice issued a first draft, which amended the

²⁵ K. P. Berger, *Drafting History and Principal Features of the New German Arbitration Law*, in K. P. Berger (ed), *Das Neue Recht der Schiedsgerichtsbarkeit – The New German Arbitration Law*, RWS, 1998, p. 42

²⁶Cfr Bundestags-Drucksache n. 13/5274 of July 12, 1996 at p. 3; K. H. Böckstiegel, *An Introduction to the New German Arbitration Act*, cit, p. 20

²⁷Thus, the scope of the mandate conferred by the Minister of Justice to the commission represented an important change in the direction of the reform process: contrary to the proposals made by the German Institute of Arbitration, the reform should now focus not only to international but also to domestic arbitration

commission's one only on minor details²⁸. The Ministry's draft contained also a summary of the aims of the reform, as well as a commentary on both the general aspects and its particular provisions²⁹. This report constitutes the *travaux préparatoires* of the new German arbitration law. Thereafter, the Legal Committee of the German Parliament adopted the final text on November 2, 1997. The final bill was approved by the Parliament on December 13, 1997 and entered into force on January, 1, 1998. Thus, by drafting a text which closely followed the Model Law, the two commissions were able to persuade the German legislature to adopt a piece of legislation which was *de facto* drafted by outside experts at UNCITRAL and not by the officials in the German legislative body³⁰. This was undoubtedly due to the “double-track” activity of German legal experts, Gerold Herrmann and Karl Heinz Bockstiegel above all, who were two of the most influential personalities during the *travaux* of the Model Law and also members of the commissions at the German Ministry of Justice and at the German Institute of Arbitration (DIS).

The guiding principles of the German Arbitration Act

The drafting process was influenced by a number of drafting guidelines which were approved right at the outset of the deliberations by both commissions. With hindsight, they also represent the guiding principles of the new arbitration act, since they reflect the essential features of what constitutes a modern arbitral legislation. These principles may be summarised in: signalling effect, user-friendliness and arbitration-friendliness³¹. The idea of the signalling effect is the main feature of the new German arbitration law: it essentially means that the German arbitration law must be familiar to the foreign practitioner. He has to recognise the law as a well-known set of rules able to dispel concerns of local particularities hidden in the statute or in the commentaries. This explains why German arbitration law constitutes a “bow” to the Model Law. Drafting the new arbitration law as closely as possible to the original wording of the Model Law³² was a means to let the foreign practitioner feel immediately at

²⁸ Cp. Bundestags-Drucksache n. 13/5274 of July 12, 1996 at p. 1 <<Das Kernstück des Entwurfs entspricht im wesentlichen dem von der Kommission zur Neuordnung des Schiedsverfahrensrechts vorgeschlagenen Diskussionsentwurf, dessen Redaktion beim Bundesministerium der Justiz oblag>>.

²⁹ Bundestags-Drucksache n. 13/5274 of July 12, 1996

³⁰ K. P. Berger, *The New German Arbitration Law in International Perspective*, Forum Internationale, 2000, 26, p. 3.

³¹ K. P. Berger, *Drafting History and Principal Features of the New German Arbitration Law*, cit, p. 44

³² The effort towards a *verbatim* reception of the UNCITRAL Model Law was taken so seriously, that the Commission at the Ministry of Justice constantly made sure that the text of the German arbitration law could be easily re-translated into

home, when reading the German arbitration law, for if he knows the Model Law (and all arbitration practitioners certainly do), he also knows the German arbitration law³³. The other two guidelines are a specification of the signalling effect. They were applied to the modifications to the Model Law, which were necessary in order to adapt it to the particularities of the German legal system. The user-friendliness and arbitration-friendliness of the law are ensured in so far as the drafters take into careful consideration that in no way shall amendments to the Model Law undermine the latter's original spirit and regulatory framework. This is because the purpose of the Model Law is indeed to provide a framework for arbitration, which is readily understandable by people of very different legal cultures³⁴. Accordingly, national legislatures which take care to keep the wording of the Model Law provisions as far as possible, help foreign users becoming familiar with national law.

The strict adherence to the wording and the drafting style of the Model Law has entailed the adoption in the German law of arbitration of a number of provisions which sound quite peculiar to the German lawyer's ear³⁵. This is the case of suppletive provisions, which are generally introduced by the formula “unless otherwise agreed by the parties” or “failing an agreement by the parties” and the like. The provision of suppletive rules relies on the idea that all legal rules are generally mandatory. Therefore non-mandatory rules must be expressly identified by the law with the above-mentioned formulas. This approach is quite unusual for German law-making tradition, according to which it is preferable to state, in more general terms, that the parties are always free to agree on their own rules, unless this is not expressly excluded by a particular legal provision³⁶. Nonetheless, in order to comply with the principles of user friendliness and arbitration friendliness, German drafters decided to stick as close as possible to the Model Law's drafting technique, doing away with the German law-making tradition.

English. Cp. P. Schlosser, *Bald neues Recht der Schiedsgerichtsbarkeit in Deutschland?*, RIW, 1994, p. 723

³³German arbitration law's signalling effect is clearly stated in the words of the working commission at the Ministry of Justice during the *travaux préparatoires*: <<if we want to reach the goal that Germany will be selected more frequently as the seat of international arbitrations in the future, we have to provide the foreign parties with a law that, by its outer appearance and by its contents, is in line with the framework of the Model Law which is so familiar all over the world>>. (Bundestags-Drucksache n. 13/5274 of July 12, 1996 at p. 28, translated by K.P. Berger, *Drafting History and Principal Features of the New German Arbitration Law*, cit., p. 44. Thus the working commission appeared to be aware that the German arbitration's law signalling effect was primarily directed to overcome Germany's “inferiority complex” vis à vis international arbitration.

³⁴Cp. Scotland and the UNCITRAL Model Law. *The Report to the Lord Advocate of the Scottish Advisory Committee on Arbitration Law*, Arb Int, 1990, p. 63

³⁵Cf. P. Schlosser, *Bald Neues Recht der Schiedsgerichtsbarkeit in Deutschland?*, RIW, 1994, p. 724

³⁶F. B. Weigand, *The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden*, Arb Int, 1995, 11, 4, p. 400. Relying on this drafting style, the former Code of Civil Procedure (s. 1034) embodied in one single provision the regulation of arbitral proceedings, by stating *inter alia* that insofar as the parties have made no express agreement on the matter, the procedure shall be determined by the arbitrators at their own discretion.

The main provisions of the German arbitration law

As we have seen in the previous paragraphs, in 1998 the German arbitration law has been completely reformed, after having remained virtually unchanged for almost a century³⁷. The *Leit-Motiv* of this reform is the so-called “signalling effect”, that is the purpose of promoting Germany as an attractive venue for international arbitration³⁸. The core of the new German arbitration law consists in a number of provisions (sections 1025-1066), which replace the former sections of the 10th Book of the Code of Civil Procedure (the “ZPO”) ³⁹. The new German arbitration law's provisions may be divided into three groups with respect to the level of conformity to the Model Law: those identical to the Model Law, those modifying the Model Law, and those introducing new rules which were not envisaged by the Model Law.

Common provisions

One of the major novelty introduced by the new German arbitration law is the adoption of the so-called territoriality principle, which is one of the cornerstones of the Model Law and brings Germany in line with most of the other European arbitration systems⁴⁰. This provision does away with the procedural theory which, as we have seen above, was one of the main inconvenient of the previous law. According to the territoriality principle, the new German arbitration law applies now to all arbitration

³⁷M. Buhler, *The German Arbitration Act: Text and Notes*, Kluwer, 1998, p. 3

³⁸Cfr also Bundestags-Drucksache n. 13/5274 of July 12, 1996 at p. 1 <<ein zeitgemasses und den internationalen Rahmenbedingungen angepasstes Recht soll das Ansehen der Bundesrepublik Deutschland als Austragungsort internationaler Schiedsstreitigkeiten fördern>>

³⁹More precisely, the new German Arbitration Law is divided into five Articles. Article 1 encompasses Sections 1025 to 1066 of the ZPO; Articles 2 and 3 contain provisions amending other federal acts; Article 4 contains transitional provisions and Article 5 contains provisions as to the coming into force of the new law.

⁴⁰M. Buhler, *The German Arbitration Act: Text and Notes*, Kluwer, 1998, p. 5

proceedings whenever the place of arbitration⁴¹ is located in Germany (§1025-1)⁴². The shift to the territoriality criterion entails that the parties can no longer agree on a foreign procedural law for an arbitration taking place in Germany⁴³. This represents a significant limitation of the principle of party autonomy, which is nonetheless necessary in order to overcome the uncertainties related to the application of the procedural theory⁴⁴. Moreover, since in the majority of cases the parties agree on the place of arbitration, the issue of the applicable procedural law is, according to the territoriality principle, unproblematic⁴⁵: it is with no exception the *lex loci arbitri*. Finally, the choice of the territoriality principle makes the distinction between a domestic and a foreign award (and arbitration) very easy to draw: all the awards issued in Germany are to be considered domestic, whereas those issued abroad are to be considered as foreign. This in turn leaves no ground to the application of art 1.1.3 of the New York Convention⁴⁶. On the other hand, the adoption of the territoriality criterion does not exclude *in toto* the possibility of applying a foreign procedural law, because, like in the Model Law, most of the German arbitration law provisions are suppletive in nature and thus can be derogated by the parties. It follows that, within the framework of the mandatory provisions of the *lex loci arbitri*, the parties are free to agree on the application of foreign procedural rules⁴⁷.

⁴¹As the legal base of the arbitral proceedings, the place of arbitration must be distinguished from the place where the hearings are held. This is clearly stated in § 1043 (2), which, in complying with art 20(2) ML, allows the tribunal to meet and hold meetings in places other than the established place of arbitration. It follows that the place of arbitration is a legal fiction which serves the purpose of striking a balance between the two opposite needs of anchoring the arbitration to a particular jurisdiction and granting the principle of party autonomy the widest application possible. By allowing the parties to designate the place of arbitration and at the same time authorizing the arbitral tribunal to conduct the proceedings virtually anywhere, the place of arbitration may in fact be chosen for the purpose of determining the applicable procedural law only. The question of where it is most convenient to meet and hold hearings should really be of no concern in this context: once the place of arbitration has been determined, the parties may set up the proceedings anywhere. Cp. G. Wagner, *Commentary on § 1025*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice*, cit, p. 75-76

⁴²In line with the Model Law, the German Arbitration Act envisages a number of exceptions to the territoriality principle, i.e. provisions which apply to arbitrations whose place of arbitration is outside Germany, or where the place of arbitration has not yet been determined. These provisions are listed in sec. 1025 (2)- (4) and concern the court's jurisdiction vis à vis the enforcement of a valid arbitration agreement and the granting of interim measures, as well as some measures of court support.

⁴³P. Schlosser, *Bald Neues Recht der Schiedsgerichtsbarkeit in Deutschland?*, cit, p. 729; K. Schumacher, *Fragen zum Anwendungsbereich des künftigen deutschen Schiedsverfahren Recht*, cit, p. 347

⁴⁴P.S. Heigl, *Das Deutsche Schiedsverfahrensrecht von 1998 im Vergleich zum English Arbitration Act 1996*, cit, p. 96

⁴⁵*Ibidem*. The author also quotes the ICC statistics (ICC Arbitration Bulletin vol 9/1 1998, 8), according to which in 85% of the cases the parties reach an agreement on the place of arbitration.

⁴⁶K. Schumacher, *Fragen zum Anwendungsbereich des künftigen deutschen Schiedsverfahren Recht*, cit, p. 351

⁴⁷P.S. Heigl, *Das Deutsche Schiedsverfahrensrecht von 1998 im Vergleich zum English Arbitration Act 1996*, cit, p. 97. Accordingly, where the parties have designated a foreign law as the applicable procedural law, the law of the place of arbitration takes priority and the choice in favour of a different arbitration law is to be re-interpreted to the effect that the rules of such law derogate the *lex fori* only in its suppletive provisions. Cp. G. Wagner, *Commentary on § 1025*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice*, cit, p. 75

Another important innovation is the settlement of the issue of the so-called “*Kompetenz-Kompetenz*”, that is the arbitral tribunal's competence to decide over its jurisdiction. Under the old German arbitration law, the parties could authorise the arbitral tribunal to adopt a final and binding decision on its jurisdiction. This agreement was interpreted by the German courts as a separate arbitration clause, in which the parties agreed that the question of the jurisdiction of the arbitral tribunal should be decided exclusively by the latter, thus ousting the jurisdiction of state courts⁴⁸. However, this broad view of the *Kompetenz-Kompetenz* had raised a number of critical voices: this interpretation was accused of circumventing the principle of mandatory court control on arbitral awards envisaged by the arbitration law⁴⁹. Sec. 1040 of the new arbitration law settles the issue of the arbitral tribunal's *Kompetenz-Kompetenz*, by adopting the solution provided by art 16 of the Model Law, which establishes mandatory court control of the arbitral tribunal's decision stating in favour of its jurisdiction to hear the case. Therefore, if the arbitral tribunal finds that it is not competent, this decision is binding; if, on the other hand, it acknowledges that it does have competence, this decision is subject to review by the state court: either party may request the court to decide the matter⁵⁰. Accordingly, under the new law, the parties are no longer authorised to exclude the competence of the German courts to decide on the arbitral tribunal's jurisdiction. As the *travaux préparatoires* make clear, the issue of the competence of the arbitral tribunal will in any event be finally decided by the State court; the arbitrator's decision on its competence is always provisional⁵¹. Moreover, the German legislator has taken on board, with some modifications, those Model Law provisions aimed at minimizing the risk of arbitration proceedings started in vain because subsequently declared invalid by a state court. They are essentially embodied in § 1032 of the German arbitration law, allowing the possibility of an early, final decision on the *Kompetenz-Kompetenz* issue. In particular, § 1032 (1) is concerned with the case where claimant has initiated the main proceedings before a state court and respondent raises the defence of the existence of

⁴⁸K. P. Berger, *Drafting History and Principal Features of the New German Arbitration Law*, cit, p. 46.

⁴⁹By conferring decisions on *Kompetenz-Kompetenz* to the exclusive jurisdiction of arbitrators the courts tried to avoid that parties engaged in arbitration proceedings only to find out at the post-award stage that the arbitral tribunal lacked the necessary jurisdiction. Yet, this approach had been criticized as excessively “arbitration-friendly”, all the more that, in many cases, the courts even implied the existence of a *Kompetenz-Kompetenz* agreement even where the parties had expressly excluded to agree on this issue. Besides, this attempt had not always gone in the direction of a simplification of the arbitration proceedings, since it often entailed that a party claiming the invalidity of the arbitration agreement shall wait until the constitution of the arbitral tribunal just in order to hear that the latter was not competent to hear the case. Cp. P. Schlosser, *Bald neues Recht der Schiedsgerichtsbarkeit in Deutschland?*, cit, p. 732; p. P.S. Heigl, *Das Deutsche Schiedsverfahrensrecht von 1998 im Vergleich zum English Arbitration Act 1996*, cit, p. 110; F. B. Weigand, *The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden*, cit, p. 404-405.

⁵⁰F.J Semler, *German Arbitration Law: The 1998 Reform and Recent Case Law*, Journal of International Arbitration, 2001, 18, 5, p. 581

⁵¹Bundestags-Drucksache n. 13/5274 of July 12, 1996, p. 44 and seq. 1040(3) of the German Arbitration Law, which states that decisions on pleas contesting the arbitral tribunal's jurisdiction are taken by means of a preliminary ruling.

an arbitration agreement⁵². According to this provision, which is largely based on art. 8 of the Model Law, the court shall, if the respondent raises an objection prior to the beginning of the oral hearing, reject the action as inadmissible, unless the court finds that the arbitration agreement is null and void, inoperative or incapable of being performed⁵³. Paragraph 2, which is not based on the Model Law, concerns the case where a party applies to the State court to decide on the admissibility of arbitral proceedings. This provision enables the party to obtain a separate decision by the State court on the admissibility of arbitral proceedings, albeit only at a very early stage of the dispute, i.e. prior to the constitution of the arbitral tribunal⁵⁴.

Another important innovation of the new arbitration act adopting the Model Law regards the composition of the arbitral tribunal. Complying with art. 10 of the Model Law, § 1034 (1) of the new act provides that, unless agreed otherwise, the arbitral tribunal shall consist of three members, one appointed by each party and the third one by the arbitral tribunal. Failing an agreement between the parties, the appointment is made by the court. Accordingly, this rule abolishes the old-fashioned provision of the previous law, whereby the arbitral tribunal was composed, in the absence of a specific agreement between parties, by two members.

Finally, a number of innovations with respect to the old German arbitration law regard those provisions aimed at overcoming deadlocks during the proceedings. For example, § 1054 (1), in line with art 31 (1) of the Model Law, provides that, where one or more arbitrators refuse to sign the award, the signature of the refusing arbitrator may be replaced by a written notice by the others that the omitted signature has been refused for certain specific reasons. This is a significant innovation with respect to the 1877 arbitration law, since the latter allowed an arbitrator, sometimes influenced by the party who had appointed him, to prevent the conclusion of the arbitration and the award from becoming final, simply

⁵²P. Huber, *Commentary on § 1032: Arbitration Agreement and Substantive Claim Before Court*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice*, Kluwer Law, 2007, p. 140

⁵³The most important difference with respect to art. 8 ML is that § 1032(1) provides that the court shall “reject the action as inadmissible”, whereas art. 8 ML provides that the court shall “refer the parties to arbitration”. The German legislature decided to deviate from the Model Law because it argued that a rejection of the action as inadmissible would lead to a clear result already at an early stage of the proceedings: by rejecting an action as inadmissible the court must engage in a comprehensive review of the existence of a valid arbitration agreement and could not limit itself to a *prima facie* review which the referral to arbitration would have implied. In addition, § 1032(1) contains a slightly more precise definition of the time limit for raising the defence. Unlike art 8 ML, which establishes this limit in the submission of the party's first statement on the substance of the dispute, § 1032 (1) provides that the objection must be raised “prior to the oral hearing on the substance”. P. Huber, *Commentary on § 1032: Arbitration Agreement and Substantive Claim Before Court*, cit, pp. 141-145.

⁵⁴A similar rule existed in the old German arbitration law before the 1998 reform, but it was limited only to negative decisions stating the inadmissibility of arbitration. The German legislature decided to keep this rule for reasons of procedural economy and to extend it also to the possibility of asking for a positive declaration on the admissibility of the arbitration. P. Huber, *Commentary on § 1032: Arbitration Agreement and Substantive Claim Before Court*, cit, p. 150

by refusing his signature⁵⁵. Moreover, §§ 1034 et seq. provide several rules ensuring that the arbitral tribunal may be constituted despite a party's failure to cooperate or take the necessary steps in the appointment proceedings. The required appointment will then be made by the courts, not only in cases where the place of arbitration is in Germany, but also in cases where it has not yet been fixed. This exception to the territoriality principle is also an innovation with respect to the correspondent provisions of the Model Law⁵⁶.

Provisions modifying the Model Law.

The new German arbitration law also contains some provisions which differ from those envisaged by the Model Law. They relate to the scope of the law, the conflict of laws rules and the enforcement procedures for domestic and foreign arbitral awards.

The most important difference between the new German arbitration law and the Model Law consists in the former's much larger scope of application⁵⁷, since it applies to all arbitrations taking place in Germany, both domestic and international, irrespective of whether they can be identified as commercial. German doctrine was always divided on the issue whether the new arbitration law should follow a monistic approach and provide a single discipline for both domestic and international arbitration, or a dualistic approach, limiting the reform to international arbitration only. This cleavage was reflected, as we have seen, in the drafting process itself. Whereas at the beginning the 1989 Report supported the dualistic approach, the monistic one ultimately prevailed. The reason for this change is that the drafters realised that, after all, international and domestic arbitration do not differ in so many respects as to deserve two completely separate regimes. Accordingly, the original idea of drafting a

⁵⁵K. P. Berger, *International Economic Arbitration in Germany: A New Era*, cit, p. 106. The 1986 Reform had introduced a rather obscure rule in this respect: it was established that the signature of the majority of the arbitrators was enough to make an award final, provided that the chairman indicated under the award that the signature could not be obtained. From the wording of this rule it was not clear whether the chairman had always to be part of the majority and thus his refusal to sign could in any case prevent the award from being final. The new rule introduced with the 1998 Reform, by eliminating any reference to the chairman, clarifies that his sole refusal to sign cannot prevent the award from being final, provided that the majority of the arbitral tribunal has signed the award. On this point cp. O. Sandrock, *Procedural Aspects of the New German Arbitration Act*, Arb Int, 1998, 14, 1, p. 41

⁵⁶Cp. § 1025 (3) of the German arbitration law: <<if the place of arbitration has not yet been determined, the German courts are competent to perform the court functions specified in §§ 1034, 1035, 1037 and 1038, if the respondent or the claimant has his place of business or habitual residence in Germany>>. It follows that if neither party has its habitual residence or place of business in Germany, German courts must refrain from assistance

⁵⁷Cp. G. Lörcher, *The New German Arbitration Act*, cit., p. 85

new law for international arbitrations and including a list of special provisions for domestic arbitrations was abandoned. The number of additional provisions required for domestic arbitrations was simply not enough to justify the introduction of the problematic distinction between domestic and international arbitrations⁵⁸. Likewise, the exclusion of the limitation to commercial arbitrations was decided in order to spare the interpreter the difficulty of defining the term “commercial”, since the notion thereof provided in the Model Law was different from the one employed in the German Commercial Code. Consequently, the drafters wanted to avoid a situation of different notions of “commercial relationship” in different German laws⁵⁹.

Another provision of the Model Law which the German drafters agreed to modify was art. 28, concerning the choice of law rules. Sec. 1051 of the new German law closely follows the first part of art 28 of the Model Law: it allows the parties to choose the “rules of law” instead of simply “the law”. This expression is commonly interpreted as allowing the parties to choose not only single provisions of different laws to govern different parts of their relationship (the so-called *depeçage*), but also transnational legal principles (*lex mercatoria*, general principles of law, UNIDROIT Principles, and so on), instead of domestic law, as the law governing their contract⁶⁰. However, the German arbitration law modifies the second part of art. 28 of the Model Law which states that, absent a choice of law by the parties, the arbitral tribunal may apply the law determined by the conflict of laws rules which it considers applicable. The Model Law has thus opted for the so-called *voie indirecte* in the determination of the law applicable to the merits of the dispute. Contrary to the approach followed by the Model Law, the German arbitration law has opted for the so-called *voie directe*, whereby, absent a choice of law by the parties, the arbitral tribunal shall refer directly to the applicable law it deems appropriate. The new § 1051 (2) provides that, failing any designation of the applicable law by the parties, the arbitral tribunal shall apply the law of the state with which the subject matter of the

⁵⁸Cfr K. H. Böckstiegel, *An Introduction to the New German Arbitration Act*, cit, p. 22. See also Bundestags-Drucksache n. 13/5274 of July 12, 1996, at p. 5 << in Übereinstimmung mit dem Diskussionsentwurf sieht der Entwurf weder Sondervorschriften für nationale oder internationale Verfahren noch für Verfahren der (internationalen) Handelsschiedsgerichtsbarkeit vor. Die wenige Fälle, in denen unterschiedliche Regelungen für nationale und internationale Verfahren diskutabel erschienen hatten es von ihrem Gewicht her nicht gerechtfertigt, ein entsprechendes Sonderkapitel mit der Folge der Notwendigkeit einer nicht nur für den Gesetzgeber, sondern auch die Gerichte und die sonstigen Rechtsanwender schwierigen Abgrenzung internationaler und nationaler Verfahren vorzusehen>>

⁵⁹K. P. Berger, *Drafting History and Principal Features of the New German Arbitration Law*, cit, p. 47. See also Bundestags-Drucksache n. 13/5274 of July 12, 1996 at p. 5, which observes that the reception of the unclear definition of “commercial”, as laid down in the Model Law <<hätte für das deutsche Recht einen gespaltenen Handelsbegriff zur Folge gehabt, dessen Auswirkungen angesichts der in die Wege geleiteten Reformarbeiten zum Handelsrecht und Handelsregister derzeit nicht überblickbar gewesen wären>>

⁶⁰Cp. A. Redfern and M. Hunter, *op.cit.*, p. 121, Bundestag Drucksache 13/5274, p. 52; K. H. Böckstiegel, *An Introduction to the New German Arbitration Act*, cit, p. 27

proceedings has the closest connection. The drafters decided to depart from the Model Law, because they believed that the new law on arbitration should have the same conflicts of law rule that is included in art. 4 of the 1980 Rome Convention relating to the law applicable to contractual obligations. The rules provided in this Convention – they argued – were public international law obligations with which Germany must comply⁶¹. Since this provision limits the authority of the arbitral tribunal to the application of the “law of a state”, it follows that, in the absence of an agreement on the applicable law by the parties, the arbitrator is not entitled to apply transnational principles on its own initiative⁶². However, even in those cases where the arbitrators apply domestic rules, transnational elements may be introduced by means of what Berger has called the “international useful construction of domestic law”⁶³. This approach is founded on the idea that in international contexts, the interpretation of domestic law according to transnational principles (e.g. the UNIDROIT Principles) shall be admissible⁶⁴.

Finally, a minor modification concerns the discipline of recognition and enforcement of the awards. Art. 36 of the Model Law provides for the same procedure to be applied to both domestic and foreign awards, whereas the German arbitration law envisages two different procedures, one dealing with domestic (§ 1060) and the other with foreign arbitral awards (§ 1061). However, for domestic awards § 1060 provides that the enforcement of a domestic award must be refused if it is affected by a ground which would justify its setting aside under § 1059(2). Both the grounds for setting aside envisaged by this section and the grounds provided in art. 36 of the Model Law closely follow art. V of the New York Convention. Moreover, § 1061 of the German law establishes that recognition and enforcement of foreign awards is regulated by the New York Convention. Thus, as far as the discipline of recognition and enforcement of arbitral awards is concerned, the difference between the Model Law and the

⁶¹Bundestags-Drucksache n. 13/5274 of July 12, 1996, p.53. The drafting of this provision resulted in a conflict between the “traditionalist” and “transnationalist” supporters of international arbitration. The “traditionalist” approach was followed by the representative of the Department on Conflict of Laws at the Federal Minister of Justice, who intervened in the discussion and claimed for the adoption of the same conflict of laws rule envisaged in the Rome Convention. The “transnationalist” were the members of the two working commissions, who tried to convince the minister official that an arbitral tribunal has no *lex fori* and for this reason it is generally acknowledged, since a 1957 Resolution of the Institut de Droit International, that an international arbitral tribunal needs not necessarily apply the conflict of laws provisions in force at its seat. Yet these arguments failed to convince the Minister representative, who insisted on the need to respect the public international law commitments contained in the Rome Convention. K. P. Berger, *The New German Arbitration Law in International Perspective*, cit., p. 14

⁶²O. Sandrock, *Procedural Aspects of the New German Arbitration Act*, cit p. 39.

⁶³K. P. Berger, *The New German Arbitration Law in International Perspective*, cit, p. 15

⁶⁴Cp. ICC Arbitral award in Clunet 1998, in which the arbitrator interpreted the provision of the applicable Dutch Law on force majeure in the light of the corresponding provision of the UNIDROIT Principles of International Commercial Contracts.

German law is more one of system than of substance⁶⁵, as both sources are closely modelled on the New York Convention.

Another aspect deserves attention in this respect: we have already hinted at the fact that the enactment of the Model Law in Germany has sometimes entailed the adoption of legal terms which may result unusual and even misleading to the German reader. The terminology “recognition and enforcement” used by the New York Convention is a case in point: the terms “recognition and enforcement” used in the New York Convention, as well as in § 1060 and 1061 ZPO, must be clearly distinguished from enforcement proceedings in the proper sense. In the German legal system, like in most systems of the world, the enforcement of rights is a two-step process, involving two separate and different sets of proceedings⁶⁶. The first stage (*Erkenntnisverfahren*) has the purpose of reaching a binding determination of whether an alleged right exists. The second stage (*Vollstreckungsverfahren*) consists in the enforcement process in the proper sense and is aimed at executing the right whose existence has been ascertained in the first stage against the non-complying party. Despite the misleading terminology, the proceedings envisaged in the New York Convention and in §§ 1060 and 1061 ZPO belong to the first stage: their purpose is to declare the award enforceable, that is to confer upon it a “title” of enforcement which is the necessary condition for initiating enforcement proceedings in the proper sense. Once a court has declared an award enforceable, the award - or, more precisely, the court order declaring the award enforceable - can be executed in enforcement proceedings, like any other title. These latter proceedings are entirely regulated by German Law (i.e. they have no international source) and depend both on the content of the award (title for the payment of money or non-money title) and on the specific measure sought (enforcement against movables or immovable property, or the garnishment of money claims or non-money titles).⁶⁷

New provisions

⁶⁵K. P. Berger, *Drafting History and Principal Features of the New German Arbitration Law*, p. 48; K. H. Böckstiegel, *An Introduction to the New German Arbitration Act*, cit, p. 29

⁶⁶S.M. Kroll, *Introduction to §§ 1060, 1061*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds) , *Arbitration in Germany: The Model Law in Practice*, cit, p. 481

⁶⁷S. Rutzel and C. Krapfl, *Enforcement of Decisions Declaring Awards Enforceable in Germany*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds) , *Arbitration in Germany: The Model Law in Practice*, cit, p. 1063

In addition to the modifications to the Model Law, the German drafters introduced a number of new provisions regulating some aspects not envisaged by the Model Law. However, they generally refrained from introducing provisions on controversial issues. This would have run counter to the general guideline of achieving the maximum degree of user-friendliness for foreign practitioners, by keeping the text of the new law as close as possible to the wording and spirit of the Model Law. Therefore, issues as multi-party arbitration and set-off are not regulated by the German law. Their solution is left to the German courts⁶⁸.

The most important provision of this group concerns the issue of arbitrability. The UNCITRAL Working Group refrained from regulating this subject-matter in the Model Law, because this was considered as an intolerable interference with the sovereignty of each adopting country. Moreover, it was deemed impossible to include an exhaustive list of arbitrable disputes in the Model Law on which all state delegates could agree. According to the continental European tradition, arbitrability covers those claims based on a right of which the parties can freely dispose, or in respect to which the parties are entitled to conclude a settlement⁶⁹. In doing away with this tradition, the German legislature has adopted a much broader notion of arbitrability, which is modelled on the Swiss arbitration law: § 1030 (1) provides that all disputes which have an economic character are arbitrable⁷⁰. The *travaux préparatoires* clarify that, in order for a dispute to be arbitrable, it suffices that the claimant pursues any direct or indirect economic interest with his claim, no matter whether the claim belongs to public or private law⁷¹. The reason why the drafters decided to adopt such a broad definition of arbitrability is in

⁶⁸On these issues see the following paragraph

⁶⁹P. Schlosser, *Bald neues Recht der Schiedsgerichtsbarkeit in Deutschland?*, cit, p. 725

⁷⁰The requirement of the old German arbitration law that the parties must be able to conclude a settlement on the issue in dispute, has not however completely disappeared. The second part of art 1030(1) of the new arbitration law provides that an arbitration agreement concerning claims not involving an economic interest shall have legal effect to the extent that the parties are entitled to conclude a settlement on the issue in dispute. It follows that if a given claim has an economic character, it can be referred to arbitration even if the possibility of concluding a settlement on it is excluded. If a claim has not an economic character, then the old criterion provided for in the previous law is still into force. Cfr V. Sangiovanni, *la Compromettibilità in Arbitri nel Diritto Tedesco*, Rivista dell'arbitrato, 2006, XVI, 1, p. 221. This broad conception of arbitrability has raised some criticism. Concerns have been expressed that if a claim involving an economic interest is governed by mandatory provisions which prevent the parties from concluding a settlement over it, the parties cannot settle the claim outside arbitral proceedings. In contrast, they may settle during arbitral proceedings, since § 1053 (1) of the German arbitration law allows the parties to agree upon the terms of the award. Accordingly, this broad conception of arbitrability could be relied on in order to circumvent those mandatory provisions excluding the possibility of a settlement over certain claims. Yet, it may be presumed that the arbitrator, in converting a settlement into an award on agreed terms, will exert some control and not issue the award if the settlement contravenes mandatory provisions of law. R. Trittman and I. Hanefeld, *Commentary on § 1030*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds) , *Arbitration in Germany: The Model Law in Practice*, cit, p. 118

⁷¹Bundestags-Drucksache n. 13/5274 of July 12, 1996, p. 35: <<Vermögensrechtliche Ansprüche müssen in übrigen nicht notwendig privatrechtlicher Natur sein. Was für öffentliche Recht angeht, bleibt es bei dem Grundsatz, dass Schiedsgerichtsbarkeit in soweit möglich ist, als die Parteien über den Streitgegenstand einen öffentlich-rechtlichen Vertrag schliessen können>>.

line with the overall objective of the 1998 reform act: increasing the number of arbitrable disputes under German law and promoting Germany as a venue for international arbitral proceedings⁷². Accordingly, claims involving an economic interest are not only claims for the payment of a sum of money, but also declaratory claims and actions for the change of a legal relationship, prohibitory actions and actions for revocation raised to protect economic interests⁷³. This new conception of arbitrability seems to be more in line with contemporary developments in international law. On the one hand, it does away with the old mistrust against arbitration enshrined in the previous arbitration law, which was a typical expression of 19th century thinking. On the other hand, it provides a much clearer criterion to distinguish between arbitrable and non-arbitrable claims. Since nowadays the boundaries between private and public law tend to blur, it may not always be easy to establish whether a given claim is freely disposable, especially where this ascertainment has to be done by an arbitrator dealing with a foreign applicable law⁷⁴. The solution provided in the German and Swiss arbitration laws, accompanied by a worldwide tendency to extend the arbitrability of subject matters⁷⁵, makes the qualification of a given claim much easier: it suffices that the claimant pursues any direct or indirect economic interest, immaterial of whether the claim falls within the public or private law domain⁷⁶. The *travaux préparatoires* reflect this worldwide tendency, by recommending to admit arbitration agreements in almost all civil and commercial matters, except for claims arising out of family and matrimonial law and those in respect of private rental agreements for flats and houses⁷⁷. On the other hand, only those issues will be excluded from arbitration for which a specific legal provision has reserved the right to adjudicate them before domestic courts⁷⁸. This is for example the case of stock exchange transactions, and the already mentioned proceedings related to family law, succession and the validity and existence of non-commercial rental agreements⁷⁹. However, there are still some disputes

⁷²Bundestags-Drucksache n. 13/5274 of July 12, 1996, p. 34

⁷³R. Trittman and I. Hanefeld, *Commentary on § 1030*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice*, cit, p. 117-118

⁷⁴P. Schlosser, *Bald Neues Recht der Schiedsgerichtsbarkeit in Deutschland?*, cit, p. 725

⁷⁵K. P. Berger, *Drafting History and Principal Features of the New German Arbitration Law*, p. 49

⁷⁶Bundestags-Drucksache n. 13/5274 of July 12, 1996, p. 35

⁷⁷F. B. Weigand, *The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden*, cit, p. 401-402. The final version of § 1030 (2) expressly excludes from arbitrability disputes arising under lease agreements on residential accommodation within Germany. On the other hand, the former limitation under German antitrust law has been removed: the German legislature believed that also the arbitral tribunal can deal with the mandatory provisions of this subject-matter in the same way as the national courts. Cp. P.S. Heigl, *Das Deutsche Schiedsverfahrensrecht von 1998 im Vergleich zum English Arbitration Act 1996*, cit, p. 103

⁷⁸K. P. Berger, *Drafting History and Principal Features of the New German Arbitration Law*, cit p. 49; F. B. Weigand, *The UNCITRAL Model Law: New Draft Arbitration Acts in Germany and Sweden*, cit, p. 401

⁷⁹However, family law disputes and disputes over succession will be arbitrable if they concern an economic interest, such as maintenance payments or the dividing of inheritance. By the same token, a claim for the payment of a lease or a claim for

whose arbitrability remains controversial even under the new arbitration law. The most important case is represented by claims related to the validity of the decisions taken by the general meeting in corporations (*Gültigkeit von Beschlüssen der Hauptversammlungen von Kapitalgesellschaften*).⁸⁰ Even if in recent times German case-law has shifted from a general mistrust to a more favorable approach towards the arbitrability of these claims⁸¹, concerns still remain with regard to their effect vis à vis third parties⁸².

The formal requirements for the arbitration agreement laid down in art. 7 of the Model Law have been further clarified in § 1031 (2) and (4) of the German arbitration law⁸³. These additional provisions specify a number of cases not expressly provided for in the Model Law, in which the formality of an arbitration agreement is deemed nonetheless absolved. In particular, an arbitration agreement contained in a document transmitted from the other party to the other and not contested in due time is regarded as valid, provided that this document is to be considered as part of the contract according to trade usages (the so-called “half-written form”)⁸⁴. Moreover, it is envisaged that a bill of lading making reference to an arbitration agreement contained in a charter-party constitutes a valid arbitration agreement. Finally, a special rule on the formal validity of arbitration agreements concerning consumers has been introduced. This rule was introduced because, contrary to the Model Law, the German arbitration law applies also to non-commercial disputes and therefore also to disputes involving consumers. Accordingly, § 1031(5) deals with the formal validity of the arbitration

the payment of damages will be arbitrable as long as the existence of a lease contract is not in dispute. R. Trittmann and I. Hanefeld, *Commentary on § 1030*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice*, cit, p. 122 and 125

⁸⁰P. Schlosser, *Bald neues Recht der Schiedsgerichtsbarkeit in Deutschland?*, cit, p. 725

⁸¹V. Sangiovanni, *La Compromettibilità in Arbitri nel Diritto Tedesco*, *Rivista dell'Arbitrato*, 2006, XVI, 1, p. 229

⁸²Bundestags-Drucksache n. 13/5274 of July 12, 1996, p. 35. In particular, German law (par. 248.1 AktG) provides that where a judgement declares the nullity of a general meeting decision, this judgement shall display its effect with respect to all other shareholders, as well as the executive board and supervisory board members, even if they did not take part to the process. The issue here arises whether this extension of the effects of the judgement to third parties may find application also in the arbitral process. The prevalent doctrine maintains that the arbitral award displays its effects not only with respect to those who take part to the process, but also those who, although not taking part to it, were invited to do so. Moreover, according to a well-known decision of the Federal Supreme Court (BGH, 29.3.1996 – II ZR 124/95, NJW 1996, p. 1753 ff.) , claims challenging shareholder's resolutions are considered arbitrable, as long as the arbitration agreement provides for inclusion of all shareholders in the arbitration procedure, and for all shareholders and the claimant to have equal rights in composing the arbitral tribunal. Accordingly, the arbitration agreement must be drafted in such a way as to reflect the possibility of giving rise to a multi-party arbitration enabling each party to influence the selection of the arbitrator and ensuring that the binding effect of the award extends to all shareholders and to the company itself. V. Sangiovanni, *La Compromettibilità in Arbitri nel Diritto Tedesco*, cit, p. 232; H. Raeschke-Kessler, *The New German Arbitration Act v. Old German Case law: Which Case Law of the of the Bundesgerichtshof (German Federal Supreme Court) is to be Applied to the New Act?*, *Arb Int*, 1998, 141, p. 53; R. Trittmann and I. Hanefeld, *Commentary on § 1030*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice*, cit, p. 121

⁸³K. H. Böckstiegel, *An Introduction to the New German Arbitration Act*, cit, p. 23

⁸⁴For example, arbitration agreements concluded orally and later confirmed by one party in a confirmation letter, not simply an invoice, will fulfill the form requirement. Cp. OLG Hamburg, 14.05.1999, OLGR 2000, p. 19;

agreement concluded by a consumer. In this case, the arbitration agreement must be contained in a document which is separate from the main contract and no other agreements other than those referring to the arbitral proceedings may be contained in this document. Only if a contract is concluded before a public notary, no separate document is required for the arbitration agreement.

In contrast to the Model Law, the new German arbitration law has provided in § 1057 a provision imposing on the arbitral tribunal to decide in its award on the costs and legal fees. This rule is very important for the smooth progress of the arbitration, as party agreements on this issue are frequently missing in practice⁸⁵.

Finally, the new German arbitration act has provided a number of additional provisions regarding the competence of the courts before, during and after the arbitration. Also these rules comply with the user's friendliness guideline and thus they do not affect the basic approach of the Model Law towards court intervention in the arbitral proceedings. Sec. 1026 reiterates art. 5 of the Model Law, which lays down the basic principle of court intervention: no court shall intervene in the arbitral proceedings, except in the cases expressly provided for in the law. The German arbitration law envisages three additional provisions regulating the scope of court intervention prior to the commencement of the proceedings. Sec. 1025 (3) provides that German courts may hear motions relating to the composition of the arbitral tribunal or the rejection or replacement of arbitrators, if the claimant or respondent has his seat or habitual residence in Germany. This provision has been introduced in order to overcome a major inconvenience stemming from the territoriality principle, namely the case where, before the beginning of the proceedings, the parties have not fixed yet the seat of arbitration. Accordingly, absent this provision, German courts would deny their competence to hear motions for the appointment of arbitrators, since the territoriality principle requires the seat to be fixed in that country. Yet, the rule envisaged by § 1025 (3) does not solve the problem in cases where, prior to the beginning of the arbitration, a party wishes to apply to German courts, but it has not his seat or habitual residence in Germany. The second additional provision concerning the court's powers before the beginning of arbitration is § 1032 (2), which provides that the courts are competent to determine the admissibility or non-admissibility of the arbitration. However, parties may apply to the court for this determination only before the constitution of the arbitral tribunal. Finally, § 1034 (2) lays down another special rule concerning the appointment of the arbitrators. It provides that if the arbitration agreement grants preponderant rights to one party with respect to the composition of the arbitral tribunal, which place the

⁸⁵K. P. Berger, *Drafting History and Principal Features of the New German Arbitration Law*, cit., p. 49-50; K. H. Böckstiegel, *An Introduction to the New German Arbitration Act*, cit, p. 28

other one at a disadvantage, the latter party may apply to the court to have the arbitrators appointed by the judge, in deviation from the procedure envisaged in the arbitration agreement. This new rule is in line with the general tendency to maintain as much as possible the validity of the arbitration agreement. An arbitration agreement posing one party at a disadvantage has been sometimes considered by courts as null on grounds of public policy⁸⁶. The German drafters believed that it would be closer to the intention of the parties to uphold their referral to arbitration by eliminating the disadvantage concerning the appointment of the arbitrators⁸⁷. Examples in which German case-law has found such disadvantage include cases where one party has the right to nominate the sole arbitrator or the chairman and the passing of the right of nomination of an arbitrator to the other party following failure by one party to nominate an arbitrator within the time allowed⁸⁸. Moreover, as we will see in more detail in the following paragraphs, this provision may be relied on in multi-party arbitrations when parties are unable to agree on the appointment of one or more arbitrators.

The most important provision regarding the power of the courts during arbitral proceedings concerns the enforcement of interim measures. According to the old German arbitration law, arbitral tribunals were prevented from issuing interim measures. Now the new law complies with art. 17 of the Model Law and, under § 1041 (1), authorises the arbitral tribunal to issue interim measures. Accordingly, German arbitration law provides for concurrent jurisdiction of arbitral tribunals and courts for granting interim relief: unless otherwise agreed by the parties⁸⁹, an application for an interim measure may be submitted to both a state court and an arbitral tribunal⁹⁰. Sec. 1041 (2) goes beyond the Model Law and

⁸⁶Cfr Cour de Cassation, *Sociétés BKMI et Siemens v. Société Dutco*, in Rev. de l'Arb., 1992, pp. 470 et seq.

⁸⁷K. H. Böckstiegel, *An Introduction to the New German Arbitration Act*, cit, p. 25

⁸⁸Cfr P. Nacimiento and A. Abt, *Commentary on § 1034*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds) , *Arbitration in Germany: The Model Law in Practice*, cit, p. 185

⁸⁹Whereas section 1041 expressly states that the parties may contract out the possibility for the arbitral tribunal to grant interim measures, the question whether parties can opt out of access to court for interim relief is highly disputed. The Higher Regional Court (Oberlandesgericht – OLG) of Munich has excluded the possibility of opting out of court ordered interim relief (OLG München 26.10.2000, NJW- RR 2001, 711). Whereas some commentators support this view, others argue in favour of the enforcement of an opt-out agreement. A more nuanced view reads that the opt-out agreement may be recognised only until the arbitral tribunal has been constituted. Another position is that, in order for state court's interim protection to be excluded, the agreement must provide for an alternative institution available to grant interim relief (e.g. The ICC Pre Arbitral Referee Procedure). Cfr R. Kreindler and J. Schafer, *Commentary on § 1033*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds) , *Arbitration in Germany: The Model Law in Practice*, cit, p. 159-160

⁹⁰The wording of § 1041(1), which provides the arbitral tribunal with the power of ordering such interim measures of protection as it may consider necessary in respect of the subject-matter of the dispute, entails a wide margin of discretion upon the arbitral tribunal. This stands in contrast with the narrower power State courts enjoy in assessing claims for interim relief. Under the procedure applicable in the German courts, the judge must order an interim measure once the prescribed conditions for such measures are fulfilled and thus cannot evaluate further its necessity with reference to the subject-matter of the dispute. On the other hand, the court has the discretion to decide whether to grant enforcement of an arbitral tribunal-granted interim measure. However, given the above mentioned discretion of the arbitral tribunal to order interim relief, German courts have in practice refrained from reviewing on the merits the measures ordered by the arbitral tribunal. Nevertheless, according to legal scholars, the court is entitled to review the interim measure according to its conformity to

provides that a party may request the court to enforce interim measures issued by the arbitral tribunal and the court, in turn, can admit execution, unless the same party has already applied for such a relief to a local court⁹¹. This latter rule strengthens the authority of the arbitral tribunal, because in many jurisdictions, if permitted, interim measures by arbitral tribunals are not covered by an enforcement sanction⁹². Yet, under the new German arbitration law, interim measures do not constitute enforceable awards, nor are they equated with arbitral awards. In regulating the enforcement of interim measures, the new German arbitration law has envisaged a special enforcement regime for interim measures, which confers to the enforcing court a certain degree of discretion⁹³. According to par 2 of § 1041 of the German arbitration law, a court may recast an interim measure of protection issued by the arbitral tribunal, if this is necessary for the purpose of enforcing the measure. This provision enables the court to reconcile the extreme flexibility arbitrators may have in ordering interim relief and the often exhaustive and limited list of interim measures available under national procedural law⁹⁴. The following paragraphs of § 1041 provide the court with further powers aimed at modifying or restricting the effects of an interim measure ordered by the arbitral tribunal. Par. 3 states that the court may upon request repeal or amend an interim measure⁹⁵, whereas par. 4 provides that if the interim measure proves to be unjustified from the outset, the party who obtained its enforcement is obliged to compensate the other party for the damage resulting from the enforcement of such a measure. Finally, it should be noted that, since the German arbitration law is based on the principle of territoriality, the enforcement regime of interim measures envisaged therein is applicable only within the territory of Germany, i.e. to the enforcement in Germany of interim measures granted by arbitral tribunals sitting in Germany⁹⁶. On the other hand, the enforcement of interim measures abroad, as well as the enforcement in Germany of interim measures issued by arbitral tribunals sitting in another country, are not covered by the New York Convention. As we have seen, under the New York Convention interim measures

ordre public.

⁹¹Accordingly, this provision confers upon the competent court (ex § 1062.1, the Higher Regional Court designated in the arbitration agreement or located in the district where the arbitration has its seat) the task of solving possible conflicts between interim relief ordered by a State court and similar measures issued by arbitral tribunals

⁹²K. H. Böckstiegel, *An Introduction to the New German Arbitration Act*, cit, p. 25.

⁹³K. P. Berger, *The New German Arbitration Law in International Perspective*, cit, p. 11

⁹⁴*ibidem*

⁹⁵This will essentially occur in cases where it is necessary to convert a measure issued by an arbitral tribunal into one enforceable under German law (cp. OLG Karlsruhe 19.12.1994, ZZP Int 1996, p. 91) or a party alleges a change of the circumstances on which the granting of the interim measure was grounded (cp. OLG Jena 24.11.1999, BB 2000, Beilage no 12, p. 22).

⁹⁶*ibidem*

issued by an arbitral tribunal are not considered as enforceable, since by their very nature they do not constitute final and enforceable awards.

Art. 6 of the Model Law is an open-ended provision, through which each enacting state should specify the court competent to perform functions referred to the courts in other articles of the Model Law. The new German arbitration law entrusts the Court of Appeal with the primary competence to hear all motions related to arbitration and in particular on the following matters: appointment and challenge of arbitrators, statement of the admissibility or inadmissibility of arbitral proceedings, determination of the arbitral tribunal's jurisdiction, enforcement and modification of interim measures ordered by the arbitral tribunal, setting aside and enforcement of the award. These decisions are final and may not be appealed before the Supreme Court, except for decisions concerning the arbitrator's competence and the setting aside and enforcement procedures⁹⁷. Therefore, the discipline of the proceedings before state courts goes in the direction of a simplification and speeding up of court procedures in this context⁹⁸: it is hoped that this will reduce the amount of time and money the parties have to spend in German courts⁹⁹. In addition, it is expected that the concentration of jurisdiction into a small number of higher level courts¹⁰⁰ will foster the rapid formation of expertise and of a significant body of case-law on arbitration¹⁰¹.

Unsettled issues

As we have repeatedly said, in order not to undermine the success of the reform, the German legislator decided to leave aside from the scope of the new law those controversial issues on which no uniform solution could be found. In this paragraph two of the most disputed issues which could not find a regulatory solution in German arbitration law will be discussed: set-offs and multi-party arbitrations.

⁹⁷Under the old arbitration law, judicial decisions on arbitration matters were taken by the district court; they could be appealed to the competent Court of Appeal and its decisions could in turn be brought before the Supreme Court. Now the much criticized instances of appeal have been finally replaced by a sole one: from the Court of Appeal under very restrictive conditions to the Supreme Court.

⁹⁸K. H. Böckstiegel, *An Introduction to the New German Arbitration Act*, cit, p. 29

⁹⁹K. P. Berger, *Drafting History and Principal Features of the New German Arbitration Law*, cit, p. 51

¹⁰⁰This tendency is also exemplified by section 1062 (5), which authorises those federal states with more than one Court of Appeal to confer jurisdiction with respect to all arbitral matters to just one court.

¹⁰¹O. Sandrock, *Procedural Aspects of the New German Arbitration Act*, cit p. 45; K. H. Böckstiegel, *An Introduction to the New German Arbitration Act*, cit, p. 29; K. P. Berger, *International Economic Arbitration in Germany: a New Era*, cit, p. 113

Set-off

The admissibility and reach of set-off is one of the most disputed issues in international arbitration, since it calls into question one of its fundamental principles, namely the will of the parties. Set-off is a particular form of counterclaim whereby defendant does not object to the existence of plaintiff's claim, but rather alleges that it has been extinguished or reduced through an opposite claim he has against plaintiff¹⁰². The rules of the most important arbitral institutions admit that set-off falls within the scope of the arbitration agreement¹⁰³. This follows from the basic principle that arbitral jurisdiction is based on the will of the parties and that the arbitral tribunal may decide only on the issues which fall under the scope of the arbitration agreement¹⁰⁴. Accordingly, this is also the position of most German commentators, who recognise set-off only in so far as it falls within the scope of the arbitration agreement; if the claim or counterclaim relied upon for set-off exceeds the scope of the arbitration agreement, such claim may only be relied upon if the other party does not object to the tribunal's jurisdiction¹⁰⁵. But opinions diverge in cases where set-off stems from a relationship which is not covered by the arbitration agreement. Most scholars argue that, since the arbitral jurisdiction is founded on the will of the parties, the arbitral tribunal is prevented from deciding over claims or counterclaims not subject to the arbitration agreement. On the other hand, others argue that the principle of the will of the parties implies that, when the parties agree to submit the decision of their dispute to an arbitral tribunal, the latter has to decide on all defences raised against the main claim¹⁰⁶.

¹⁰²V. Pavic, *Counterclaim and Set-off in International Commercial Arbitration*, Annals International Edition, 2006, p. 103 available at SSRN: <http://ssrn.com/abstract=1015713>. See also definition provided in Black's Law Dictionary: <<a counter-claim demand which defendant holds against plaintiff, arising out of a transaction extrinsic of plaintiff's cause of action>>. Although in the common law a distinction between a set-off and a counterclaim is often made, in arbitration practice it is virtually unknown: as Berger notes, set-off and counterclaim are only a hair breadth's away in international commercial arbitration, since they are often based on similar factual background (reciprocal debts of the parties), the motivation and goals of their use is similar and they often result in similar decisions.

¹⁰³Cp. e.g. Art 3(2) International Arbitration Rules of the American Arbitration Association; art 7a Rules of Arbitration and Conciliation of the Vienna Arbitration Centre; art 25(2) Arbitration Rules of the Netherlands Arbitration Institute; art 19(3) UNCITRAL Arbitration Rules. This requirement is however subject to a broad interpretation: it is generally argued that if the set-off is in relation to the same contract which contains the arbitration clause, or a contract with a sufficiently close connection to the main contract and the clause covers all disputes arising under or in connection with the main contract, then the arbitral tribunal may well have jurisdiction to consider the claim. Cfr A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, 1991, p. 319

¹⁰⁴V. Pavic, *Counterclaim and Set-off in International Commercial Arbitration*, cit., p.105

¹⁰⁵K. Sachs and T. Lörcher, *Commentary on § 1046*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice*, cit, p. 316 and bibliography quoted therein.

This is the rationale underlying art. 21(5) of the Swiss Rules of International Arbitration¹⁰⁷, according to which the arbitral tribunal shall have jurisdiction to hear a set-off defence even when the relationship out of which this defence is said to arise is not within the scope of the arbitration clause, or is the object of another arbitration agreement or forum selection clause. A mid-ground position admits set-off not covered by the arbitration agreement only where certain conditions are met, namely the counterclaim is undisputed because it has already been adjudicated, or the party against whom it is opposed has acknowledged the arbitral tribunal's jurisdiction, or the parties have submitted to a set of regulations of an arbitral institution providing for an extension of jurisdiction¹⁰⁸. In such cases it is argued that the parties have, at least implicitly, agreed on the arbitral tribunal's jurisdiction to decide over set-off falling outside the arbitration agreement and therefore reasons of justice and procedural efficiency should prevail. Set-off may be relevant not only during arbitration proceedings, but also after an award has been rendered and enforcement is sought. In this case it may happen that a party raises set-off as a ground for refusing enforcement. The extent to which substantive defences such set-off, in addition to those defences listed in § 1059 ZPO, may be raised as a defence in the proceedings for the declaration of enforceability of the award, is controversial¹⁰⁹. Relying on grounds of procedural efficiency, the prevailing view is that such defence, which may be the object of a separate proceeding against the title of enforcement under § 767 ZPO, can already be relied on in the proceedings to have an award declared enforceable. However, unlike the defences in § 1059, they do not lead to the setting aside of the award, but merely prevent the declaration of enforceability¹¹⁰. It is argued that it would run counter to the principle of *venire contra factum proprium*, or at least procedural efficiency, if state courts should first declare an award enforceable and later deny its execution for reasons already existing at the time when the award was declared enforceable¹¹¹. On the other hand, it is observed that this view would run against the purpose of the proceedings for the declaration of enforceability, which are aimed at

¹⁰⁶C. Benedict, *Construction Arbitration in Germany*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice*, cit, p. 915

¹⁰⁷In order to promote international arbitration in Switzerland and to harmonise existing rules of arbitration, in 1994 the Chambers of Commerce of Basel, Bern, Geneva, Ticino, Vaud and Zurich have adopted uniform rules of international arbitration proceedings which replace the Chambers' former rules and are largely based on UNCITRAL Arbitration Rules.

¹⁰⁸Cfr P. Schlosser, *Das Recht des internationalen privaten Schiedsgerichtsbarkeit*, Mohr Siebek Verlag, 1989, p. 301; H. Raeschke-Kessler, K.P. Berger, *Recht und Praxis des Schiedsverfahrens*, RWS Verlag Kommunikationsforum, 1999, p. 169-170

¹⁰⁹For the distinction between proceedings for the declaration of enforceability and enforcement proceedings in the proper sense see *supra*, p. 263

¹¹⁰S. Kroll, *Commentary on § 1060*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice*, cit, p. 501

¹¹¹S. Kroll, *Commentary on § 1061*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds), *Arbitration in Germany: The Model Law in Practice*, cit, p. 563

facilitating the obtainment of this declaration. This purpose would be frustrated if, in addition to the defences listed in art. V of the New York Convention and §1059 (2) ZPO, material defences could be raised requiring extensive evidence. Moreover, this would also run counter to the exhaustive character of the list of defences which may be raised against recognition and enforcement of awards. That is why some authors maintain that only set-off which is not contested or whose existence has already been determined in a binding court judgement could be considered, for reason of procedural efficiency, in proceedings for a declaration of enforceability¹¹². In any case, it is agreed that only set-offs which could not be raised during the arbitral proceedings may be raised at this stage. These are either defences which only arose after the award was rendered (e.g. fulfilment of the award), or defences for which the arbitral tribunal lacked jurisdiction (e.g. set-off against a claim not covered by the arbitration agreement).

Multi-party arbitrations

The lack of regulation, both in the Model Law and in the German arbitration act, of multi-party arbitration issues has been considered by German doctrine as a regrettable omission¹¹³. Given the widespread importance of this form of arbitration in international practice – it has been observed – a legislator which is willing to issue a piece of legislation in line with the modern needs of practice, should necessarily deal with these kinds of problems. Nonetheless, this omission is not without reason: the drafters did not want to risk the success of the project by dealing in the law with one of the most disputed issues of modern arbitration law and practice¹¹⁴. Therefore, in the wake of the principle of user friendliness, they decided to include in the law only those provisions reflecting internationally or nationally accepted standards.

Multi-party arbitrations concern disputes with more than two parties on claimant or respondent side. It is possible to distinguish two different situations in which multi-party disputes arise: one is when claims are made by several claimants or against several respondents; the other stems from the so-called

¹¹²S. Kroll, *Commentary on § 1061*, cit, p. 564

¹¹³Cfr F. B. Weigand, *The UNCITRAL Model Law*, cit, p. 400; P. Schlosser, *Bald neues Recht der Schiedsgerichtsbarkeit in Deutschland?*, cit, p. 724

¹¹⁴K. P. Berger, *The New German Arbitration Law in International Perspective*, cit, p. 12

string contracts, that is a number of connected contracts generating a chain of connected claims¹¹⁵. Despite this distinction, the issue related to multi-party disputes are very much the same. In particular, the most controversial ones are the problem of the joinder of parties and the appointment of the arbitral tribunal.

As far as the first issue is concerned, the question arises whether, in the absence of agreement of all the parties potentially involved in the multi-party dispute, the arbitrator or the state court are entitled to order a compulsory consolidation of the arbitrations. If on the one hand reasons of justice and procedural efficiency (namely, avoiding contradictory decisions, as well as time and cost saving) support the need for a consolidation of multi-party disputes, on the other hand this may often undermine the will of the parties: it may well happen that the parties to the main arbitration do not want other parties involved in “their” arbitration, or conversely that third parties do not want to join other parties' arbitration. Consequently, arbitral tribunal often repeat that neither can they extend the effect of an arbitration agreement to third parties¹¹⁶, nor can they force parties to an arbitration agreement to participate to an arbitration with third parties¹¹⁷. Although there are some examples to the contrary¹¹⁸, the general view in most jurisdictions is that neither the state court nor the arbitral tribunal can order consolidation, lacking a specific agreement among all parties involved. An arbitral procedure which is imposed upon parties can hardly be said to be in accordance with the agreement of the parties and recognition and enforcement of an award made in such circumstances may be refused under the provisions of the New York Convention and the Model Law¹¹⁹. This is also the unanimous position which is found in German doctrine and case-law.¹²⁰

¹¹⁵String contracts are very frequent in the construction sector. It happens very often that, within the framework of an international construction project, the employer enters into a contract with the main contractor, who in turn has contracted with various sub-contractors and suppliers. If the employer has any complaints regarding the work done, he will arbitrate against the main contractor. The latter, in turn, will then seek to recover from the sub-contractor or supplier concerned with the defective work, by way of a separate arbitration. It is often considered that, in this situation, it would be better if all parties involved in the string contracts could be brought into the same set of arbitral proceedings, so as to save time and expenses and avoid the risk of inconsistent awards. A. Redfern and M. Hunter, *The Law and Practice of International Commercial Arbitration*, cit, p. 184

¹¹⁶Cp. e.g. *OIAETI v. Sofidif*, Rev. Arb. 1987, p. 372

¹¹⁷Cp. e.g. *CA Weadlands v CLCand others*, 2 Lloyd's Rep. , 1999, p. 739

¹¹⁸Especially in the United States, some state courts and legislations admit the possibility of a judicially consolidated arbitration, also in the absence of a specific party agreement. This doctrine, which is founded on an analogical interpretation of the federal rules of civil procedure, has however been rejected by the Court of Appeals 2nd Cir. in 1993, although the Supreme Court has not yet had the chance to rule on this issue. Moreover, art 1046 of the Dutch Code of Civil Procedure confers upon the President of the Amsterdam Tribunal of First Instance the power of consolidating two arbitral proceedings having connected objects and both pending in Holland. Cfr J. F. Poudret and S. Besson, *Droit Comparé de l'Arbitrage International*, Bruylant, 2002, p. 215-216

¹¹⁹A. Redfern and M. Hunter, *The Law and Practice of International Commercial Arbitration*, cit, p. 186-7

¹²⁰Cfr P. Nacimiento and A. Abt, *Commentary on § 1035* , in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds) , *Arbitration in Germany: The Model Law in Practice*, cit, p. 203

Similar underlying problems characterise the issue of the appointment of arbitrators in multi-party disputes when the parties fail to reach an agreement. In this case we find a conflict between needs for procedural efficiency and the need to respect the principle of equal treatment between the parties, in particular the need to provide the same degree of influence for each party in appointing the arbitrators. Where the arbitration agreement or the arbitral institution rules provide for the appointment of a sole arbitrator, the plurality of parties deemed to participate to his choice does not pose problems. In the absence of an agreement among parties, the arbitrator will be designated by the arbitral institution or the state court. But where, as it is now the established custom, a three-member arbitral tribunal is envisaged, the presence of a plurality of parties may often result in a serious obstacle to its appointment. This happens especially where there are multiple parties only on one side (i.e. multiple claimants vs one defendant, or multiple defendants vs one claimant) Sec. 1035 ZPO, which establishes the appointment procedure in the absence of party agreement, is tailored only to the normal case of a dispute between two parties. Its application to multi-party disputes would entail that multiple parties on one side of the dispute should jointly nominate one arbitrator. In case of non-agreement among the parties combined on one side, the state court will nominate the missing arbitrator. By contrast, the other side, consisting of only one party, will have no difficulty in nominating its own arbitrator, since it does not have to reach an agreement with others. This situation has been considered by German case-law and doctrine as an infringement of the principle of equal treatment between the parties, since it does not provide each side of the dispute with the same influence on the composition of the arbitral tribunal¹²¹. It is generally accepted that the solution whereby each party will nominate an arbitrator (one party/one judge) is not practicable in this case, first because the arbitral tribunal may then consist of an undefined (and possibly too large) number of arbitrators¹²², secondly because the side consisting of only one party would be under-represented¹²³. The solution which is emerging in international practice is that in the absence of an agreement among parties all the arbitrators should be appointed by the arbitral institution or the state court¹²⁴. This is for example the approach adopted by the ICC Rules: art. 10 (1) provides that multiple claimants and defendants first have the opportunity to propose jointly an arbitrator (and this implies that each party gives up the right to nominate his own arbitrator); if they fail to do so, the ICC will appoint each member of the arbitral tribunal and also designate one of them to

¹²¹BGH 03.07.1995, BGHZ 65,69; BGH 29.03.1996, NJW 1996, 1753

¹²²A. Redfern and M. Hunter, *The Law and Practice of International Commercial Arbitration*, cit, p. 188

¹²³Münchener Kommentar zur Zivilprozessordnung, 2001, Vol 3, § 1035, par 34

¹²⁴J. F. Poudret and S. Besson, *Droit Comparé de l'Arbitrage International*, cit, p. 213-214

act as the chairman¹²⁵. A similar solution has been adopted in the revised Arbitration Rules of the German Institution of Arbitration, which entered into force on July, 1, 1998¹²⁶. Finally, this is also the prevailing opinion followed by German courts¹²⁷. This opinion is founded on an analogical interpretation of § 1034(2) ZPO, which, as we have already seen, provides that if the arbitration agreement grants preponderant rights to one party with respect to the composition of the arbitral tribunal, which place the other one at a disadvantage, the latter party may apply to the court to have the arbitrators appointed by the judge, in deviation from the procedure envisaged in the arbitration agreement. On this reading, the possibility of deviating from the arbitration agreement would allow for the appointment of the whole arbitral tribunal by the court, including the chairman. The rationale underlying this solution is that in multi-party disputes it is impossible to guarantee the same degree of influence for each of the parties on the appointment of the arbitrators. Consequently, procedural efficiency and the need to avoid deadlocks in arbitral proceedings should prevail over the right of each party to nominate its own arbitrator. Yet, this view has also been subjected to criticism, since it risks undermining one of the most important advantages of arbitration with respect to litigation¹²⁸. One of the main reasons why parties decide to resort to arbitration is arguably the possibility of influencing the constitution of the tribunal by nominating their own arbitrator; consequently, it is hard to justify why a party should give up his right to appoint his own arbitrator just because there are multiple parties involved on the other side.

Ten years after: is the inferiority complex overcome?

¹²⁵A similar provision is found in the most important arbitral institutions' regulations: cfr e.g. Arbitration Rules of the London Court of International Arbitration art 8; Arbitration Rules of the American Arbitration Association art 6.5, Swiss Rules art. 8.

¹²⁶According to sec. 13(2) of the DIS Arbitration Rules, if the parties cannot agree on the nomination of the two party-nominated arbitrators, these are nominated by the arbitral institution. Once they are appointed by the DIS, the two arbitrators will in turn nominate the chairman. The solution provided by the DIS Rules slightly differs from that adopted by the ICC and LCIA Arbitration Rules, according to which, if the parties cannot agree on the nomination of the tribunal in multi-party situations, the whole tribunal and not only the two party-nominated arbitrators shall be appointed by the arbitral institution. Cp. K. P. Berger, *The New German Arbitration Law in International Perspective*, cit, p. 12

¹²⁷BGH 29.03.1996, NJW 1996, 1753; OLG Frankfurt 24.11.1995, SchiedsVZ 2006, 219

¹²⁸J.G. Frick, *Arbitration and Complex International Contracts*, Kluwer, 2001, p. 233

After ten years since the coming into force of the new German arbitration law, one may wonder if the strenuous effort carried out by German lawyers to overcome their homeland's “inferiority” vis à vis arbitration has proved successful. The image of the half-empty, half-full glass illustrates well the case. Confidentiality in arbitration is a serious hurdle in the study of this subject-matter. As a large part of awards is unpublished, there are only limited empirical data available and thus it is difficult to draw a complete picture of the phenomenon. The only statistics available on German arbitration are those published in the ICC and the DIS reports. The ICC statistics undoubtedly show not only a constant increase of arbitrations taking place in Germany (which, as we have repeatedly seen, is the most important goal of the 1998 reform), but also an increase of German arbitrators and parties. In the period 1992-1997 the number of German arbitrators, German parties and places of arbitration in Germany was 52, 80 and 10 respectively. In the period 1998-2003 (that is, soon after the coming into force of the 1998 reform) these figures have raised to 76, 115 and 21 respectively¹²⁹. Accordingly, data show that the number of arbitrations taking place in Germany has doubled since the adoption of the new law. In this respect, the 1998 reform can be considered a success. But if on the other hand we compare these data to the overall amount of arbitral disputes decided every year by the various arbitral institutions, we must conclude that Germany still holds a very small stake in the arbitration business, certainly not mirroring its leading role in international trade. One can get the whole picture, by considering that more than 500 new cases are decided under the ICC auspices every year and that the number of cases decided by the Hong Kong International Arbitration Centre (HKIAC) increased from 54 cases in 1990 to 281 in 2005, whereas the number of CIETAC arbitrations increased from 238 in 1990 to 979 in 2005¹³⁰. Consequently, with respect to worldwide arbitration practice, Germany's “inferiority” still remains, even if the relatively steep increase in ICC arbitrations taking place in Germany looks promising. If we look at the statistics provided by the DIS, which mainly regard domestic arbitration¹³¹, we find an even more significant increase in arbitration practice. From its creation in 1992, the number of cases decided under the DIS auspices has increased from 20 in 1992 to over 40 in 1997 (with a total

¹²⁹Data quoted in D. Kuhner, *ICC Arbitration in Germany*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds) , *Arbitration in Germany: The Model Law in Practice*, cit, p. 839. For the next 6-year period, data are available only for the years 2004 and 2005: the number of German arbitrators has so far been 74, that of German parties 114 and arbitrations taking place in Germany have been 17.

¹³⁰These data are quoted in C. N. Brower, *W(h)ither International Commercial Arbitration? The Goff Lecture 2007*, *Arb Int*, 2008, 24, 2, p. 181-182

¹³¹According to the DIS statistics, only 25-30 percent of the cases involve non-German parties. J. Bredow and I. Mulder, *Introduction to the DIS*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds) , *Arbitration in Germany: The Model Law in Practice*, cit, p. 659

value of approximately EUR 46 million) and to 74 in 2006 (with a total value of EUR 500 million)¹³². Accordingly, after the coming into force of the 1998 reform, the number of DIS arbitrations is increased nearly for times and their total value has increased of more than ten times. If we also add that Germany, given the high number of German parties involved, appears now as one of the main user of ICC arbitration in Europe¹³³, we can argue that the commitment of German lawyers in promoting the practice of arbitration has not been in vain, but has produced a sort of side-effect: far from promoting Germany as a venue for international arbitration, their effort has been crucial in the diffusion of an arbitration culture among German companies and businessmen, which now consider resort to arbitration as the preferred means for the settlement of their disputes.

¹³²Data quoted in in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento, *Germany as a Place for International and Domestic Arbitrations – General Overview*, in ID (eds), *Arbitration in Germany: The Model Law in Practice*, cit, p .6

¹³³D. Kuhner, *ICC Arbitration in Germany*, in K. H. Böckstiegel, S.M. Kroll, P. Nacimiento (eds) , *Arbitration in Germany: The Model Law in Practice*, cit, p. 838

SECTION IV: THE RECEPTION OF THE MODEL LAW IN ENGLAND AND SCOTLAND

The development of English arbitration legislation

The “symbiotic relationship” between the commercial bar and the English arbitration community

The large extent of court supervision over the arbitration process has been for many centuries the distinctive feature of English arbitration law. One cannot understand this particular aspect without taking into account the “symbiotic relationship” among the commercial bar, the London Commercial Court and the arbitration community which has been crucial in the development of English arbitration and commercial law. London’s commercial bar represented – and to a large extent still represents today - a small community within the barristers’ elite: it comprises less than 10 percent – some 550 out of 6,500- of the bar in general¹. Nonetheless, it has until recently laid at the heart of the development of English business law. The commercial bar has provided the largest number of leading figures within commercial judges and arbitrators. For example, from the commercial chambers came Justice Michael Mustill, now Lord Mustill of the House of Lords; sir Michael Kerr, formerly judge to the Court of Appeal, then president of the London Court of International Arbitration; sir Johan Steyn, former judge of the Commercial Court and the Court of Appeal and president of the DAC (Departmental Advisory Committee, on which see below) and sir Anthony Evans, chief Justice of the Commercial Court.² All these commercial judges became also key figures in the London arbitration community in the 1980s and 1990s³.

¹Y. Dezalay and B. Garth, *Dealing in Virtue*, University of Chicago Press, 1996, p. 130

²Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, pp. 131-132

³Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 132

Within the framework of this “symbiotic relationship”, resolution of arbitral disputes occurred largely under the supervision of the commercial bar and the Commercial Court. The routine administration of commercial disputes was run by non-legal professionals highly knowledgeable of a particular trade sector (shipping, construction, insurance), but commercial barristers reserved the right to intervene whenever a serious legal question was raised⁴. Accordingly, they acted as “double agents”, serving the interests of the merchants who retained their services and their own interests as lawyers⁵. On the one hand, they assured diffusion of flexible rules for the conduct of business (e.g. standard contract terms, “English style “ arbitration rules), on the other hand they contributed to the selection of a small number of troubling legal issues which deserved to be decided by professional lawyers (namely, the commercial barristers and the Commercial Court's judges), because they could contribute to the enrichment and renovation of commercial caselaw. It comes thus as no surprise that in the 1970s it was estimated that roughly 40-50 percent of the cases decided by the Commercial Court was represented by arbitration appeals⁶.

The earlier legislation

The development of English arbitration law has always been centered on the relationship between the court and the arbitration process. Starting from 1698 a number of Acts of Parliament have attempted to solve what was felt as one of the major drawbacks of arbitration: the non-enforceability of the arbitration agreement⁷. The 1698 Statute⁸ enabled a party to an arbitration to enforce a written arbitration agreement by an action of contempt of court. This was possible by means of a fiction, whereby the agreement to arbitrate was treated as though the reference to arbitration had been made not by the parties themselves, but by the court under its power to let issues of fact arising in a pending civil action be decided by a referee rather than by a jury⁹. The result was that the court could apply to

⁴Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, pp. 198-199

⁵Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 119

⁶Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 131

⁷ Cfr L. Mustill and S.C. Boyd, *Commercial Arbitration*, vol II, Butterworths, 2001, p. 4; A. Tweeddale and K. Tweeddale, *Arbitration of Commercial Disputes: International and English Law and Practice*, Oxford University Press, 2007, p. 482

⁸ 9 & 10 Will 3 c. 15

⁹L. Mustill and S.C. Boyd, *Commercial Arbitration*, vol II, cit, p. 5

the recalcitrant party to an arbitration the same penalties which could be imposed on a litigant who failed to co-operate in an order issued by the court¹⁰. However, this fiction implied a large degree of court supervision over the arbitration process. It was natural for the court to consider such reference to arbitration as though it had stemmed from a real reference in a pending action and accordingly to impose on the arbitral process the same orders as though the fiction had been true. So, the court could not be expected to enforce an award containing manifest errors of law appearing on the face of the award itself; by the same token, the court would set aside an award which was the result of procedural unfairness, since the mandate of the arbitrator, like that of the referee, was to reach a conclusion by fair means. These powers of review seriously undermined the practical importance of the arbitration process, since it could frequently happen that a minor procedural error or any conflict on a question of law could result in the complete annulment of the award. Accordingly, the Common Law Procedure Act 1854 established a framework within which the court's power of review could be exercised. In particular, judicial control over arbitration proceedings was channelled into two forms of review: the so-called special case procedure and the power to set aside the award for errors appearing on the face of the award itself. The first was a special form of appeal, whereby the parties could ask the arbitral tribunal to submit to the court's decision any question of law arising out of the award; the second empowered the court to set aside an award if it appeared from the award itself that the arbitral tribunal had reached some erroneous conclusions of fact or law¹¹. Despite these amendments, the tight control of the court on the arbitration process remained. First, the court had the power to intervene, by orders to set aside or remit the award, in case of procedural misconduct or error. Secondly, the parties had a substantially unrestricted right of appeal to the High Court on questions of law arising out of an arbitration award.¹² As a result, in order to escape the strict judicial review, English practice had developed some devices which undermined arbitration as a rational and effective dispute resolution process. For example, in order to avoid that any *prima facie* error might lead to the annulment of the award by the court, arbitral tribunals frequently made two alternative awards premised on two opposing views of the law, from which the court could choose according to its opinion on the law¹³, or even declined to give reasons for their decisions and therefore rendered unmotivated awards¹⁴. The

¹⁰*ibidem*

¹¹D. St. J. Sutton and J. Gill, *Russell on Arbitration*, Sweet and Maxwell, 2003, p. 19

¹²Lord Mustill, *A New Arbitration Act for the United Kingdom? The Response of the Departmental Advisory Committee to the UNCITRAL Model Law*, *Arb Int*, 1990, 6, 1, p. 8

¹³L. Mustill and S.C. Boyd, *Commercial Arbitration*, vol II, cit, p. 6

¹⁴D. St. J. Sutton and J. Gill, *Russell on Arbitration*, cit., p. 20; B. Zuffi, *L'Arbitrato nel Diritto Inglese*, Giappichelli, 2008, p. 15

tight judicial control was criticised as being not in line with the concept of arbitration itself. Arbitration, it was said, is a consensual process chosen by the parties precisely because they wish to avoid litigation¹⁵. Consequently, a “minimalist” approach to court intervention was required, limited to the bare minimum extent necessary to ensure that the arbitration agreement and any resulting award could be enforced.¹⁶

The 1979 reform

The very close partnership among the commercial bar, arbitration networks and the commercial court has remained crucial to the development of arbitration law until the 1970s, when the system had to confront with an unprecedented crisis. The steep increase of international trade had caused an expansion of the arbitration market, which had in turn led to a flood of appeals to the Commercial Courts which was hard to handle¹⁷. In addition, American law-firms, which now dominated the arbitration market, started calling into question the excessive involvement of the courts in the English arbitration system. Accordingly, they increasingly preferred resort to ICC arbitration in Paris or Switzerland, where they were less likely to get tied up in the courts and thus could provide their clients with a quicker enforceable decision of their dispute¹⁸. As a leading arbitrator has said, referring to the practice of international arbitration in the 1970s, “no one but an Englishman would recommend London as a place of international arbitration”¹⁹. In this new context, a new generation of arbitrators, made up in part of solicitors, began to support the dominating ICC-style arbitration partly because of their cosmopolitan background and partly because, as solicitors, they were given the opportunity to handle an arbitration from start to finish independently of the barristers' intervention. This has in turn undermined the barristers' dominant role in developing commercial law²⁰. This new generation of arbitrators, supported by an avant-garde of members of the House of Lords with a similar

¹⁵Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 9

¹⁶*Ibidem*; L. Mustill and S.C. Boyd, *Commercial Arbitration*, vol II, cit, p. 6

¹⁷Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 134

¹⁸Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 135

¹⁹Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 129. This statement is confirmed by the fact that throughout the 1970s the ICC had refused to designate London as the site of an arbitration unless the parties had specifically designated this city as the place of arbitration.

²⁰Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 144

cosmopolitan background²¹, formed a sort of internationalist community within the commercial bar, which engaged in a reform campaign against excessive control of the courts over arbitration²². In 1979 this avant-garde succeeded in passing a bill for the reform of the arbitration law, which only partly remedied the flaws in the system. The key feature of this reform was the abolition of the special case procedure and the introduction of a general right of appeal to the High Court, confined to questions of law only, therefore leaving decisions on questions of fact to the exclusive determination of the arbitral tribunal²³. This reform was prompted by the concerns that the unrestricted right to enact the special case procedure represented a considerable disincentive towards choosing England as a forum for international commercial arbitration. By contrast, it was argued that the special case procedure was vital to the ability of the Commercial Court to ensure the continued development of English commercial law and thus the pre-eminence of English law in international commerce. The provision of a general procedure of appeal on a point of law found in the 1979 Act attempted to strike a balance between those views: the parties could, as a general rule, exclude the possibility of an appeal on a question of law except from certain categories of contracts (the so-called special categories: shipping, commodity, and insurance contracts) which provided for arbitration in London and were accordingly vital to the flow of cases to the Commercial Court and to the maintenance of the symbiotic relationship among barristers, courts and arbitration which has been described above²⁴.

In addition, this enlightened elite managed to confine the right of appeal into very narrow limits. In a series of judgments in the early 1980s, the House of Lords cut down dramatically the opportunities for appeal to the courts²⁵. Finally, the cosmopolitan elite secured close ties with the ICC and various other international bodies²⁶. For example the LCIA and ICC frequently participated together in conferences; the ICC committee in London was chaired by sir Michael Kerr of the LCIA; Karl Heinz Bockstiegel, one of the best known arbitrators of the ICC, succeeded sir Michael Kerr as president of the LCIA.

²¹For example, to this group belonged Lord Wilberforce, a cosmopolitan with a French wife (the daughter of a French judge), who served as an arbitrator in the ICC already in the early 1970s; Lord Mustill who speaks fluent French and wrote the early drafts of his well-known treatise on arbitration while he was in France; sir Michael Kerr, who was a German immigrant and is fluent in French as well.

²²Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 137

²³D. St. J. Sutton and J. Gill, *Russel on Arbitration*, cit., p. 20

²⁴Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 137

²⁵Cfr e.g. *BTP Dioxide Ltd v. Pioneer Shipping Ltd, the Nema*, Lloyd's Rep., 1981, 2, 239, in which the House of Lord introduced additional limitations for the granting of a leave to appeal with respect to that envisaged in the 1979 Act. According to the House of Lord, not any question of law arising out of an arbitral award substantially affecting the rights of the parties can be the object of a leave to appeal by a court: in addition to this requirement it is also necessary that the court believes that decision of the arbitral tribunal is obviously wrong and that the question of law is one of general public importance and the decision of the tribunal is at least open to serious doubt. These requirements have been subsequently embodied in section 69(3)(c) of the 1996 Arbitration act.

²⁶Y. Dezalay and B. Garth, *Dealing in Virtue*, cit, p. 139

Since 1985, the LCIA started publishing the journal *Arbitration International*, which is edited by one of the leading ICC arbitrators of the new generation, Jan Paulsson, and has contributed to the integration of London in the international community. This approach turned out to be successful, since it changed the attitude of the international arbitral community vis à vis English arbitration. By means of these reforms, England succeeded in putting an end to the “ICC-boycott”, so that London is now third, after Paris and Geneva, among the cities selected by the ICC for arbitrations where the parties have not selected a site²⁷. All that notwithstanding, it was still possible to identify, within the commercial bar, a conflict between the “traditionalists” and the “internationalists”²⁸: the former were convinced that the strength of English arbitration relied just on this special relationship among the bar, the commercial court and the arbitration community; the latter worried little about the need for courts to supervise private justice and fostered the elimination of the special treatment of shipping, insurance and commodities arbitrations.

The legislative history of the Arbitration Act 1996

The issue of court intervention in the arbitration process was again the main theme of the debate which led to the latest reform of the English arbitration law in 1996. This debate was heavily influenced by the large attention the UNCITRAL Model Law was paid to in many countries. In the wake of this success, many commentators took the view that the Model Law offered a simpler and more updated approach to arbitration, without the delays and unnecessary court intervention mechanisms which were prevalent in many common law jurisdictions²⁹. Accordingly, in response to the growing interest in the UNCITRAL Model Law which the international community was acknowledging, the English government decided to set up a Departmental Advisory Committee on Arbitration Law (hereinafter referred to as the DAC), whose main purpose was to advise on whether England should adopt the UNCITRAL Model Law. In June 1989 the DAC, which at that time was chaired by Lord Mustill, issued its first report. After a rigorous and detailed analysis of the Model Law history, legal nature,

²⁷*ibidem*

²⁸Y. Dezalay and B. Garth, *Dealing in Virtue*, cit., p. 141

²⁹A. Tweeddale and K. Tweeddale, *op. cit.*, p. 489

international role, possible implementation options, as well as of its substantial rules, the Mustill report strongly suggested not to adopt the Model Law. Nonetheless, it advised that the new Bill should comply with the Model Law's logical structure and language and that at the same time it should use it as a yardstick by which to assess the quality of English arbitration law. This was clearly stated in the most important part of the report – paragraph 108 – which laid down the principles on which the future bill should rely. In particular, this paragraph envisaged *inter alia* not only that the new act should comprise a statement in statutory form of the more important principles of the English law of arbitration, statutory and (to the extent practicable) common law (sub-paragraph 1), but also that consideration should be given to ensuring that any such new statute should, so far as possible, have the same structure and language as the Model Law, so as to enhance its acceptability to those familiar with the Model Law. Accordingly, by recognising the importance of complying as far as possible to the structure, language and spirit of the Model Law, the report seems to have relied on the same principles of signalling effect, user- friendliness and arbitration friendliness which lied at the basis of the 1998 reform of the German arbitration law.

The Mustill Report

If this was the most important indication stemming from the Report, a more detailed analysis is nonetheless worthwhile, since it provides a critical, and in many respects sceptical, approach to the Model Law, which is rarely found in the literature. The scepticism towards the Model Law was evident from the very beginning of the Report, where the legal nature of this harmonisation tool was analysed with a clear view to emphasising its drawbacks. The first ground of scepticism was the non-binding nature of the Model Law: since it had not been drafted in the form of an international convention, states were under no treaty obligation to enact legislation in accordance with its terms.³⁰ Accordingly, it was not expected that all states, whatever the characteristics of their arbitration laws, necessarily found it advantageous or even practicable to adopt the Model Law in its entirety³¹. The non-binding nature of the Model law entailed also a lack of certainty as regards the function which this text was intended to

³⁰Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 5

³¹*Ibidem*

fulfil. According to one view, in order not to undermine its harmonisation purpose, the Model Law should be implemented as a whole, in relation to all the aspects of international arbitration falling within its scope. Any substantial divergence from its text in domestic legislation would affect the balance struck in the Model Law and reduce its value as a harmonisation instrument.³² According to another view, states may implement the Model Law *à la carte*, by making use of its text as they may think fit and without undermining its spirit and purpose. Given this difference of approach in considering what action might be taken in relation to the Model Law, it was legitimate to take into account the possibility of enacting only some of its articles, or enacting its text with modifications. The second ground of scepticism concerned the Model Law's limited scope of application. First, it was applicable only to international commercial arbitration and second, even within this scope there were many aspects which were not regulated, such as the definition of arbitration itself, as well as its international and commercial character, the powers, duties and liabilities of the arbitrator, the issues of arbitrability, multi-party proceedings, and nullity or avoidance of the arbitration agreement³³. This meant that the Model Law was not designed to achieve full harmonisation, its aims being relatively modest, and in the main directed to minimising the opportunities for intervention of the courts, leaving ample room for diverging national procedures.³⁴ The third ground was that, although English was the primary drafting language, the Model Law had adopted a language as well as a number of drafting techniques which differed from those generally practised in the United Kingdom.

Despite the scepticism vis à vis the Model Law, the Mustill Report did not consider English arbitration law as so self-evidently superior that it should be maintained in its present form at all costs³⁵. Quite on the contrary, the Mustill report severely criticised the extent of court supervision on the arbitration process, which had become a matter of criticism both in England and abroad and had led to a wide debate on the reform of English arbitration law³⁶. This strong judicial control was not only against the principle of party autonomy but also constituted a potential source of delay and extra expense, which could be abused by an unscrupulous losing party³⁷. But the most serious drawback of English statutory

³²Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 6

³³But see F. Davidson, *International Commercial Arbitration in Scotland*, Lloyd's Maritime and Commercial Law Quarterly, 1992, 3, p 377-378, who commenting on this point of the report argues :<< yet it would be quite wrong to suggest that the Model Law fails to deal with such issues. Article 19 makes it clear that questions of procedure are to be dealt with by agreement of the parties or, failing which, by the arbitral tribunal... the Model law then takes a facilitative rather than a directive approach to these questions but that is not the same thing as failing to regulate such matters>>.

³⁴Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 18-19

³⁵Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 10

³⁶Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 8

³⁷Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 9

law of arbitration was considered its dispersed and fragmentary character: although contained for its most part in the three Acts of 1950, 1975 and 1979, there were also single provisions on arbitration embodied in statutes covering mainly other subjects; moreover, since its development and updating had essentially been carried out by case law applying the statutes, this application had inevitably been patchy, with some topics treated in detail and others totally ignored³⁸. As a result, the foreign or non-specialist user of arbitration could not have a whole picture of how arbitration in England worked in practice simply by reading the Arbitration Acts: in order to enhance its “user friendliness” it was necessary that the existing arbitration legislation should be replaced by a single Act of Parliament, systematically arranged, and extending to at least some of the most important aspects of arbitration law on which the statutes in force were silent³⁹.

In order to answer the core question of its mandate, namely whether and to what extent the United Kingdom should adopt the Model Law, the DAC conducted a consultation among the “users of arbitration” (i.e. lawyers, trade associations and practitioners) which closely resembles the one conducted by the European Commission in 2001 with a view to identifying a new strategy of harmonisation in the field of European contract law. The DAC drew up a list of options which were thought available to the United Kingdom with respect to the enactment of the Model Law (e.g. partial or total enactment of the Model Law, enactment of the Model Law and extension of its scope also to national arbitrations, enactment of the Model Law in a form which permits contracting in or, alternatively, contracting out, postponement of a decision until it is seen to what extent the Model Law is being adopted by other states, rejection of the Model Law) and submitted it to 370 bodies and individuals⁴⁰. By judging from the number of responses received, this consultation was not very successful: only 36 replies out of 370 questionnaires were sent; nonetheless, the report emphasised that the associations and professional bodies which replied represented many hundreds of members concerned with arbitration in one capacity or another and among them there were also some important foreign users of English arbitration. However, from the responses emerged no support to the adoption of the Model Law in its entirety; one third even supported rejection; the rest was divided between partial enactment with reservations and limitations, postponement of a decision until it was seen how the Model Law had fared in other States, and enactment in a form allowing contracting in or, alternatively, contracting out⁴¹. On the basis of this consultation, the Report analysed the options which

³⁸Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, pp. 34-35

³⁹Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 35

⁴⁰Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, pp. 15-16

⁴¹Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 16

had received more support, namely the direct choice between total acceptance and total rejection of the Model Law and the intermediate solutions of a legislation allowing the contracting-in or contracting-out of the Model Law⁴².

As far as the first group of options was concerned, the report considered as the most significant advantage of the Model Law its systematic structure: it consisted of a collection of international arbitration standards expressed in a statutory form; therefore, its adoption in the English legal system would foster a restatement of the existing unsystematic and piecemeal statutory law of arbitration. On the other hand, English arbitration law, although unsystematic, could rely on a well established case-law and expertise which was accepted and trusted by a very large international commercial community. In contrast, the Model law was still wholly untried in practice⁴³. Consequently, were the existing English arbitration law to be completely replaced by the Model Law, a precious heritage of rules, case-law and expertise built upon over the centuries should be given up in favour of a newly made and therefore unknown body of rules. The courts and lawyers would be required to familiarise with the new legislation and the practical expertise which had been developed in the context of the old law would have to be re-learned in the new situation. This was all the more true taking into account the modest success encountered so far by the Model Law. The number of states which had then enacted, or were planning to enact it was modest and none of the major trading nations had shown any signs of an intention to have their national arbitral legislation completely replaced by the Model Law. Countries with no developed or outdated arbitration law and practice had much to gain by enacting the Model Law: this carefully drafted international text could update their legislation to international standards and consequently render it more easily accessible to foreign business communities⁴⁴. But in countries like the United Kingdom, or Switzerland and France, where an updated body of arbitration law and a sufficient volume of arbitrations had permitted the growth of a well-established expertise, one may wonder whether the losses resulting from full support to the Model law project would outweigh the gains⁴⁵. The most serious concern stemming from rejection of the Model Law was the fear that, since the latter represented the accepted international standard in international arbitration, the United Kingdom might drive away arbitrations if it did not enact the Model Law. However, this argument was

⁴²Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 17

⁴³Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 23

⁴⁴Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 13

⁴⁵Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 13-14

deemed of little weight, given the scarce number of countries which had so far adopted the Model Law and the lack of indications that this number would increase in the near future.⁴⁶

A major disadvantage related to the total adoption of the Model Law was that it would have entailed the problem of multiple regimes in the law of arbitration: one applicable to international arbitration and governed by the law enacting the Model Law and another relating to domestic arbitration and governed by the existing arbitration Acts together with the existing common law rules, which would therefore continue to apply notwithstanding the adoption of the Model Law⁴⁷. As a result, the difficulties in distinguishing an international from a national arbitration would have in turn significantly increased the uncertainties about whether the proceedings were governed by the ordinary English law or by the regime of the Model Law. In addition, as the detailed study on the impact of each single Model Law article on English arbitration law had revealed⁴⁸, a significant number of Model Law provisions were either detrimental or of doubtful benefit for the local arbitration law and practice: for example, art. 28(3), by allowing the arbitral tribunal to decide as *amiable compositeur* or *ex aequo et bono*, would introduce concepts with no recognised meaning in English law; art. 7, by requiring that the arbitration agreement should be signed, would run against the well established practice of arbitration agreements which are considered as binding although not signed by both parties (e.g. those in bill of lading, broker's contract notes etc)⁴⁹.

To sum up, this assessment led the DAC to the conclusion that the disadvantages of a full adoption of the Model Law outweighed in the end the advantages and accordingly recommended that it should not be enacted for England, Wales and Northern Ireland⁵⁰.

As far as the option of contracting in or out were concerned, the DAC argued that allowing the parties to apply or disapply the Model Law regime by consent would have undermined the balance between party autonomy and court supervision which had been struck in the 1979 Act and had been accepted with satisfaction by the arbitration community⁵¹. This was because the Model Law was not concerned primarily with the procedural rules to be applied by the arbitral tribunal: it established a framework for the relationship between the arbitral tribunal, the parties and the supervising court⁵². Consequently, had

⁴⁶Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 20-21 With hindsight, one may argue that this consideration, which was refuted only few years later, shows how biased and unjustified the scepticism of the Report vis à vis the Model Law was.

⁴⁷The report completely overlooked to analyse the option of extending the Model Law regulation also to national arbitration.

⁴⁸Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, Part II Appendix 2

⁴⁹Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 27

⁵⁰Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit., p. 29

⁵¹Cp. the 1985 Commercial Court Committee quoted by the Report at p. 24

⁵²Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 30-31

the parties been allowed to contract in or out the Model Law, they would have been enabled to dictate the jurisdiction of the court and to determine the remedies available to the judge, as well as the circumstances and manner in which he may employ them⁵³. Moreover, the previous assessment had already showed that the Model Law regime could bring only very few advantages to the existing arbitration law; therefore, the right of contracting in or out its regime would create only the inconvenience of a double regime, without any corresponding practical benefit.⁵⁴

The last part of the Report focused on the formulation of a number of proposals for the improvement of the existing English arbitration law⁵⁵. The hypothesis of a mere consolidation bringing together in one text all the provisions of the current statutes was rejected as too modest an enterprise: in order to make English arbitration law more accessible, it was also necessary to take into account the principles elaborated by the extensive case law on the topic. By contrast, the solution of a codification of the entire English law on arbitration was considered too ambitious and also entailing the risk of depriving it of the flexibility necessary to respond to the changing climate of international arbitration. Also the intermediate option of a restatement on the American model was rejected, partly because this drafting technique was unknown in the English system, and partly because its preparation would have been too long and would have not resulted in a synthetic, rational and comprehensive exposition of the most important contents of the existing law⁵⁶. Eventually, the solution recommended by the report was that of a new Act which, without requiring a lengthy period of planning and drafting or prolonged parliamentary debate, should comprise a statement in statutory form of the most important principles of English law of arbitration, statutory and (to the extent practicable) common law⁵⁷. Moreover, the new act should be limited to those principles whose existence and effect are uncontroversial⁵⁸, set out in a logical order and expressed in a language which is sufficiently clear and free from technicalities to be readily comprehensible to the layman⁵⁹. Finally, although its scope should not be limited to the subject-matter of the Model Law⁶⁰, it should have as far as possible the same structure and language as the latter, so as to enhance its accessibility to those who are familiar with the Model law itself⁶¹.

⁵³Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 31

⁵⁴Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 32

⁵⁵Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, pp. 35-36

⁵⁶Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 37

⁵⁷Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, par. 108(1)

⁵⁸Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, par. 108(2)

⁵⁹Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, par. 108(3)

⁶⁰Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, par. 108(59)

⁶¹Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, par. 108(7). This final statement shows the ambiguity of the report vis à vis the Model Law. After having analysed its weaknesses in much detail (both in terms of form, content, language and lack of practical applications) the DAC concluded by emphasising the Model Law's role in ensuring a

After the publication of the Mustill report the parliamentary draftsmen set off to work in order to prepare a draft for the new Arbitration Act, which was issued in February 1994. However, they thought that the guidelines embodied in paragraph 108 of the Mustill Report were not susceptible of being put into legislative form and therefore produced a consolidating statute bringing together, with some amendments, the three main pieces of legislation which had so far regulated the subject-matter of arbitration: the Arbitration Act 1950, the Arbitration Act 1975 and the Arbitration Act 1979. In an Interim Report in April 1995 the DAC rejected this draft as being in contrast with the original guidelines of the arbitration reform enshrined in paragraph 108 of the Mustill report⁶². The DAC Interim Report led to a new draft, which was circulated for public consultation in July 1995. As the first provision in the preamble illustrated, the 1995 draft was completely in line with sub-paragraph 1 of paragraph 108 of the Mustill Report: an Act to restate and improve the law relating to arbitration pursuant to an arbitration agreement. Given the favourable response, the 1995 draft was taken forward, with some amendments, to form the basis of the final draft, which was enacted as the arbitration Act 1996 and came into force on 31 January 1997. Although the Arbitration Act 1996 did not officially implement the Model Law provisions, it relied, as the drafters have expressly acknowledged, whenever possible on its structure, language and spirit.⁶³ The draft on which the Arbitration Act was based moved closer to the Model Law than what originally envisaged in the Mustill Report: most of the Model Law appeared in one or other form in the draft, although some new features not included in the Model Law but considered helpful to the smooth functioning of English arbitration were introduced and whose lack lied at the basis of the Mustill Report's decision not to adopt the Model law⁶⁴.

systematic structure and a comprehensible language to English arbitration law. As previously observed, by recognising the importance of complying as far as possible to the structure, language and spirit of the Model Law, the report seems to have relied on the same principles of signalling effect, user friendliness and arbitration friendliness which lied at the basis of the 1998 reform of the German arbitration law and were essentially implemented through full adoption of the Model Law.

⁶²DAC Interim Report, quoted in the 1996 Report on the Arbitration Bill, *Arb Int*, 1997, 13, 3, p. 276 <<the view of the DAC is that a new Bill should still be grounded on the objectives set out in paragraph 108 of the 1989 Report, but that, reinterpreted, what is called for is much more along the lines of a restatement of the law, in clear and "user-friendly" language, following as far as possible, the structure and spirit of the Model Law, rather than simply a classic exercise in consolidation>>. It is worth noting that also the DAC Interim Report, in illustrating the main purpose of the reform, relied on the same principle of user-friendliness which also constituted a major guideline in the 1998 reform of the German arbitration act.

⁶³Cfr DTI Consultative Paper, p. 3

⁶⁴ R. Merkin, *Arbitration Law*, vol. 1, LLP Publisher, 2000 p. 1/9

The reception of the Model Law in Scotland

The Dervaird Report

The conclusions reached by the Mustill report were valid only for the law districts of England, Wales and Northern Ireland. As far as Scotland was concerned, in July 1986 a Scottish Advisory Committee on Arbitration Law was set up (the Dervaird Committee, from the name of its chairman, Lord Dervaird) with the twofold purpose of advising on whether and to what extent the UNCITRAL Model Law should be implemented in Scotland and examining the operation of the system of arbitration in Scotland in the light of the Model Law, with a view to making recommendations as how to improve Scots arbitration law⁶⁵. The establishment of a special committee for Scotland was due to the marked differences existing between English and Scots arbitration laws. In particular, the two systems differed in two main respects: the extent of statutory discipline and the extent of court intervention in the arbitral process⁶⁶. Scots law on arbitration was even more dispersed than English law, since it lacked in very large measure any statutory regulation⁶⁷: practice and procedure in arbitration had therefore almost entirely to be found in case law and handbooks. Accordingly, whereas in England a consolidation of the existing law had been carried out by the Arbitration Act 1950, Scots law on arbitration had an urgent need for codification in order to make it easy for the foreigner to ascertain how arbitration in Scotland worked and persuade the overseas party to accept Scots law and jurisdiction⁶⁸. As to court intervention, from the earliest times Scots law had permitted parties to exclude the merits of any dispute between them from the consideration of the courts, by simply naming their arbitrator⁶⁹; moreover, it had until recently admitted judicial review of arbitral awards only within very narrow

⁶⁵Lord Dervaird, *Scotland and the UNCITRAL Model Law: The Report of the Lord Advocate of the Scottish Advisory Committee on Arbitration Law*, Arb Int, 1990, 6, 1, p. 63. Although The Scottish Committee pledged to take into account the conclusions reached in the Mustill Committee (the chairman of the Scottish Committee, Lord Dervaird and one of its members, Dr Kenneth Chrystie, were also members of the Mustill Committee), it was agreed that the implementation of the Model Law in Scotland should be a matter for decision of the Scottish Committee.

⁶⁶Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 10

⁶⁷Lord Dervaird, *Scotland and the UNCITRAL Model Law*, cit, p. 66

⁶⁸Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 11

⁶⁹per Lord Watson in *Hamlyn & Co. v. Talisker Distillery* (1814), 21R (HC), 21 at 27, quoted in Lord Dervaird, *Scotland and the UNCITRAL Model Law*, cit., p. 65

limits: provided that the arbitrator had not exceeded the mandate given to him by the parties with the arbitration agreement and had behaved fairly in the conduct of the arbitration, the award could not be successfully challenged in court, however erroneous the parties and the court could think the award had been⁷⁰. A form of judicial review similar to the English special case procedure had been introduced only by virtue of Section 3 of the Administration of Justice (Scotland) Act 1972, but this provision had had very little impact in practice, given the frequent recourse of the parties to agreements excluding this procedure and the modest amount of reported cases related to this matter⁷¹.

These marked differences were the grounds on which the Scottish Committee relied in order to justify full enactment of the Model Law in the Scots arbitration law. The Committee argued that, despite the introduction of the special case procedure in 1972, a constant feature of Scots law had always been the principle that parties should be free to have their disputes determined privately and with finality without the intervention of the courts. Accordingly, the Model Law regime was in line with this foundational principle: central to this system was the purpose of limiting the extent to which the courts may exercise control over the process of arbitration⁷². Therefore, the Committee concluded that there was nothing hostile to the common law of Scotland in the fundamental provisions of the Model Law. Whereas the argument that adoption of the Model Law would entail multiple regimes applicable to arbitration was considered by the Mustill Committee as one of the most serious drawbacks, the Scottish committee did not attach much importance to it, since a plurality of different arbitration regimes already co-existed in Scots law: arbitrations subject to sec. 3 of the Administration of Justice (Scotland) Act 1972, arbitrations in which parties had opted out this regime, special types of arbitrations subject to particular statutory regulations. But the most important argument in favour of full adoption of the Model Law was that it would have overcome the lack of statutory regulation in the field of arbitration which represented the most important disincentive to the selection of Scotland as a place of international commercial arbitration⁷³. By providing a framework for arbitration readily understandable by people of different legal cultures, the introduction of the Model law in Scotland would have gone in the direction of making it a more attractive arbitration centre⁷⁴.

In the wake of the Dervaird committee's recommendations, the Model Law was enacted in Scotland almost *verbatim* through the Law Reform (Miscellaneous Provisions) (Scotland) Act 1990, section 66

⁷⁰Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 11

⁷¹Lord Mustill, *A New Arbitration Act for the United Kingdom?*, cit, p. 12

⁷²Lord Dervaird, *Scotland and the UNCITRAL Model Law*, cit, p. 65

⁷³Lord Dervaird, *Scotland and the UNCITRAL Model Law*, cit, p. 66

⁷⁴Lord Dervaird, *Scotland and the UNCITRAL Model Law*, cit, p. 67

and Schedule 7. Only minor modifications were introduced in order to accommodate its text to the particularities of the Scottish legal system⁷⁵. For example, whereas the original art. 10(2) states that in the absence of an agreement between the parties on the determination of the number of the arbitrators, the number of the arbitrators shall be three, in order to comply with the tradition in Scots law of the single arbitrator, the Scottish version provides that failing any determination as to the number of the arbitrators, there shall be a single arbitrator. The only four modifications which are of some significance regard the provisions on the *Kompetenz-Kompetenz*, the power to appoint arbitrators, the grounds on which an award may be set aside and the extension to domestic arbitrations. Whereas art. 11 of the Model Law allows, in the absence of an agreement between the parties, bodies other than courts to act as appointing authorities, it did not seem to the Dervaird committee necessary or desirable to nominate specific institutions other than courts to exercise these functions⁷⁶. As a result, unless expressly provided for by the parties, the well established international practice to rely on arbitral institutions such the ICC and the LCIA as appointing authorities is not possible in Scotland. According to art. 16(3) of the Model Law, the arbitral tribunal's decision that it lacks jurisdiction is not subject to judicial review: it was felt inappropriate to compel an arbitral tribunal which established that it did not have jurisdiction to continue with the proceedings⁷⁷; by contrast, the Scottish version of this article provides that also the arbitral tribunal's decision excluding its jurisdiction is subject to appeal to the court. It was thought that in any case the system envisaged by the Model Law conferred upon the court the last word on the arbitral tribunal's jurisdiction: if parties following the arbitral tribunal's decision excluding its jurisdiction resorted to litigation, each of them could nonetheless under art. 8 ask the court to refer the matter to arbitration and the court would be bound to do it if it considered that the matter was covered by a valid arbitration agreement⁷⁸. Consequently, it was simpler to allow courts to review also arbitral decisions of no jurisdiction. In envisaging the grounds on which an award may be set aside, the Scottish version of art. 34 adds the case in which the award has been rendered on the basis of fraud, bribery and corruption. As the Dervaird committee expressly admitted, the award may be challenged on such grounds on the basis of public policy infringement; nonetheless, it preferred to add such specific ground in order to put the matter "beyond doubt".⁷⁹ More importantly, whereas the setting aside of the award is generally subject to a three months time limit, this is not so when the award is

⁷⁵*Ibidem*

⁷⁶Lord Dervaird, *Scotland and the UNCITRAL Model Law*, cit, p 71

⁷⁷UN Doc A/40/17 par. 163

⁷⁸F. Davidson, *International Commercial Arbitration in Scotland*, cit., p. 384

⁷⁹Lord Dervaird, *Scotland and the UNCITRAL Model Law*, cit, p 74

challenged on the above ground. The Model Law drafters discussed about the opportunity of envisaging a considerably longer period of time for challenging an award in case of fraud, but eventually it was decided that such an extension was contrary to the need for speedy and final settlement of international commercial disputes.⁸⁰ By contrast, parties who choose Scotland as place of arbitration need not face the frustration of being unable to have the award set aside, although they have been aware that it was produced by fraud, merely because the three months time limit has elapsed. The price which is paid as a result is that the award is never secure from challenge in the Scottish courts. It must be for parties to international commercial arbitrations to judge which is the more advantageous situation⁸¹. Finally, sec. 66(4) allows the parties to agree that the Model Law as set out in Schedule 7 shall apply even if the arbitration would not be an international commercial arbitration within the meaning of art. 1 of the Model Law. Thus, by virtue of the agreement of the parties, any arbitration may potentially fall within the scope of the Model Law.⁸²

Towards a new reform

The adoption of the UNCITRAL Model Law had not, however, sorted the expected effect of attracting significant international arbitration business to Scotland. A number of defects still remained in the arbitration law of Scotland, which made this country an unattractive arbitration centre, the most important one being the lack of a domestic arbitration regime to fill the gaps left by the Model Law regulation. The regulation of domestic arbitration in Scotland was a partial regime, mainly governed by the common law which was quite uncertain and inadequate to the effective conduct of arbitration according to international standards⁸³. As a result, in 1996 the Dervaird committee published a draft Bill of reform of domestic arbitration law. Yet, this draft dealt with certain specific issues only, filling some gaps and making some improvements but leaving domestic arbitration law largely uncodified. In 1999 the Scottish Council for International Arbitration and the Scottish branch of the Chartered Institute of Arbitrators developed the Scottish Arbitration Code. This text (revised in 2007) was meant

⁸⁰UN Doc A/40/17 par. 300

⁸¹F. Davidson, *International Commercial Arbitration in Scotland*, cit, p. 392

⁸²F. Davidson, *International Commercial Arbitration in Scotland*, cit, p. 380

⁸³F. Davidson, *Some Thoughts on the Draft Arbitration (Scotland) Bill*, JBL, 2009, 1, p. 44.

to set out a general framework for arbitration and the rules under which arbitration should be conducted, but it was only a voluntary code, which required all parties to agree to its adoption. In 2002 a new bill was issued aiming to combine Scotland's domestic and international arbitration law into a single source. Unfortunately, the Bill failed to attract sufficient political backing and did not advance through the Parliamentary process. In June 2008 the reform process seems to have reached a turning point: the Scottish Government has launched a public consultation on a new arbitration bill⁸⁴. Like the previous attempts, the new bill aims to reform and consolidate the law of arbitration, which is currently outdated and incomplete. It is part of a more complex strategy involving not only legislative reform but also the creation of what in the context of the German arbitration reform has been called “arbitration infrastructure”. To support and attract arbitration business to Scotland it is envisaged not only to introduce an arbitration bill to modernise and codify the law and bring it into line with up-to-date arbitral practices in other jurisdictions, but also to develop a self-financing dispute resolution centre to which arbitration as well as domestic dispute resolution business might be attracted and to encourage representative bodies of arbitrators to improve the professional expertise of their members⁸⁵. In line with the principle of user friendliness, the bill puts the vast majority of the Scots law of arbitration into a single statute: the underlying idea is to enable anyone seeking to do business in Scotland to find in one place the principles governing the law of arbitration in Scotland in a language which can be readily understood⁸⁶. By the same token, the same rules will apply to domestic, cross-border (i.e. with other parts of the UK) and international arbitrations. The provision of a single regime applicable to both domestic and international arbitration seems to imply a departure from full adoption of the Model Law: the consultation paper announces that the separate treatment in Scotland of international commercial arbitrations under the UNCITRAL Model Law will be replaced by a single code still informed by the Model Law principles, but also by the 2002 draft bill and, more importantly, the UK Arbitration Act 1996⁸⁷. It has been observed that the Model Law does not provide a comprehensive arbitration regime and quite few states have applied it to both domestic and international arbitration. Accordingly, it would be much better to look at the example of States such as England which have used the Model Law as the basis for the creation of a comprehensive, modern

⁸⁴ The Scottish Government, *Consultation on Arbitration (Scotland) Bill*, Scottish Government Publication, June 2008, available on the internet at www.scotland.gov.uk/consultations (July 2009).

⁸⁵ The Scottish Government, *Consultation on Arbitration (Scotland) Bill*, cit, p. 1

⁸⁶ *Ibidem*

⁸⁷ The Scottish Government, *Consultation on Arbitration (Scotland) Bill*, cit, pp. 8-9

arbitration statute, so as to make Scots law on arbitration more consistent with that in force in the rest of the UK⁸⁸.

The reception of the Model Law in the English Arbitration Act 1996

General Features of the Arbitration Act 1996

The Arbitration Act 1996 is a statute without precedent in English arbitration law⁸⁹: it has not merely consolidated the principal statutes of 1950, 1975 and 1979 and codified the most important rules found in the common law, but it has also introduced drafting techniques which appear radically innovative with respect to the English traditional standards. Contrary to the previous arbitration acts, which had disciplined only single aspects of the arbitral procedure, the Arbitration Act 1996 has largely adopted the logical structure of the Model Law and has dealt comprehensively with the regulation of arbitration starting from the definition of the arbitration agreement and ending with the enforcement of the arbitral award⁹⁰. But its most important innovation has certainly been the provision in statutory form of general principles of arbitration law: this drafting technique, unconventional in a common law context, is more usually found in codified legal systems and is perhaps the most remarkable aspect of the 1996 Act.⁹¹ These principles, embodied in sec. 1 of the Act, are three: due process, party autonomy and minimal court intervention⁹². They constitute the “touchstone” by which any of the following provisions may be tested⁹³: where there is a doubt as to the meaning of any section within the Act, then regard should be had to these principles⁹⁴. As we have seen in the previous chapter, such principles also constitute the inspiring guidelines (the so-called “Magna Charta”) of the Model Law regulation.

⁸⁸ F. Davidson, *Some Thoughts on the Draft Arbitration (Scotland) Bill*, cit, p. 45.

⁸⁹ J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, Sweet and Maxwell, 2003, par. 2-059

⁹⁰ J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, cit, par. 2-065

⁹¹ J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, cit, par. 2-066

⁹² cp. A. Tweeddale and K. Tweeddale, *op. cit.* p. 495-497

⁹³ J. Tackaberry and A. Marriott, *Bernstein's Handbook of Arbitration and Dispute Resolution Practice*, cit, par. 2-068

⁹⁴ A. Tweeddale and K. Tweeddale, *op. cit.*, p. 495

The principle of due process is stated in sec. 1(a) of the Act in the following terms: “the object of arbitration is to obtain the fair resolution of disputes by an impartial tribunal without unnecessary delay and expense”. Many provisions of the Act can be read as a specification of this principle: sec. 33 imposes a mandatory duty on the arbitral tribunal to conduct the proceedings fairly and impartially, as well as to adopt suitable procedures which avoid unnecessary delay and expense; sec. 68 provides that an award may be challenged on the ground of serious irregularities in the proceedings when the arbitral tribunal has not complied with its duty under sec. 33; sec. 24 provides that the arbitral tribunal may be removed or have its fees forfeited for not being impartial or failing to conduct the proceedings properly, or for not using all reasonable dispatch in conducting the arbitration; sec. 40 imposes a mandatory duty on the parties to do all things necessary for the proper and expeditious conduct of the proceedings; sec. 41 provides that the arbitral tribunal may dismiss a claim where there is inordinate and inexcusable delay on the part of the claimant in pursuing the claim, which damages the fairness of the proceedings and prejudices the respondent.

The principle of party autonomy is laid down in sec. 1(b): “the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest”. This principle is further emphasised in the Act by envisaging a list of provisions which are mandatory; it is then provided by sec. 4(2) that any other provisions only apply in the absence of alternative agreements agreed to by the parties⁹⁵.

The principle of limited court intervention, embodied in sec. 1(c), was included as a response to international criticism that English courts were too interventionist in the arbitral process and therefore discouraged the selection of England as a forum for arbitration⁹⁶. This principle is closely connected to that of party autonomy: as the DAC acknowledged, in order to respect the decision of the parties to choose a private tribunal rather than the court to solve their dispute, the Act has strengthened the powers of the arbitrators and limited the role of the court to those occasions in which it is obvious that either the arbitral process needs assistance, or there has been or it is likely to be a clear denial of justice. In other words, the court intervention is limited in those cases where it is necessary to safeguard due process in arbitral proceedings. This principle mirrors art. 5 of the Model Law; yet it has been formulated as a general guideline, rather than a substantive provision as in art. 5 of the Model Law.

⁹⁵F. Davidson, *The New Arbitration Act- A Model Law?*, JBL, 1997, 2, p. 103. The drafters of the Arbitration Act 1996 managed to confer an even stronger emphasis upon the principle of party autonomy than that found in the Model Law. During the *travaux* of the Model Law it was proposed to draw up a list of mandatory provisions; nonetheless, given the difficulties related to their identification, this approach was not adopted, the drafters preferring instead to point out the non-mandatory nature of most of the provisions of the Model Law. See UN DOC A/CN9/246 paras. 176-177.

⁹⁶A. Tweeddale and K. Tweeddale, *op cit.*, p. 497

Account was taken of the concerns expressed in the DAC report that a mandatory prohibition on the court's intervention in terms similar to article 5 of the Model Law was inappropriate, given the difficulty in determining its exact scope, especially in cases where the Model Law was silent upon an issue. As a result, some commentator has expressed the view that this principle has not the purpose of limiting the cases of court intervention to those expressly provided for in the Act, but only that of encouraging a frugal exercise in practice of court intervention wherever in the law the source of this power may be found: significantly, instead of “shall not intervene”, like in art. 5 of the Model Law, the Act uses the expression “should not intervene”⁹⁷. This view seems however to contradict the drafters' intention, who have expressly clarified that the purpose of this principle is to enable the parties to know precisely the limits to the powers of the English courts to intervene in arbitral proceedings so that they will not have any concern that some unexpected form of intervention may be relied on some principle derived somewhere in the common law⁹⁸.

The scope of application

Like the Model Law, the English Arbitration Act 1996 founds its scope of application on the territorial criterion; yet the latter introduces in lieu of the place of arbitration the more precise concept of the “seat”: according to sec. 2 (1), the Act applies where the seat of arbitration is in England and Wales or Northern Ireland. Sec. 3 clarifies that the seat of the arbitration means the juridical seat of the arbitration designated by the parties to the arbitration agreement, by any arbitral or other institution or person vested by the parties with the powers in that regard, or by the arbitral tribunal if so authorised by the parties⁹⁹. Unlike art. 20 of the Model Law, which establishes that the tribunal is automatically

⁹⁷Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, Butterworths, 2001, p. 28; A. Tweeddale and K. Tweeddale, *op. cit.*, p. 498; *contra* B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, Blackwell Publishing, 2000, p. 60. The issue has also been considered in two recent cases. In *Vale do Rio Doce Navegacos SA v SA Shanghai Bao Steel Ocean Shippin Co Ltd and Sea Partners Ltd* (All ER Comm, 2000, 2, 70), relying on the considerations expressed in the DAC report on this matter, the judge concluded that the word “should” rather than “shall” within the Arbitration Act 1996 sec. 1(c) meant that there was not an absolute prohibition on the court from intervening in arbitral proceedings in cases other than those specified in the Act. The same rationale was followed in *IT Mackley and Co Ltd v Gosport Marina Ltd* (EWHC, 2002, 1315, TCC), in which the court granted declaratory relief outside of its power in the Arbitration Act. However, in both cases, the court held that such intervention was contrary to the general intention of the Arbitration Act and that the courts should usually not intervene outside the general circumstances specified in the Act itself.

⁹⁸DTI Consultative Paper

⁹⁹Cp DAC 1997 Supplementary Report on the Arbitration Act 1996, Arb Int, 1997, 13, 3 par. 11: <<the seat of an arbitration refers to its legal place, as opposed to its geographical location. It is, of course, perfectly possible to conduct an arbitration with an English seat at any convenient location, whether in England or abroad>>.

entitled to determine the place of arbitration at its discretion if the parties have failed to do so, the Act provides that the arbitrator may designate the seat only if so authorised by the parties. In the absence of such authorisation, sections 2 (4)(a) and 3 establish that the seat should be determined by the court with regard to the parties' agreement and all the relevant circumstances¹⁰⁰.

There are however a number of provisions which may be seen as generally supportive of the arbitral process and which apply wherever the seat of arbitration is, or where the seat has not been determined. They regard stay of legal proceedings, enforcement of arbitral awards, attendance of witness and interim measures of protection. Furthermore, in cases where there has been no designation of the seat, the court may exercise a power derived from the Act if the power is exercised for the purpose of supporting the arbitral process and there is sufficient connection between England and the arbitration in question. Art. 1(2) of the Model Law embodies a similar, but less detailed rule, limiting the provisions applying irrespective of the place of arbitration to the stay of legal proceedings, interim measures of protection and recognition and enforcement of awards.

But the most significant difference from the Model Law with respect to the scope of application is that the Arbitration Act 1996 is not confined to international commercial arbitrations: it applies to all arbitrations having their seat in England, whatever the nationality or place of business of the parties, the place of performance of the substantive contract and the governing law. In this respect the act differs radically not only from the Model Law, but also many national laws, which draw a sharp distinction between international and other types of arbitration¹⁰¹. Actually, sections 85 to 87 of the Arbitration Act 1996 were meant to re-enact those provisions of the old law laying down a special regime for domestic arbitration with regard to the stay of legal proceedings and the circumstances under which the parties could exclude the appeal of an award on questions of law. Yet, with the Arbitration Act 1996 (Commencement no. 1) Order 1996 it was decided not to bring these sections into effect. This decision was essentially grounded on the considerations expressed in the DAC Report of February 1996: the special regime for domestic arbitration was deemed to preserve a supervisory role for the courts at the expense of party autonomy; in addition, concerns were expressed that such different treatment discriminated against the European Union nationals who are not English and was thus contrary to

¹⁰⁰ Cp *Tonicstar Ltd v American Home Assurance Co* (EWHC, Comm, 2004, 1234), in which the seat of the arbitration had not been determined by the parties in the arbitration agreement. As the parties could not agree on the seat, Tonicstar applied to the court. The court first considered the law applicable to the merits of the dispute: by applying the Rome Convention principles, it concluded that the applicable law was English law. The court then held that the law applicable to the arbitration agreement was the same as the applicable law. The court therefore concluded that these factors together suggested that England was the natural forum for the dispute.

¹⁰¹ Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 13

European Law.¹⁰² This concern was confirmed some months after the publication of the report in the case *Philip Alexander Securities and Futures Limited v. Bamberger*¹⁰³, where the Court of Appeal held that the Consumer Arbitration Agreements Act 1988, which in its protection of consumers drew a distinction between domestic and non-domestic agreements, contravened the treaty of Rome by distinguishing between UK nationals and EC nationals from outside the UK. Finally, in July 1996 the Department of Trade and Industry published a consultation document on the commencement of the Act, in which *inter alia* views were sought on whether or not the distinction between international and domestic arbitration should be maintained. The majority of the respondents were in favour of the abolition of this distinction and the application of the international regime to all kinds of arbitrations. Accordingly, in the supplementary Report of February 1997 the DAC concluded that there was no option but to abolish this distinction.¹⁰⁴

Provisions common to the Model Law

Stay of legal proceedings

The provisions on the stay of legal proceedings, embodied in sec. 9, are founded on art. 8 of the Model Law, which are in turn drawn from art. 2(3) of the New York Convention. They essentially impose a mandatory duty on the court to stay an action brought in breach of an agreement to arbitrate, unless the court is satisfied that the arbitration agreement is null and void, inoperative or incapable of being performed¹⁰⁵. Although the Model Law and the New York Convention impose an obligation upon the court to refer the parties to arbitration, the English court can only stay (i.e. suspend) its own

¹⁰²DAC 1996 Report on the Arbitration Bill, cit, par. 326.

¹⁰³1996 CLC 1757

¹⁰⁴DAC 1997 Supplementary Report on the Arbitration Act 1996, Arb Int, 1997, 13, 3, par. 49

¹⁰⁵Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 268

proceedings¹⁰⁶: nonetheless this is only a difference in language rather than in substance, since the parties will have in any case to bring their dispute in front of the arbitral tribunal if they wish to continue the proceedings¹⁰⁷. Two changes introduced by the 1996 Act have contributed to bring the provisions on the stay of legal proceedings closer to those of the Model Law and the New York Convention. The first is that a stay may no longer be refused on the grounds that there is in fact no dispute between the parties, as was the case under the old law. The DAC had considered this extra ground, not contained in the New York Convention, as confusing and unnecessary and therefore it was omitted from sec. 9(4), with the result of bringing English legislation more in line with international standards. The second change stems from the decision not to bring into force the special regime for domestic arbitrations envisaged in sections 85-88 of the Act. In particular, as far as the stay of legal proceedings is concerned, sec. 86(2)(b) laid down an extra criterion on which the court could rely to refuse the stay: when there were sufficient grounds for not requiring the parties to abide by the arbitration agreement. Given the lack of definition of what was meant by “sufficient grounds”, this residual power of refusal was deemed not to comply with the principle of party autonomy and to result in an interference with rather than a support for the arbitral process. It was therefore suggested to abolish the distinction between domestic and non-domestic arbitrations and apply the New York Convention rules to all cases. Now a single regulation for the stay of legal proceedings applies to all arbitrations, both domestic and international and this regulation closely mirrors the corresponding provisions of the Model Law and the New York Convention.

The conduct of arbitral proceedings

The main principle regulating the conduct of arbitral proceedings is laid down in art. 34(1), which is largely based on art. 19 of the Model Law: in the absence of an agreement between parties on

¹⁰⁶R. Merkin, *op. cit.*, p. 1-12; V. Cobb, *Domestic Court's Obligation to Refer Parties to Arbitration*, *Arbitration International*, 2001, 3, 17, p. 313

¹⁰⁷Yet, the concept of a stay of proceedings conveys the idea of an incumbent court jurisdiction ready to intervene whenever appropriate. As Mustill and Boyd observe: <<where the court exercises its right, and in many instances its duty to renounce jurisdiction over a dispute which falls within an agreement to arbitrate, this renunciation is only provisional. Until a valid award is published, the court retains its underlying jurisdiction for the purpose of making orders in aid of the process of arbitration>>. (Lord Mustill, and S.C. Boyd, *Commercial Arbitration*, vol I, cit, p. 156).

procedural matters, the arbitral tribunal is allowed complete freedom on procedural matters, including freedom to decide on how evidence is to be presented, this freedom being subject only to the requirement of sec. 33(1)(a) that it should act fairly and impartially between the parties, giving each of them a reasonable opportunity of putting his case and dealing with that of his opponent. This provision overrides the practice emerged under the old law, whereby in the absence of a contrary party agreement the procedures in an arbitration should be modelled on court procedures and therefore an arbitration should be conducted in an adversarial manner under the normal rules of civil evidence¹⁰⁸. By grounding the arbitral discretion on procedural matters upon a statutory basis, the Act clearly does away with this old-fashioned theory which contributed to make English arbitration law rather unattractive to the businessman's eyes¹⁰⁹. In order to help the arbitral tribunal to correctly use its discretion, sec. 34 sets out a non-exhaustive list of procedural and evidential matters falling within its power, many of which derive from similar provisions of the Model Law: for instance, the power to determine where any part of the proceedings may be held mirrors art. 20 ML; the power to determine the language of the arbitration corresponds to art. 22 ML; the power to determine whether evidence should be given orally or in writing is similar to art. 24(1)ML.

As stated above, sec. 33(1)(a) imposes on the arbitration a clear limitation as to the exercise of its freedom on procedural matters. This provision, although closely following art. 18 of the Model Law, contains a noteworthy difference in language: it speaks about a party being allowed a “reasonable” opportunity to put his case, as opposed to the “full” opportunity found in the Model Law. The term “reasonable” has been chosen because it was deemed to remove any suggestion that a party was entitled to take, as long as he required it, to explore every aspect of his case, however unreasonable this may be.¹¹⁰ . And indeed the duty under sec. 33(1)(a) is reinforced by a further duty under sec. 33(1)(b), which has no counterpart in the Model Law, to adopt procedures suitable to the circumstances of the

¹⁰⁸DAC 1996 Report on the Arbitration Bill, cit., par 153; J. Steyn, *Towards a New English Arbitration Act*, Arb Int, 1991, 7, 1, p. 24; *Bremen Vulkan Schiffbau und Maschinenfabrik v. South India shipping Corporation*, 1981 A.C., 909, at 947-948

¹⁰⁹J. Steyn, *op.cit.*, p. 23. This theory was strongly criticised by legal doctrine: see e.g. R. Goode, *The Adaptation of English Law to International Commercial Arbitration*, Arbitration International, 1992, 8, 1, p. 6 <<One of the reason why parties opt for arbitration is informality and a commercial approach to the determination of their dispute. The notion that they intend the rules of evidence for litigation to be applied in all their rigour is surprising indeed. The English law of evidence possess a most infortunate tendency to rigidity in the formulation of rules which fly in the face of experience and are alleviated only by the robust good sense of our trial judges. Now if we in England wish to tie ourselves hand and foot by rules of this kind in domestic legislation, so be it. But why, in an international arbitration, should we expect foreign parties accustomed to business evidence and to relaxed evidential rules in their own countries, to be circumscribed by our arcane jurisprudence on evidence?>>>

¹¹⁰B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 170; DAC 1996 Report on the Arbitration Bill, cit., par. 165

particular case, avoiding unnecessary delay and expense, so as to provide a fair means for the resolution of the matters falling to be determined.

The law applicable to the merits of the dispute

Until sec. 46 of the Arbitration Act 1996 opened up the possibility that the parties could effectively agree that a dispute would be decided according to rules not based on a particular legal system, there was a well established rule at common law that in the conduct of arbitration the arbitral tribunal must in general apply a fixed and recognisable system of law¹¹¹. English courts were prepared to enforce foreign awards which were not based on the rules of any particular legal system¹¹², but one thing was accepting the validity of a foreign award made upon a basis which is legally sustainable in the state of origin and another is considering whether an English award made on such basis should be accorded validity¹¹³. Sec. 46 of the Act, which reflects much, though not all of art. 28 of the Model Law¹¹⁴, introduces important innovations as to the choice of the rules applicable to the substance of the dispute. Sec. 46(1) requires the tribunal to decide the dispute in accordance with the law chosen by the parties as applicable to the substance of the dispute. Sub-sec.2 clarifies that the law chosen by the parties shall be understood as the substantive law of the country and not its conflict of laws rules. Unlike the corresponding art. 28(1) of the Model Law, sec. 46(1) does not make reference to the “rules of law” which allow the parties to refer to a set of rules not embodied in a national legal system. The possibility for the parties to agree that the dispute should be decided according to a non-national system of rules seems to be contemplated by sec.46(1)(b), which allows the parties to authorise the tribunal to decide the dispute in accordance with “such other considerations as are agreed by them or determined by the tribunal”. This expression replaces the terms “*ex aequo et bono*” and “*amiable compositeur*”, found in

¹¹¹ *Orion Compania Espanola de Seguros v. Belfort Maatschappij Voor Algemene Verzekeringen*, Lloyd's Rep , 1962, 2, 257 at 264.

¹¹² *Cp Deutsche Schachtbau und Tiefbohrgesellschaft mbH v. Ras al Khaimah National Oil Co*, WLR, 1987, 3,1023, where the Court of Appeal did not consider it contrary to English public policy to enforce an award made in Switzerland which had been decided according to “internationally accepted principles of law governing contractual relations”.

¹¹³ F. Davidson, *The New Arbitration Act- A Model Law?* cit, p. 120

¹¹⁴ DAC 1996 Report on the Arbitration Bill, cit, par. 222

art. 28 (3) of the Model Law: the drafters of the Act refrained from adopting the Latin and French expressions, given the uncertainty which the introduction of such unfamiliar terms might create.¹¹⁵ Accordingly, in line with the principle of user friendliness, they preferred to use a non-technical expression closer to the ordinary language. While there seems to be no reason why this expression should not extend to non-national rules¹¹⁶, its scope appears even wider than those adopted in the Model Law: it includes not only standards such as equity, but any criteria whatsoever limited only by public policy¹¹⁷, so that the arbitral tribunal may decide according to its personal view of what fairness ought to be in that particular dispute¹¹⁸. Failing any designation by the parties, sec. 46(3), completely in line with art 28(2) of the Model Law, provides that the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Finally, it should be noted that the last part of art 28 of the Model Law, which requires the tribunal to take into account in all cases the usages of the trade applicable to the transaction, was omitted. The reason for this omission was that if the applicable law allows this to be done, then the provision is not necessary; while if it does not, then the provision might override the law otherwise applicable.¹¹⁹ Furthermore, the Act can and often will apply to non-commercial matters where there is no relevant “trade”¹²⁰.

Challenge of the award

The Arbitration Act 1996 envisages the grounds on which an award may be challenged in two separate provisions: sec. 67, which deals with the lack of substantive jurisdiction of the arbitral tribunal, and sec. 68, which deals with serious procedural irregularity affecting the tribunal. The reason for this distinction is that a challenge on grounds of lack of jurisdiction involves no issue of “substantial justice”¹²¹: an award made by a tribunal which lacks jurisdiction simply cannot stand, whereas procedural irregularity may be relied upon as a ground for challenging an award only where it is proved

¹¹⁵F. Davidson, *The New Arbitration Act- A Model Law?* cit, p. 120

¹¹⁶Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 50

¹¹⁷F. Davidson, *The New Arbitration Act- A Model Law?* cit, p. 121

¹¹⁸Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 125

¹¹⁹DAC 1996 Report on the Arbitration Bill, cit, par. 222

¹²⁰B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 170, DAC 1996 Report on the Arbitration Bill, cit, par. 227

¹²¹ DAC 1996 Report on the Arbitration Bill, cit, par. 279

that it has caused or will cause substantial injustice to the applicant¹²². The first provision is spelt out in much the same way as articles 16 and 34(3) of the Model Law, whereas sec. 68 presents some peculiarities which are worth analysing. The Arbitration Act encompasses all the grounds (except lack of jurisdiction) on which an award may be set aside under the category of “serious irregularity”, which is unknown under the Model Law. This concept is carefully defined in sec. 68 by providing a closed list of irregularities which it is not open to the court to extend¹²³, so that they do not give rise to a general supervisory jurisdiction over arbitral awards on the general ground of unfairness or want of due process¹²⁴. Accordingly, this list of irregularities is to be interpreted strictly: even where it is proved that a serious irregularity falling within the cases listed in sec. 68 has occurred, the court may still not intervene, unless it also considers that the irregularity has caused or will cause substantive injustice to the applicant: this will happen only in extreme cases where the tribunal has gone so far in its conduct of the arbitration from what could reasonably be expected of the arbitral process, that justice calls out for it to be corrected and thus we would expect the court to take action¹²⁵. Although the grounds for challenging an award have been expressed in the Act in a different form from the Model Law regulation, the two sets of rules are quite similar in substance¹²⁶. For example, the irregularities listed in sec. 68(c) (failure by the tribunal to conduct the proceedings in accordance with the procedure agreed by the parties) and sec. 68(d) (failure by the tribunal to deal with all the issues that were put to it) correspond to art 34(iv) (the arbitral procedure was not in accordance with the agreement of the parties); sec. 68 (a) (failure by the tribunal to comply with the general duty of acting fairly and impartially between the parties, giving each party a reasonable opportunity of putting his case) corresponds, at least partially, to art. 34 (ii) of the Model Law (the party was not given proper notice of the appointment of an arbitrator, or of the arbitral proceedings or was otherwise unable to present his case) of the Model Law; sec. 68(g) (the award being obtained by fraud or the award or the way in which it was procured being contrary to public policy) is, as we have seen when dealing with Scots arbitration law, only a specification of the public policy infringement laid down in art. 34(2)(b)(ii) of the Model Law.

¹²²B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 305

¹²³ DAC 1996 Report on the Arbitration Bill, cit, par. 282

¹²⁴Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 352; DAC 1996 Report on the Arbitration Bill, cit, par. 280

¹²⁵ DAC 1996 Report on the Arbitration Bill, cit, par. 280

¹²⁶F Davidson, *The New Arbitration Act- A Model Law?* cit, p. 126-127

Main divergencies

Kompetenz-Kompetenz

Most major arbitration laws observe the two related principles of *Kompetenz-Kompetenz* (the power of the tribunal to rule on its own jurisdiction) and separability of the arbitration agreement (the arbitration agreement is treated as separated from the main contract, so that the invalidity of the latter does not affect the former) and the Model Law embodies both principles in the same art. 16. The Arbitration Act 1996 deals with the matter of the jurisdiction of the arbitral tribunal in sections 30-32, which are largely based on art. 16 of the Model Law. However, the two sets of provisions differ in some respects. Whereas art. 16(1) of the Model Law simply states that the arbitral tribunal may rule on its own jurisdiction, including any objection with respect to the existence or validity of the arbitration agreement, sec. 30(1) of the Arbitration Act 1996 provides a more comprehensive definition of what matters are included in the jurisdiction of the arbitral tribunal, including also whether the tribunal is properly constituted and what matters have been submitted to arbitration in accordance with the arbitration agreement. However, such matters, although not expressly envisaged in art. 16(1) would probably fall within its scope¹²⁷. But the most important difference is that, unlike the corresponding provision of the Model Law, sec. 30 of the Act is not mandatory and therefore the parties, if they wish, may agree that the arbitral tribunal shall not have the power to rule on its own jurisdiction.¹²⁸ Another important difference is that art. 16(3) of the Model law only contemplates judicial review of the arbitral tribunal decision that it does have jurisdiction, while sec. 67 of the Act, which deals with the challenging of the award as to its substantive jurisdiction, does not appear to comply with this limitation: consequently, one must conclude that it allows also an appeal against a tribunal decision that it does not have jurisdiction¹²⁹. Finally, sec. 32 envisages a particular procedure for challenging the arbitral tribunal jurisdiction which is not contemplated by the Model law: a party may apply directly to

¹²⁷B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 159

¹²⁸DAC 1996 Report on the Arbitration Bill, cit, par. 139

¹²⁹F. Davidson, *The New Arbitration Act- A Model Law?* cit, p. 113. as we have seen above the Scottish version of art. 16(3) of the Model law was amended in order to allow for an appeal against an arbitral tribunal decision that it does have jurisdiction.

the court in order to decide a question of jurisdiction of the arbitral tribunal in a preliminary ruling before the latter has taken any decision on the matter. However, this procedure is subject to a number of restrictions which make it applicable in exceptional cases only¹³⁰: all the parties must agree in writing or, alternatively, the arbitral tribunal must give permission and the court is satisfied on a number of conditions, including the determination of the question is likely to produce a substantial savings in costs and there is good reason why the matter should be decided by the court.

Contrary to the Model Law approach, the Arbitration Act 1996 has expressed the principle of the separability of the arbitration agreement in a different provision from that containing the *Kompetenz-Kompetenz* rule. This in order to clearly differentiate between the two concepts.¹³¹ Nonetheless, sec. 7 closely mirrors art. 16(1) of the Model Law with a significant difference: the doctrine of separability does not apply if the parties have agreed otherwise.

Appointment of arbitrators

Sec. 15 complies with the basic principles, stated in art. 10(1) of the Model Law, that the parties are free to agree on the number of arbitrators. But, whereas sec. 15(3) indicates that where the parties do not agree on the number of arbitrators, the tribunal shall be composed of a sole arbitrator, in the Model Law the default number is three. The sole arbitrator is more in keeping with the English tradition and also the concern of avoiding unnecessary expenses: as the DAC observed, the cost of three arbitrators would have amounted to three times the cost of employing one and it seemed right that this extra burden should be available if the parties so choose, but not imposed on them. In addition, the three arbitrators rule does not cater for the situation where there are more than two parties to the arbitration¹³². On the other hand, the default rule of the Model Law reflects general practice in international commercial arbitration and is more likely to guarantee equal treatment of both parties¹³³, even if this is not always so in multi-party arbitrations¹³⁴. Moreover, sec. 15 (2) contains a rule which

¹³⁰DAC 1996 Report on the Arbitration Bill, cit., par. 147

¹³¹ DAC 1996 Report on the Arbitration Bill, cit, par. 43

¹³² DAC 1996 Report on the Arbitration Bill, cit, par. 79

¹³³UN Doc A/CN9/232 par. 81

¹³⁴Cp the discussion on multi-party arbitration in the chapter of the reception of the Model law in Germany

does not appear in the Model Law and represents a derogation of the principle of party autonomy, in order to ensure that, unless the parties otherwise agree, decisions cannot be deadlocked for want of majority¹³⁵: in the absence of a contrary agreement by the parties, an agreement that there should be an even number of arbitrators shall be understood as requiring the appointment of an additional arbitrator as chairman of the tribunal. By contrast, the drafters of the Model Law, while considering it unnecessary to adopt the rule followed by some states that there should always be an uneven number of arbitrators¹³⁶, made nonetheless no provision for any of the difficulties which may arise when an even number were appointed¹³⁷.

Another important difference in the matter of the composition of the arbitral tribunal is that sections 15 and 21 of the Arbitration Act 1996 make reference to the possibility of appointing an umpire. A tribunal consisting of two arbitrators and an umpire is a well-established feature of English arbitration practice, but little understood outside England: it is thus not surprising that this particular composition of the arbitral tribunal is not contemplated by the Model Law. The umpire is an arbitrator who, as long as the other arbitrators are in agreement, has no real function or status, but as the arbitrators disagree on any matter of the dispute, replaces them as deciding tribunal¹³⁸. The umpire is to be distinguished from the chairman, who is an arbitrator having the same functions and obligations and whose views rank equally with those of the other members of the tribunal, save where there is no majority¹³⁹.

Minor differences relate to the role of the chairman and some default rules applying in case that the parties fail to reach an agreement on the procedure for the appointment of the arbitrators. If there is neither majority nor unanimity among the arbitrators, sec. 20 of the Act provides that the chairman's decision will prevail. By contrast, art. 29 of the Model Law provides no fall-back provision when a majority or unanimity cannot be reached: the decision-making powers of the presiding arbitrator are confined to matters of procedure and such powers are in any case subject to the authorisation of the parties or all members of the arbitral tribunal. Accordingly, the presiding arbitrator will not be able to exercise these powers to issue an award, nor otherwise to deal with a matter of substance such as a challenge to any arbitrator or a jurisdictional challenge¹⁴⁰: in these matters the arbitrators will, in

¹³⁵Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 281

¹³⁶UN Doc A/CN 9/207 par. 67

¹³⁷Un Doc A/CN 9/216 par. 77

¹³⁸B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 104; Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 287

¹³⁹B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 104

¹⁴⁰F Davidson, *The New Arbitration Act- A Model Law?* cit, p. 108; UN Doc/ACN9/246 par. 38

practice, have to persuade each other, until at least a majority is reached¹⁴¹. Default rules for the appointment of arbitrators are substantially based on art. 11 of the Model Law, although they deal with a wider range of situations.¹⁴² Whereas art. 11 of the Model Law only provides for in situations where there shall be either a one or a three arbitrator tribunal, sec. 16 of the Act contemplates also the hypothesis of an arbitral tribunal composed by two arbitrators and an umpire, as well as a residual default provision applying in any other case (and in particular, if there are more than two parties). In addition, sec. 17 of the Act envisages a special rule applying in a two-party case where each party is to appoint an arbitrator and one of them fails to do so. In this situation the Act allows the party not in default to appoint his arbitrator as sole arbitrator, whose award shall be binding on both parties as if it had been so appointed by agreement. However, this provision has attracted criticism on the grounds that the resulting tribunal does not comply with the agreement of the parties and consequently the resulting award risks not to be enforced under the New York Convention¹⁴³. Nonetheless, the DAC has recommended that this rule should be retained, since it spurs the recalcitrant party into prompt action and reduces the opportunities of those contemplating dilatory tactics¹⁴⁴.

Challenge of arbitrators

The provisions of the Act on the challenge of arbitrators are very similar to the correspondent Model Law rules, even if they may appear perhaps in a more systematic fashion¹⁴⁵. Whereas the Model Law generically refers to the challenge of an arbitrator, the Act distinguishes between revocation of the arbitrator's authority by the parties and removal of the arbitrator by the court. The first case is contemplated in sec. 23, which allows an arbitrator to be revoked either at the instance of the parties acting jointly, or at the instance of a third party (which may be an arbitral institution) to whom the parties have vested the relevant powers. The most important difference with the Model Law in this respect is that in the latter's regime, if the parties do not agree otherwise, the arbitral tribunal is entitled to decide on the challenged arbitrator, whereas this possibility is not contemplated in the Act. The

¹⁴¹B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 122

¹⁴²DAC 1996 Report on the Arbitration Bill, cit, , par. 80

¹⁴³Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 283

¹⁴⁴DAC 1996 Report on the Arbitration Bill, cit, , par. 84

¹⁴⁵F. Davidson, *The New Arbitration Act- A Model Law?* cit, p. 110

reason for this difference is evidently that the Model Law follows the standard of the three arbitrator tribunal, while the Act that of the single arbitrator. The second case is contemplated by sec. 24, which allows a party to apply to the court to remove an arbitrator on any of the grounds envisaged in the following subsections (a)-(d). These grounds closely resemble those found in articles 12 and 14 of the Model Law: nonetheless, the first of the grounds envisaged in sec. 24 of the Act has given rise to much debate because, unlike the Model Law, it refers only to justifiable doubts about the arbitrator's impartiality, without making any mention of his independence. The DAC justified this omission on a number of grounds. First, the lack of independence, unless it gave rise to justifiable doubts about the impartiality of the arbitrator, was considered of no significance. Accordingly, the lack of independence as a separate ground for challenge was regarded unnecessary¹⁴⁶. Secondly, it was feared that the inclusion of this further ground could give rise to endless arguments as it had, for example, in Sweden and in the United States, where almost any connection (however remote) had been put forward to challenge the independence of the arbitrator¹⁴⁷. Thirdly, it was argued that there may well be situations in which the parties desire their arbitrators to have familiarity with a specific field, rather than being entirely independent¹⁴⁸.

The problem of the arbitrator's lack of independence is particularly delicate in the English system, where it is often the case that members of the same barristers' chambers participate in arbitrations both as advocates and as arbitrators, as well as judges in a possible appeal in front of the Commercial Court. The DAC observed that if in such a case the lack of independence were an available ground, the strict independence of the arbitrator could be called into question and used as a basis for a challenge¹⁴⁹. However, such a challenge has never been successful in English case law because judges have always considered the lack of independence as relevant to the extent that it gave rise to serious doubts about the arbitrator's impartiality. Accordingly, the fact that a barrister arbitrator belongs to the same set of chambers as the barrister acting for one of the parties has not been regarded as jeopardising his impartiality: it has been an everyday occurrence for a barrister to appear against a member of his own chambers, and for other members of his chambers to appear before him when he is acting as an arbitrator or deputy judge or recorder.¹⁵⁰

¹⁴⁶DAC 1996 Report on the Arbitration Bill, cit., par. 101

¹⁴⁷DAC 1996 Report on the Arbitration Bill, cit., par. 102

¹⁴⁸DAC 1996 Report on the Arbitration Bill, cit., par. 103

¹⁴⁹B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 133; DAC 1996 Report on the Arbitration Bill, cit, par. 102

¹⁵⁰*Laker Airways Inc v. FLS Aerospace Ltd*, Lloyd's Rep., 1999, 2, 45

Appeal on a point of law

During the *travaux préparatoires* of the Arbitration Act 1996 there was extensive discussion on whether the right of appeal on a question of law should be maintained. The trend in legal systems around the world had been towards immunising the award from challenge on the ground of error of law¹⁵¹, and indeed the Model Law envisaged no such appeal. Furthermore, allowing the court to substitute its own view for that of the parties' chosen tribunal amounted to subvert the parties' choice of arbitration in preference to litigation¹⁵². Finally, from a commercial standpoint the possibility of giving rise after an award was made to long court proceedings, often of dilatory character, made England a less attractive option to parties choosing a forum for international arbitrations¹⁵³. On the other hand it was answered that, where the parties have agreed that the arbitrator should decide the dispute in accordance with an established system of law, they have implicitly agreed that the arbitral tribunal should apply the law properly, with the consequence that, if it failed to do so, it was not reaching the result contemplated by the arbitration agreement¹⁵⁴.

Accordingly, the choice has been not to abolish the right of appeal on a point of law altogether, but rather to keep it in a considerably attenuated fashion¹⁵⁵, by restating in legislative form the existing principles largely found in case law and adding a number of further adjustments which will make it less easy to bring an appeal¹⁵⁶, thus ensuring that only rarely will the award not constitute the final decision on the substantive issues in the arbitration¹⁵⁷. Maybe the most important reform envisaged by the Act in this respect is the extension of the right of the parties to exclude the appeal to all categories of disputes: the “special categories” under the 1979 Act have been abolished and, by virtue of the decision not to bring into force the special regime for domestic arbitrations provided for in the Arbitration Act 1996, also the limitation laid down in sec. 87(1) has no longer effect¹⁵⁸. It is now open to the parties to

¹⁵¹ A. Redfern and M. Hunter, *op. cit.* p. 435

¹⁵² Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 336

¹⁵³ B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 309

¹⁵⁴ DAC 1996 Report on the Arbitration Bill, cit, par. 285

¹⁵⁵ Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 49

¹⁵⁶ F Davidson, *The New Arbitration Act- A Model Law?* cit, p. 123

¹⁵⁷ B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 310; DAC 1996 Report on the Arbitration Bill, cit, , par. 170

¹⁵⁸ According to sec. 87(1) of the Arbitration Act 1996, in case of a domestic arbitration agreement, any agreement to exclude the jurisdiction of the court will only be valid if entered into during the course of the arbitral proceedings.

exclude the right of appeal in any category of dispute and at any time, that is to say before or after the commencement of the arbitration¹⁵⁹. Another significant limitation to the right of appeal is that the party intending to appeal must obtain either the agreement of all the other parties, or the leave of the court; among the conditions which must be satisfied before the court grants the leave are that the question of law is one of general public importance and is open to serious doubt or that the decision of the tribunal on the question of law is obviously wrong; furthermore, an appeal may not be brought unless the appellant has first exhausted any available arbitral process of appeal or review, or any available recourse under sec. 57 (correction of award or additional award); finally the appeal may be submitted within 28 days of the date of the award, although this deadline may be extended by the court. Despite the significant limitations introduced with the Arbitration Act 1996, the appeal on a point of law is one of the most striking differences between the English and the Model Law regime of arbitration. Significantly, during the *travaux preparatoires* of the Model Law, the United Kingdom expressed reservations on the narrowness of the grounds upon which an award may be challenged: the Model Law – it observed – must set only a minimum of judicial control; it does not follow, however, that it must set a maximum, eliminating even those means of judicial control which the parties themselves desire to retain. Consequently, while fully understanding the point of view that the parties should not be compelled to submit an appeal on question of law, the United Kingdom suggested that the logical consequence of party autonomy was that the parties should be allowed to have recourse, if that is what they have agreed¹⁶⁰.

However, aware of the fact that foreigners do not like the idea of the courts involving themselves in the merits of arbitrations¹⁶¹, the drafters of the Arbitration Act 1996 have expressly restated the caveat that a question of law is, for a court in England and Wales, a question of the law of England and Wales¹⁶²:

¹⁵⁹B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 310

¹⁶⁰UN Doc A/CN.9/263/Addendum 1 paras. 37-38

¹⁶¹Lord Mustill, and S.C. Boyd, *Commercial Arbitration*, vol I, cit, p. 454

¹⁶²Sec. 82 of the Arbitration Act 1996 clarifies that the well-established common law principle that foreign law is treated as a question of fact (see e.g. Dicey and Morris, *The Conflicts of Laws*, Sweet and Maxwell, 1993, p. 226; *Bumper development Corporation v. Commissioner of Police of the Metropolis and Others*, WLR, 1991, 1, 1362 at 1368) applies also to the field of arbitration. The reason of this rule is that it is unlikely that an English judge will have any qualifications or training in the foreign law in question, therefore, in a system which adopts adversarial procedures, it appears easier to introduce the legal fiction whereby a foreign law must be proved by the parties as fact to an English judge. However, the extension of this rule to international arbitration has been considered not in line with the particular features of international arbitration itself, where the adoption of adversarial procedures is not always the rule and the international composition of the arbitral tribunal and the parties' counsel ensure that both the arbitral tribunal and the parties will be sufficiently familiar with the foreign law. As Hunter notes, one can for example imagine the surprise of an arbitral tribunal composed by three distinguished French lawyers, sitting in England, with French advocates representing the parties, on being informed that French law would be required to be proved to them as “fact” through an adversarial procedure involving the examination and cross-examination of expert witnesses duly qualified in French law! (M. Hunter, *The Procedural Powers of Arbitrators*

where the parties have chosen a foreign law or some sets of rules which are not law at all, such as equity or good conscience, there is no right of appeal.

Issues not contemplated in the Model Law

Consolidation

Sec. 35 of the English Arbitration Act 1996 deals with the thorny question of consolidation of arbitral proceedings: in accordance with the principle of party autonomy, it provides that the arbitral tribunal has no power to order the consolidation (that is to say the combining of different, but related claims into a single proceedings) or to order concurrent hearings (where the claims remain separate but are heard together for reasons of convenience and cost saving) against the will of the parties¹⁶³. Moreover, in the absence of an express provision entitling the court to do so, the latter has no power to order consolidation¹⁶⁴. As Hunter has put it, sec. 35 amounts in effect to no more than a general statement of party autonomy and represents the law as it would be if the topic had not been mentioned in the Act at all¹⁶⁵. Despite a strong body of opinion calling for a provision that would empower either a tribunal or the court (or both) to order consolidation of concurrent arbitral proceedings, the DAC was eventually persuaded by the objection that a power of compulsory consolidation would be against the basic principle of party autonomy and in particular would frustrate the agreement of the parties to have their own arbitral tribunal for their own disputes, since at least one set of parties would be compelled to have their dispute tried by an arbitral tribunal other than the one chosen by them and possibly also by a procedure other than that which they have agreed¹⁶⁶. Accordingly, it concluded that the problem could be best solved by those in charge of drafting standard forms of contracts or arbitral institutions whose regulations may include suitable clauses permitting the tribunal to order consolidation in appropriate cases.¹⁶⁷

under the English 1996 Act, Arb Int, 1997, 13,4, p. 356).

¹⁶³B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 181

¹⁶⁴Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 309

¹⁶⁵M. Hunter, *The Procedural Powers of Arbitrators under the English 1996 Act*, cit., p. 358

¹⁶⁶DAC 1996 Report on the Arbitration Bill, cit, par. 180;

¹⁶⁷DAC 1996 Report on the Arbitration Bill, cit, , par. 181; cp e.g. Rule 3.7 of the Construction Industry Model Arbitration Rules (CIMAR): <<where the same arbitrator is appointed in two or more related arbitral proceedings on the same project each of which involves some common issue, whether or not involving the same parties, the arbitrator may, if he considers it

Immunity of the arbitrator

Sec. 29 mirrors almost *verbatim* the provision on the liability of the arbitrator as found in the arbitration laws of most common law countries¹⁶⁸: the arbitrator is as a general rule not liable for anything done or omitted in the discharge or purported discharge of his functions as arbitrator, unless the act or omission is shown to have been in bad faith; this immunity is also extended, by virtue of sub-sec. (2) to the arbitrator's employees or agents. Yet, par 3 contains a rule which is not found in the other common law jurisdictions and which specifies further the extent of the arbitrator's immunity: it clarifies that the consequences of an arbitrator's resignation do not fall within the immunity provision, but are regulated by sec. 25 under which the court has the power to relieve the arbitrator from any liability incurred by him by resigning his appointment. In this case the extent of the resigning arbitrator's liability is much more uncertain because it entirely depends on the court's discretion: according to sec. 25(4), the court may grant relief from liability on such terms as it thinks fit if it is satisfied that in all the circumstances it was reasonable for the arbitrator to resign.

Costs of the Arbitration

The English Arbitration Act 1996 provides in secs. 59 to 65 a very detailed regulation on the costs and fees of the arbitration specifying exactly by whom they should be paid and how much of them is recoverable. The length of these provisions (the DAC itself does not hesitate to define them as a “code”¹⁶⁹), which extend over a considerable part of the Act, has raised some concern: too much attention seems to have been paid to a subject which is only of subordinate importance in the context of arbitration as a whole. Nonetheless, the incidence and the amount of costs is an issue of crucial importance to parties which is often underestimated by their legal advisers, with the result that the latter often convince their clients to embark on an arbitral dispute with only the haziest idea of the potential

appropriate, order the concurrent hearing of any two or more such proceedings or of any claim or issue arising in such proceedings>>.

¹⁶⁸See *supra* pp. 241 ff

¹⁶⁹DAC 1996 Report on the Arbitration Bill, cit, par. 265

liability for costs. In line with the principle of user-friendliness, these provisions attempt to make transparent to the first-time user of English arbitration (especially overseas parties and their legal advisers) the principles on which costs are awarded and their recoverable amount is determined¹⁷⁰.

Sec. 59 defines what is meant by “costs of the arbitration”: they include not only the fees and expenses of the arbitrator but also the fees and expenses of any arbitral institution concerned, the legal or other costs of the parties and the costs of or incidental to any proceedings to determine the amount of the recoverable costs of the arbitration. This provision follows the pattern of art. 38 of the UNCITRAL Arbitration Rules and has its counterpart in the arbitration laws of most common law countries.¹⁷¹ The following sections establish in large detail how the costs of the arbitration are to be determined, allocated and borne as between the parties. The most important of these provisions is sec. 63 which envisages three ways of cost determination: the first is the agreement of the parties, which is of course the most common method; in the absence of such agreement sec. 63(3) provides that the tribunal may determine by award the recoverable costs of the arbitration on such basis as it thinks fit; if the tribunal does not determine the recoverable costs of the arbitration, sec. 64(4) provides that any party to the arbitral proceedings may apply to the court for such determination.

The Act also contains an elaborated provision (sec. 49) on the award of interest by the tribunal distinguishing between interest up to the date of the award (sec. 49.a) and interest from the date of the award up to the payment. In addition sec. 49 empowers the tribunal to award interest on interest (the so-called compound interest); this is an important innovation brought about by the Arbitration Act 1996 since it confers upon the tribunal a power to which the courts are not entitled: according to sec. 3(1)(a) of the Law Reform (Miscellaneous Provisions) Act 1934 the latter are expressly prevented from the awarding of interest upon interest.

Conclusion: England as a Model Law country?

Most British commentators tend to emphasise the peculiarity of the Arbitration Act 1996 with respect to the Model Law. Although they acknowledge that the Arbitration Act 1996 has adopted the Model

¹⁷⁰Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 344

¹⁷¹See *supra* pp. 235 ff

Law's structure and language, they are reluctant to consider the Act simply as a mirror of the Model Law with some special local features, as is the case with many national arbitration laws developed under its influence¹⁷². Nonetheless, some authors underline the mismatch between the initial scepticism of the Mustill Report vis à vis the Model Law and the large extent of influence which the latter ended up exerting on the Arbitration Act 1996, so that not only is virtually every article of the Model Law reflected in a section of the 1996 Act¹⁷³, but also the Model Law was eventually taken as the standard against which pre-existing English law had to be judged¹⁷⁴.

The survey above has shown that the Arbitration Act 1996 differs from the Model Law in four main respects: the scope of application, the rules on the appointment and challenge of arbitrators, the appeal on a question of law and the rules on *Kompetenz Kompetenz*. As to the first respect, it must be observed that also Germany has made the choice of extending its arbitration act to domestic and non-commercial disputes, but this departure from the Model Law has not prevented it from being regarded as a Model Law country. As to the second respect, it may be said that such rules are non-mandatory and appear justified in order to adapt the Model Law's standard regime to the local particularities of English arbitration practice, but in no way do they represent a radical departure from the Model law's structure and inspiring principles. The only substantial differences remain the right to submit an appeal on a question of law and the rules on *Kompetenz Kompetenz*: these divergences have led some author to conclude that the Arbitration Act 1996 permits a wider extent of court intervention with respect to the Model Law¹⁷⁵. However, it should be noted that the level of judicial intervention will largely depend on the approach English courts will adopt in interpreting the Arbitration Act provisions. The test of sec 32, which allows the court to decide on any question as to the arbitral tribunal's jurisdiction, is onerous and difficult to meet; nonetheless, it has given rise to different interpretations: in some cases the English courts have rejected the claimant's application under sec. 32 which had been brought without the other party's agreement and before the arbitration had commenced¹⁷⁶; in others they have argued that they possess an inherent jurisdiction to grant declaratory relief even where sec. 32 had not been satisfied¹⁷⁷. By the same token, given the strict limitations envisaged by the Act, one may expect that an appeal will

¹⁷²Lord Mustill, and S.C. Boyd, *Commercial Arbitration: 2001 Companion Volume to the Second Edition*, cit, p. 11

¹⁷³J. Tackaberry and A. Marriott, *op. cit.*, par. 2-064

¹⁷⁴F. Davidson, *The New Arbitration Act- A Model Law?* cit, p. 128

¹⁷⁵A.S. Reid, *The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?*, *Journal of International Arbitration*, 2004, 21, 3, p. 229

¹⁷⁶*Vale Do Rio Navegacos S.A. v. Shanghai Bao Steel Ocean Shipping and Sea Partners Ltd.*, All E.R. (Comm), 2000, 2, 270

¹⁷⁷*JT Mackley & Co. v. Gosport Marina Ltd*, 2002, EWHC, 1315

be hardly successful in English courts, especially in the case of international arbitrations, since according to English law arbitral disputes in which a foreign or transnational law is applied are excluded from appeal. Yet, English courts have not so far followed a clear-cut approach: for example in *Gbangola v. Smith & Sheriff Ltd*¹⁷⁸, in interpreting the requirement whereby the question of law should be one which the tribunal was asked to determine, it was stated that this is admissible where the question of law is integral to the resolution of the dispute which was argued before the arbitrator even it had not specifically been argued before the tribunal. By contrast, in *India Steamship Co. Ltd v. Arab Potash Co Ltd*¹⁷⁹, the court argued that in a case where there is more than one arguable construction of words used in a contract and the tribunal arrived at a construction other than that which the court considered might be right, the court should not interfere by virtue of sec. 69(3)(d)¹⁸⁰.

Apart from the qualification of England as a Model Law country, it is important to underline the fundamental role the Model Law has played in the reform of English arbitration law. If the British drafters had not taken into careful consideration the Model Law provisions, the Arbitration Act 1996 would have not probably had that revolutionary character which has been repeatedly emphasised by its commentators¹⁸¹.

In conclusion, although there may be some relevant differences between the Arbitration Act 1996 and the Model Law, both sets of rules appear nonetheless linked by the same objective of reducing the level of judicial intervention in the arbitral process. This may be achieved only through a twin approach: on the one hand courts must learn to adopt a *laissez faire* approach to arbitration; on the other hand arbitrators, by increasing their professionalism through training and education, must be able to make decisions which appear to the courts beyond reproach. Given the identity of objective, it is very likely that the two systems will increasingly converge in the twenty-first century¹⁸².

¹⁷⁸1998, 3 All ER 730

¹⁷⁹Unreported, quoted by B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p. 312

¹⁸⁰This provision envisages that the court shall grant leave of appeal if it is satisfied that, despite the agreement of the parties to resolve the matter by arbitration, it is just and proper in all circumstances for the court to determine the question. This supplementary requirement provides in practice the courts with discretion as to grant the leave even where the other requirements of subsection 69(3) are satisfied,

¹⁸¹See J. Tackaberry and A. Marriott., *op. cit.*, par. 2-059; B. Harris, R. Planterose, J. Tecks, *The Arbitration Act 1996: A Commentary*, cit, p 1 and 11

¹⁸²A.S. Reid, *The UNCITRAL Model Law on International Commercial Arbitration and the English Arbitration Act: Are the Two Systems Poles Apart?* cit., p. 227 and 238

CHAPTER FIVE: THE HARMONISATION OF THE LAW APPLICABLE TO THE MERITS OF THE DISPUTE – DRAFTING AND DIFFUSION OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

The problem of the choice of law applicable to the merits of the dispute in international arbitration

The choice of the law applicable to the merits of the dispute is a crucial issue in international arbitration and has attracted much scholarly writing: nothing is more important in any international arbitration than knowing the legal or other standards to apply to assess the rights and obligations of the parties¹. The selection of the substantive law may sometimes be so complex that an interim award may be required on the issue, preceded by full written and oral submissions².

As a general rule, international conventions, national laws and the rules of international arbitral institutions support the free choice by parties of a law to govern their contract³. Accordingly, the most important principle to determine the law applicable to the merits of the dispute is party autonomy⁴. Parties may choose as substantive law, for example, a neutral law (i.e. a law with no connection with the dispute or with no particular relationship to any party), different laws to govern different aspects of their relationship (the so-called *dépeçage*) or even a non-national system of rules, such as “general principles of international law”, the *lex mercatoria*, the UNIDROIT Principles of International Commercial Contracts, or the INCOTERMS⁵. Where parties have found an agreement on the applicable substantive law (the so-called choice-of-law clause) most arbitral tribunals and national courts will normally enforce it. Nonetheless, despite this general recognition

¹J.D.M. Lew, L. A. Mistelis, S. Kröll, *Comparative International Commercial Arbitration*, Kluwer, 2003, p. 412.

²W.L. Craig, W.W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, Dobbs Ferry Oceana, 2000, p. 320.

³The most important conventions in this matter are the European Community Convention on the Law Applicable to Contract Obligations (the Rome Convention, I.L.M., 19, p. 1492, now a EU Regulation), the Convention on the Law Applicable to Contracts for the International Sale of Goods (the Hague Convention, I.L.M., 24, p. 1573) and the Inter-American Convention on the Law Applicable to International Contracts (Mexico City Convention, I.L.M., 33, p. 732). Choice-of-law agreements are also enforceable under the laws of virtually all trading nations (see e.g. Art. 187.1 of the Swiss Law on Private International Law and art. 1496 of the French Code of Civil Procedure). Finally, recognition of party autonomy in the choice of substantive law is also the unanimous approach of all institutional arbitration rules (see e.g. art 17(1) of the 1998 ICC Rules, art. 22.3 of the LCIA Rules and art. 29 of the AAA International Rules).

⁴M. Rubino-Sammartano, *International Arbitration: Law and Practice*, Kluwer, 2001, p. 418.

⁵See M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, 2008, pp. 69-75; J.D.M. Lew, L. A. Mistelis, S. Kröll; *op.cit.*, pp. 417-8.

of party autonomy in the selection of the substantive law, national laws generally impose two limits on this principle: the mandatory rules and the public policy of the forum⁶. In the United States, for example, parties are not free to choose any law. Under the Restatement Second, Conflicts of Laws, a choice-of-law agreement will be enforced if a) it violates no applicable public policy and b) there is a substantial relationship between the party or the transaction and the law that is chosen, or a reasonable basis for the parties' choice⁷

However, it is not uncommon in international arbitration that parties cannot agree on the substantive law governing their dispute:: according to a study in ICC arbitration agreements, this happens in roughly 25% of the cases⁸. In case of failure by the parties to designate the applicable substantive law, arbitration rules and laws uniformly provide that arbitrators will make this determination, and generally give them broad discretion to do so. The method of determining the law, however, differs not only from law to law, but also from arbitrator to arbitrator.

Broadly speaking, there are two ways in which arbitral tribunals determine the applicable substantive law where parties have failed to make a choice: the so-called *voie indirecte* whereby the applicable substantive law is determined by applying conflict of laws rules and the so-called *voie directe* whereby the arbitral tribunal applies directly the law which appears most appropriate or has the closest connection with the dispute. Until recently, the traditional approach has been to determine the substantive law by applying the conflict of laws rules of the place of arbitration. This solution, which was recommended by the International Law Institute in 1957 and 1959⁹, was

⁶In most cases, it is the forum's public policy that will apply to invalidate a choice-of-law agreement. However, there are also cases where the public policy of another jurisdiction will be given effect by the forum court (the so-called "foreign public policy", see e.g. § 187(b) of the US Restatement (Second) Conflict of Laws, according to which the law of the state chosen by the parties to govern their contractual rights and duties does not apply where the application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue).

⁷Restatement (Second) of Conflicts of Law, §§ 6 and 187. The state of New York is, however, an exception. According to § 5-1401 of New York General Obligations Law, the parties' choice of New York law is enforced under certain conditions even if there is no reasonable relationship to the state, namely the contract must not involve personal, family, or household services, or labour, and the amount involved must be at least US \$ 250,000. Moreover, under § 5-1402, if foreign parties stipulate that New York law is the law of the contract, the state of New York provides for personal jurisdiction and its courts may not dismiss for forum non conveniens if the amount in question is at least US \$ 1,000,000. Thus, the state of New York has chosen to accept party autonomy in commercial cases if the amount in dispute is sufficiently large in an attempt to secure and increase its reputation as an international business centre, with ease of access to its legal system for parties with relatively significant transactions. (M.L. Moses, *op.cit.*, p. 71-2).

⁸S. R. Bond, *How to Draft an Arbitration Clause (Revisited)*, in C.R. Drahozal and R.W. Naimark (eds), *Towards a Science of International Arbitration: Collected Empirical Research*, Kluwer, 2005, pp. 65-80. By analysing the arbitration clauses contained in the 237 arbitration cases submitted to the ICC's International Court of Arbitration in 1987 and in the 215 submitted in 1989, the author found that parties to ICC arbitration agreements identified a particular substantive law 75% of the time in 1987 and 66% of the time in 1989; it follows *a contrario* that at least 25% of the time parties do not choose a substantive law in their arbitration agreements. These figures have been confirmed by more recent statistics: in 1998 82.1% of the cases submitted to ICC, in 1999 82% and in 2001 77% included an express choice of law (statistics quoted by J.D.M. Lew, L. A. Mistelis, S. Kröll, *op.cit.*, p. 413).

⁹*Annuaire de l' Institut du Droit International*, 1957, 47, p. 394 and 1959, 48, p. 264: <<the rule of choice of law in the seat of the arbitral tribunal must be followed to settle the law applicable to the substance of the difference>>.

founded on the idea that the parties' selection of the place of arbitration was an implied choice that the law of that place should apply to the substance of the dispute¹⁰. Now this approach has been substantially eroded by contemporary practice, but it has not completely disappeared¹¹: there are still cases in which national courts and arbitral tribunal have considered the chosen place of arbitration as a n implied choice of the law of that place, but this is no longer an absolute presumption; the selection of the place of arbitration is no more than another general connecting factor which may be relevant in the circumstances of the particular case¹². Consequently, conflict of laws rules different from that of the place of arbitration are nowadays frequently applied by arbitral tribunals selecting the applicable substantive law. In particular, three main alternatives to the arbitral seat rule have emerged in practice¹³. The first, which was originally envisaged by art. VII(1) of the 1961 European Convention on International Arbitration, is that the arbitral tribunal has the power to select the conflict of laws rules it deems appropriate. This solution has been adopted in art. 28(2) of the UNCITRAL Model Law and has also been followed by several non-Model Law countries, such as England¹⁴. This approach confers a wide discretion upon the arbitrator in establishing what is meant by “appropriate” conflict of laws rules in relation to the circumstances of the case¹⁵. The second is the so-called cumulative approach, whereby the arbitral tribunal looks at the various conflict of laws rules which are potentially applicable in order to conclude that all the relevant rules point to the same law, and thus that law becomes the applicable law¹⁶. International arbitration tribunals have often adopted this approach with a view to avoiding to choose a single system of conflict of laws rules: where the conflict rules of all the jurisdictions related to the dispute point to the same substantive law, then there is in fact no conflict whatsoever on the law applicable

¹⁰J.D.M. Lew, L. A. Mistelis, S. Kröll, *op.cit.*, p. 415; G.B. Born, *International Commercial Arbitration: Commentary and Materials*, Kluwer, 2001 p. 529.

¹¹G.B.Born, *op.cit.*, p. 530. There are still cases in which arbitrators apply the conflict of laws rules of the place of arbitration: see e.g. ICC case 5460/1987, YBCA, 1988, XIII, p. 104 and interim award in ICC case 6149/1990, YBCA, 1995, XX, p. 41.

¹²J.D.M. Lew, L. A. Mistelis, S. Kröll, *op.cit.*, pp. 415-16. See e.g. Oberlandesgericht Hamm, 15 November 1994, *Slovenian Company, formerly State Enterprise v Agent (Germany)*, YBCA, 1997, XXII, p. 707 in which the court held that the choice of Zurich as the seat of the arbitration may imply the choice of the law of the canton of Zurich as law governing the substance of the dispute; ICC case 2735/1976, Clunet, 1977, 104, p. 947 in which the arbitral tribunal stated that the applicable law can be implied from the determination of the seat of arbitration; by contrast, in the ICC case 5717/1988 (ICC Bulletin, 1990, 1, 2, p. 22) the arbitral tribunal held that the choice of England as the place of arbitration and English as the language of the contract did not manifest the parties' intention that English law should apply to the contract.

¹³Cp. W.L. Craig, W.W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, cit., pp. 288ff

¹⁴Art. 46(3) English Arbitration Act 1996

¹⁵See e.g. ICC case 7319/1992, YBCA, 1999, XXIV, p. 141 and ICC case 6527/1991, YBCA, 1993, XVIII, p. 44. Cp also O. Lando, *The Law Applicable to the Merits of the Dispute*, in J.D.M. Lew (ed), *Contemporary Problems in International Arbitration*, Kluwer, 1987, p. 106, who argues that often arbitrators consider the law of the unsuccessful party as the most appropriate in order to show that this law confirms their findings.

¹⁶M.L. Moses, *op.cit.*, p. 77.

to the merits and therefore the arbitrator can proceed to apply that substantive law directly¹⁷. According to the third approach, the arbitral tribunal embarks on a comparative analysis of all the main systems of conflict of laws rules in an attempt to establish the existence of universally recognised principles of conflict of laws¹⁸. Yet, while a number of alternative criteria to the traditional approach may be identified, there is no consensus regarding any of these alternatives. As a result, substantial uncertainty often surrounds the selection of the applicable substantive law by arbitral tribunals and this does not match with the ideals of predictability and efficiency that arbitration promises¹⁹.

Dissatisfaction with the functioning of conflict of laws rules has led most national legislators, arbitral institutions and tribunal to abandon the *voie indirecte* approach in favour of the *voie directe*²⁰. Although the Model Law and some other national laws opt for the *voie indirecte*, most of the modern arbitration rules and laws (and among them the arbitration laws of many Model Law countries²¹) allow the arbitral tribunal to determine the substantive law directly without applying conflicts of laws rules. There is an increasing consensus that arbitrators, unlike judges, have no particular obligation to a state to use its conflict of laws rules for determining the applicable substantive law. A national court judge derives his powers from the state and therefore must apply the forum's conflict of laws rules which express the state policies as to the correct determination of the extent of legislative jurisdiction of other states. By contrast, an arbitral tribunal derives his powers from an arbitration agreement between private parties and does not exercise public powers in the name of the state. Since international arbitrators owe a duty to the parties rather than the state, they do not need to implement or follow state policies; hence, they shall not be bound to comply with any state conflict of laws rules. It follows that, even if there are conflict of laws rules in national arbitration laws, these provide a tool that the arbitrators may use rather than an obligation to apply them.²² Moreover, the place of arbitration may be chosen for many reasons, not necessarily connected to the particular conflict of laws rules in the jurisdiction. When the parties

¹⁷J.D.M. Lew, L. A. Mistelis, S. Kröll, *op.cit.*, p. 432. See e.g. interim award in ICC case 5314/1988, YBCA, 1995, XX, p. 35; ICC case 6281/1989, YBCA, 1990, XV, p. 96.

¹⁸There are two main variations of this approach. In the first, arbitral tribunals have expressly referred to “international principles of private international law” derived from a perceived consensus among the various national laws on conflict of laws rules. In the second, arbitral tribunals have derived conflict rules from international conventions on private international law, which, although not strictly applicable, were thought to embody commonly shared international principles. See e.g. ICC cases 2096/1972 and 2585/1977 cited by W.L. Craig, W.W. Park, J. Paulsson, *op. cit.*, p. 326 notes 26 and 27; O. Lando, *The Law Applicable to the Merits of the Dispute*, *cit.*, p. 107.

¹⁹G.B. Born, *op.cit.*, p. 525 and 530.

²⁰See also the discussion at pp. 96ff

²¹See e.g. Sec. 1051(2) of the 1998 German Arbitration Act and art. 75(2) of the 1993 Tunisia Arbitration Code.

²²J.D.M. Lew, L. A. Mistelis, S. Kröll, *op.cit.*, p. 426; W.L. Craig, W.W. Park, J. Paulsson, *op. cit.*, p. 322.

have not chosen a place of arbitration, and it has been selected by an arbitral institution or tribunal, there is even less reason for the state's conflict of laws rules to be considered²³.

The direct determination approach (*voie directe*) allows the arbitral tribunal to select the applicable substantive law or rules relevant for the particular case without reference to any conflict of laws rules. There are two variations of this approach: the *voie directe* limited to national laws and the unlimited *voie directe*, allowing the tribunal to apply any appropriate rules or standards, even of non-national character. Whereas most national arbitration laws still opt for the *voie directe* limited to national laws²⁴, the unlimited *voie directe* has been introduced by a number of countries with a long tradition in arbitration, such as Switzerland²⁵, France²⁶ and the Netherlands²⁷ and also by most international arbitration rules, such as the ICC²⁸, the LCIA²⁹ and the AAA³⁰. In adopting the unlimited *voie directe* the term “rules of law” has generally been used. This term, which was originally adopted in the 1987 Swiss Law on Private International Law, is commonly interpreted as allowing the arbitrator not only to apply directly any national legal system but also non-national rules, such as the *lex mercatoria* or the UNIDROIT Principles.

As we will see in the following paragraphs, the application of the UNIDROIT Principles in international arbitration may help to overcome, or at least reduce, the problems related to the choice of the substantive law applicable to the merits of the dispute. This may be done in essentially two ways. The first is by fostering further harmonisation among the various national contract laws, or at least an internationally oriented interpretation of these laws, so that they become somewhat

²³M.L. Moses, *op.cit.*, p. 77. *Contra* G.B. Born who argues that the direct application of national law is not an appropriate response to the problem of conflict of laws rules. The purpose of conflict of laws rules is to provide parties with certainty about the substantive law governing the contract: directly applying a substantive law without conflict of laws analysis leaves the parties' substantive rights to the arbitrators' unpredictable discretion. Accordingly the better (albeit difficult) solution would be to develop uniform conflict of laws rules which can predictably and transparently consulted and applied in reasoned awards. (G.B.Born, *op.cit.*, p. 531).

²⁴ See e.g. art. 39(2) of the 1994 Egyptian Law enacting a Law concerning Arbitration in Civil and Commercial Matters and sec. 1051(2) of the 1998 German Arbitration Law

²⁵Art. 187 of Swiss Law of Private International Law: <<the tribunal shall decide the dispute according to the rules of law with which the case has the closest connection>>.

²⁶Art. 1496 of the French Code of Civil Procedure: << the arbitrator shall resolve the dispute in accordance with the rules of law he considers appropriate>>.

²⁷Art. 1054(2) of the Dutch Code of Civil Procedure: <<the tribunal shall make its award in accordance with the rules of law which it considers appropriate>>

²⁸Art. 17(1) of the 1998 ICC Rules: <<The parties shall be free to agree upon the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law which it determines to be appropriate>>.

²⁹Art. 22(3) of the LCIA Rules: <<The arbitral tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the arbitral tribunal determines that the parties have made no such choice, the arbitral tribunal shall apply the law(s) or rules of law which it considers appropriate>>.

³⁰Art. 28(1) of the International Arbitration Rules of the AAA: <<The tribunal shall apply the substantive law(s) or rules of law designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law(s) or rules of law as it determines to be appropriate>>.

interchangeable and the degree of conflict among them is significantly reduced³¹. The second is through the development of an articulated body of non-national rules of substantive law which arbitrators may directly apply to the merits of the dispute without prior recourse to any set of conflict of laws rules³².

SECTION I: LEGISLATIVE HISTORY, SCOPE OF APPLICATION AND GENERAL FEATURES OF THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS

The legislative history of the UNIDROIT Principles of International Commercial Contracts

The legislative history of the UNIDROIT Principles can be traced back to 1968, when the then Secretary-General of UNIDROIT, Mario Matteucci, in the course of an international conference held in Rome to celebrate the 40th anniversary of the Institute, launched the proposal of drafting a ‘restatement’ of the general part of the law of international commercial contracts on the pattern of the “Restatements of the law” in the United States of America. The idea was to identify <<a body of rules reflecting the common principles that can be extracted from the case law of the various countries>>, which, although not bestowed with binding force, could <<represent the first step towards a uniform code>>¹. This proposal was further developed by the UNIDROIT Secretariat, which in 1970 submitted a report to the third session of UNCITRAL on the progressive codification of the law of international trade². The report emphasised the particular characteristics of international transactions with respect to domestic ones and consequently called upon the development of <<an ordinary law of international trade>>, altogether different from the regulation of domestic relationships, which alone could provide the legal framework needed by international

³¹Cp what G. Kaufmann-Kohler writes with reference to the law applicable to arbitration proceedings: <<Arbitration laws are increasingly harmonized. As a result, they tend to become interchangeable. Admittedly, most of them have not yet reached this stage, but the overall trend is undisputable. If arbitration laws are truly interchangeable, which one applies becomes irrelevant. In this sense, the impact of individual national laws decreases>>. (G. Kaufmann-Kohler, *Globalization of Arbitral Procedure*, Va. J. Trans. L., 2003, 36, p. 1320).

³²Cp G.B. Born, *op.cit.*, p. 43.

¹UNIDROIT Annuaire, 1967-1968, II, pp. 267-268

² UN Doc A/CN.9/L. 19

trade to prosper³. This ordinary law of international trade should take the shape of a uniform code: the report underlined the weaknesses of the fragmentary unification of international trade law, which had so far been achieved only in limited sectors, such as transport, the sale of goods and intellectual property, namely contradictory provisions, divergent interpretations due to lack of common general principles, overlapping and duplication⁴. In particular, the existing sectoral unification was severely undermined by the lack of common general principles, since the gaps within uniform instruments needed to be filled by drawing on basic principles of some domestic law. Accordingly, the report proposed to go beyond the stage of partial and fragmentary unification and undertake systematic codification at least of the basic principles of the law of international trade. This codification should have been gradual: at the beginning, the preparation of an outline of an ideal code was envisaged, examining all the subjects which should be covered; once this overall plan had been drafted, a project for the general part of the code should be prepared, containing the basic principles which would be the foundations of the unification; finally, the drafts related to the special parts should be drawn up, including the uniform laws already into force or in the process of elaboration, which should be nonetheless revised and harmonised to comply with the basic principles of the general part. As a result, it was expected that codification would have gradually grown within the framework of uniform general principles, until it covered the whole field of international trade law⁵. Accordingly, the initial approach of UNIDROIT to the unification of international trade law envisaged the creation of uniform rules through the drafting of an international convention or model law which, by their reception into domestic law, would have led to special statutes for international commercial law.⁶

Despite the enthusiastic claims of the report, the idea of a progressive codification of the whole subject-matter of international trade law was subsequently regarded by the experts in charge of the project as over-ambitious, if not misleading⁷. In 1971, the UNIDROIT Governing Council (the Institute's highest scientific body) set up a restricted steering committee of experts (René David, Clive M. Schmitthoff, and Tudor Popescu, representing the civil law, the common law and the former socialist systems), with the task of studying the feasibility of the proposed uniform international trade code⁸. In its first report of 1974, the steering committee decided to narrow down the codification plan to the general part of the law of contract and to deal with specific contracts

³Par. 6

⁴*Ibidem*

⁵par.7

⁶R. David, *UNIDROIT Annuaire*, 1967-1968, p. 80

⁷M. J. Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, Transnational Publishers, 1997, p. 21

⁸M. J. Bonell, *The UNIDROIT Initiative for the Progressive Codification of International Trade Law*, ICLQ, 1978, 27, 2, p. 414

only at a later stage⁹. As to the scope of application of the code, there was agreement on restricting it to international commercial contracts only, but to leave aside for the time being the difficult problem of defining the terms “international” and “commercial” contracts. This and other preliminary questions, such as the mandatory or non-mandatory character of the code or its single provisions, or the exact definition of some other basic concepts (e.g. good faith, public policy, etc.) should have been dealt with at a later stage and then included in an introductory paragraph or section of the code¹⁰. As we will see, apart from that of the mandatory or non-mandatory character of the future code, each of these questions has so far remained unsettled even in the latest version of the UNIDROIT Principles in 2004.

As far as the problem of the future code's binding force was concerned, the steering committee envisaged three possible options: the future code could be the object of an international convention by which states would undertake an obligation to bring it into force within their national systems of law; or it could be approved in the form of model law, which each national legislator would be free to adopt in whole or in part; or the code could assume a purely private character, which, simply because of the authority of the institution which elaborated it, would be used by arbitrators when called upon to decide on disputes concerning international trade relationships¹¹. Whereas the steering committee supported the first option¹², when in 1979 the project of the progressive codification of international trade law was taken up by an enlarged study group, most of its members rejected the idea of the convention¹³. However, the final decision as to the binding force of the uniform instrument was not taken until 1985, when the Secretariat was entrusted by the Governing Council with the task of preparing a paper illustrating the purposes of the project, its state of work, as well its particular problem areas, with a view to enabling it to take decisions, especially as to whether work on the project should be pursued and, if so, the speed at which such work should progress¹⁴. In its 1985 report, the Secretariat dealt, *inter alia*, with the issue of the binding character of the codification project. It observed that the term “codification” was misleading, as it might give the impression that what was envisaged was the elaboration of a “code” of the kind known in many civil law countries, i.e. a single piece of legislation providing a logically perfect and complete system of general principles and rules replacing national laws¹⁵. Yet, this was not the case: at least in the near future, the only realistic objective of the project was the preparation

⁹*Explanatory Report*, UNIDROIT 1979, Study L, Doc. 15, p. 7

¹⁰*Ibidem*

¹¹*Explanatory Report*, UNIDROIT 1979, Study L, Doc. 15, p. 9; M. J. Bonell, *The UNIDROIT Initiative for the Progressive Codification of International Trade Law*, cit., pp. 440-441

¹²*Explanatory Report*, UNIDROIT 1979, Study L, Doc. 15, p. 9

¹³UNIDROIT 1979, Study L, Doc. 16, par.4

¹⁴UNIDROIT, 1984, C.D. 63rd session, p. 27

¹⁵*Secretariat Note*, UNIDROIT 1985, C.D. 64, Doc. 6, par. 10

of a sort of international restatement of contract law (this was, after all, the original idea launched in 1968), i.e. an instrument of a purely private character which, relying on the authority of the institution under whose auspices it was drafted, would have been used in practice by parties, arbitrators and national legislators¹⁶. The Secretariat considered as anachronistic the drafting of an international trade law code in the traditional sense, i.e. a single piece of legislation constituting the primary source for the regulation of international trade relationships, capable of providing a definite solution for all cases which might arise in practice: international trade was an area subject by its very nature to continuous changes and new developments, which therefore required a sufficiently flexible legal regime¹⁷. It was also emphasised that, although in the past UNIDROIT had exclusively been engaged in initiatives aiming at the unification of law at a legislative level, the concept of unification itself had recently become less and less attractive to states¹⁸. An increasing number of conventions already adopted at international level were not ratified and thus risked remaining dead letter; moreover, states were even more reluctant to embark on initiatives for the elaboration of new uniform conventions and model laws. Accordingly, all international organizations dealing with the unification and harmonisation of law had to reconsider the working methods so far followed¹⁹. In the case of UNIDROIT the difficulties were particularly evident, since after the creation of UNCITRAL in 1968 there had been a growing tendency, also among the member states of UNIDROIT, to consider UNCITRAL, at least in the field of international trade law, the most appropriate forum for the elaboration of legislative means of harmonisation and to confer on UNIDROIT the task of carrying out the preparatory studies. Although such a task still had its merits, it was realised that the Institute should in addition pursue separate activities, so as to reinforce its unique position in relation to other international organisations and that the drafting of the proposed restatement could be seen as one of these initiatives²⁰. This being so, in order to avoid any misunderstanding in this respect, the UNIDROIT Governing Council ultimately decided in 1985 to change the name of the project: the misleading title of “Progressive Codification of International Trade Law” was renamed “Preparation of Principles for International Commercial Contracts”²¹, in order to make clear that what was intended was not the elaboration of provisions of

¹⁶M. J. Bonell, *An International Restatement of Contract Law*, cit., p. 21, n. 7 and UNIDROIT 1975, C.D. 54th Session, pp. 9-13

¹⁷*Secretariat Note*, UNIDROIT 1985, C.D. 64, Doc. 6, par. 10; M. J. Bonell, *A Restatement of Principles for International Commercial Contracts*, *Revue de Droit des Affaires Internationales*, 1988, 7, p. 877.

¹⁸M. J. Bonell, *A Restatement of Principles for International Commercial Contracts*, cit., p. 886

¹⁹These arguments have subsequently been included in the Introduction to the official text of the UNIDROIT Principles: <<Efforts towards the international unification of law have hitherto essentially taken the form of binding instruments, such as supranational legislation or international conventions, or of model laws. Since these instruments often risk remaining little more than dead letter and tend to be rather fragmentary in character, calls are increasingly being made for recourse to non-legislative means of unification or harmonisation of law>> (p. vii).

²⁰M. J. Bonell, *A Restatement of Principles for International Commercial Contracts*, cit., p. 887

²¹UNIDROIT, 1985, C.D. 64 – Doc. 14 pp. 10-37

a binding nature, but of principles of a purely private character which would be applied in practice because of their persuasive value²².

The project lagged behind for some years among the priorities of the UNIDROIT activities, until in 1980 a special Working Group was set up with the task of preparing the various draft chapters of the Principles. The Working Group's membership and decision-making method closely mirrored the typical features of an epistemic community: it was not composed by delegations of state representatives, as it would have been the case for the preparation of an international treaty²³; rather, it was made up of leading experts in the field of contract law and international trade law, representing all the major legal and socio-economic systems of the world; most of the members were academics²⁴, some high ranking judges or civil servants, but, most importantly, they all sat in a personal capacity and did not express the views of their governments. These latter features made it easier for the Working Group to make the “better argument” (in Habermas’ terms) prevail²⁵, i.e. reach a consensus on rules representing only “best solutions”, and not reflecting the solutions common to all the legal systems of the world²⁶. Of course, also the non-binding character of the project was a crucial factor facilitating compromise among experts stemming from different legal cultures²⁷. Accordingly, the fact that these experts sat in their personal capacity, together with the awareness that whatever solution would have been adopted, this would not have had a binding force, allowed them to depart, where necessary, from their national preferences and be ready to be persuaded to change them in view of the choice of the better solution, more in line with the needs of international trade.

²²M. J. Bonell, *A Restatement of Principles for International Commercial Contracts*, cit., p. 878

²³C. Kessedian, *Un Exercice de Rénovation des Sources du Droit des Contrats du Commerce International: les Principes Proposés par l' Unidroit*, Rev. crit. dr. internat. privé, 1995, 84, 4, p. 644

²⁴14 members of the Working Group out of 17 were academic professors

²⁵See *supra* pp. 77

²⁶Cp. M. P. Furmston, *The UNIDROIT Principles and International Commercial Arbitration*, in Institute of International Business Law and Practice (ed), *UNIDROIT Principles for International Commercial Contracts: a New Lex Mercatoria?*, ICC Publication, 490/1, 1995, p. 100: <<It made it strikingly more possible to conduct a realistic search for the “best” solution. An automatic assumption that one's own domestic solution is always the “best” would have been a very serious handicap to any member of the working group>>. On the distinction between “best solutions” and “common solutions”, see *infra* pp. 333 ff.

²⁷As noted by R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, Oxford University Press, 2007, p. 509, the non-binding character of the Principles entailed that it was not always necessary to reach an agreement among all members of the Working Group, in order to obtain approval for the text; moreover, the possibility of one member holding the others to ransom was substantially reduced, if not eliminated. By contrast, the process of reaching agreement in the drafting of the Vienna Convention on the International Sales of Goods was much more difficult, largely as a result of the need to produce a text which states would be willing to ratify. A good example of the different outcomes to which these two different decision-making processes have led is represented by the issue of interest payment. The controversy surrounding the entitlement of a party to recover interest was such that it was only possible to the CISG drafters to reach agreement in art. 78 to the principle that interest should be paid. By contrast, art. 7.4.9 of the UNIDROIT Principles is more detailed: the fact that there was no need to achieve unanimity on the text of the articles made it easier to reach agreement on their content and scope and gave the drafters greater latitude in developing new or best solutions to the various issues of contract law.

A particular decision-making process was followed, which was closer to the model of communicative action²⁸ than to the typical negotiation among government representatives. The Working Group appointed among its members some rapporteurs for each of the different chapters of the Principles, who were entrusted to prepare, after the necessary comparative studies, a first draft, together with comments. These preliminary drafts were discussed by the Group as a whole and then revised again by the rapporteurs in light of the comments expressed during the Group sessions. The revised drafts were circulated, together with a list of the most controversial issues, among a wider group of experts, mostly law professors²⁹, throughout the world. In addition, they were examined at the annual sessions of the UNIDROIT Governing Council, which provided its advice, especially in those cases where the Working Group had not reached a consensus. All the observations and proposal for amendment received were submitted to the Working Group, so as to enable it to take them into account when proceeding to the third and final reading of the drafts. As a result, contrary to the usual procedure followed by UNIDROIT, the Principles were at no stage submitted to a committee of government experts, lobbyists or interest groups³⁰: their preparation has mostly involved academics with particular expertise in international commercial law.

The Working Group concluded the last reading of the different draft chapters in February 1994 and in May, after the necessary editing work, the final text of the UNIDROIT Principles was submitted to the Governing Council for approval. The Governing Council decided that it would not formally approve the Principles, but rather authorise their publication³¹, a procedure which is not contemplated in the UNIDROIT Statute, had never before been followed and that does not amount to a formal approval by the UNIDROIT member states³². This is not surprisingly, given that the Principles were prepared without the involvement of government representatives. The UNIDROIT Principles were originally drafted in English, which was the working language of the Working Group. In order to facilitate its use throughout the world, it was decided that, once completed, the text of the articles and the accompanying comments should be published in as many as possible other language versions. At present, the UNIDROIT Principles (1994 edition) exist in five official versions (English, French, German, Italian, Spanish). Other complete versions of the Principles are available in Chinese, Russian and Slovak. Moreover, the black letter rules have been translated into Arabic, Bulgarian, Czech, Dutch, Hungarian, Japanese, Korean, Portuguese, Romanian and Serbian.

²⁸ See *supra* pp. 77 ff.

²⁹The list appears in UNIDROIT, *UNIDROIT Principles of International Commercial Contracts* 2004, p. XX-XXI

³⁰S.Vogenaurer, *Introduction*, in S. Vogenaurer and J. Kleinheitsterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford University Press, 2009, p. 9

³¹UNIDROIT 1994, CD (73) 18, p. 22

³²S.Vogenaurer, *Introduction*, cit. p. 9

The UNIDROIT Principles 2004

When deciding in 1994 to publish the UNIDROIT Principles, the Governing Council of UNIDROIT stressed the need “to monitor their use with a view to a possible reconsideration of them at some time in the future”³³. To this end, in September 1996 the Secretariat of UNIDROIT undertook an inquiry on the use of the UNIDROIT Principles in practice, which showed that their content had generally met with approval and not given rise to any significant difficulties of application: only few provisions of the Principles were subject to critical remarks, and not all of them referred to the substance of the provision, but merely considered the wording not to be sufficiently clear³⁴. Consequently, the Governing Council deemed it inappropriate to proceed to a major revision of the Principles. Rather, in 1997 it decided to set up a new Working Group entrusted with the task of preparing an enlarged second edition of the UNIDROIT Principles to include additional topics concerning certain aspects of international commercial contracts, which had not been taken into consideration in the previous edition. In particular, the Governing Council decided to submit to the Working Group eight topics for consideration: agency, limitation of actions (extinctive prescription), assignment of contractual rights and duties, contracts for the benefit of a third party, price reduction, conditions, set-off and waiver³⁵. The new Working Group was composed of seventeen members, some of whom having already taken part to the old group which had prepared the 1994 edition of the UNIDROIT Principles, while for the first time a number of representatives of international organisations and arbitral institutions (the United Nations commission on International Trade law (UNCITRAL), the International Court of Arbitration (ICC),

³³ UNIDROIT 1994, C.D.(73) 18, p. 22

³⁴ Study L 55 par. 5. More in detail, the Secretariat prepared a questionnaire to be circulated to all those known to have received the Principles, with a view to obtaining from them information as to whether they had made use of the Principles in their respective fields of activity and, if so, whether the Principles had provided satisfactory solutions. Of the nearly 200 replies received, only 20 made critical remarks on individual provisions, and not all of them referred to the substance of the provisions, but merely considered the wording not to be sufficiently clear; moreover, of the 120 provisions of the UNIDROIT Principles 7 had been criticised by more than one reply, while another 51 provisions had been criticised only once; finally, 80% of all critical remarks had been made by one and the same person. Yet, the Secretariat recognised that in order to have a complete picture, it would also have been necessary to take into account the body of case law relating to the UNIDROIT Principles which might have revealed additional difficulties as concerns their application in practice; nonetheless, a significant body of case law was not yet available, since at that time only 3 state court decisions and 22 arbitral awards had been collected.

³⁵ UNIDROIT 1997, CD (76) 17, p. 24. At a later stage it was decided to restrict the topic of waiver to inconsistent behaviour and to have a new provision on release of rights.

the Milan Chamber of National and International Arbitration and the Swiss Arbitration Association) were invited to attend its sessions as observers. The working method followed by the new Working group was substantially the same as that adopted for the drafting of the 1994 edition: for each chapter, a Rapporteur was appointed with the task of preparing a position paper, on the basis of which the Working Group would decide the basic outline of the chapter. Subsequently, the Rapporteurs prepared preliminary drafts of both the black letter rules and the comments, which were submitted to the Working Group as a whole and then revised by the rapporteurs to take into account the Group's comments and amendments³⁶. Exactly ten years after the publication of the first edition of the UNIDROIT Principles, the new edition was approved by the Governing Council in April 2004. The integral version of the 2004 edition of the UNIDROIT Principles of International Commercial Contracts has been published in the UNIDROIT four official languages -English , French, Italian and Spanish - , as well as in Chinese, Farsi , Korean, Romanian, Russian and Vietnamese.

The UNIDROIT Principles 2004 do not make major amendments to the provisions of the 1994 edition³⁷; rather, their coverage has been significantly extended by the inclusion of a number of additional topics: authority of agents, contracts for the benefit of third parties, set-off, limitation periods, assignment of rights, transfer of obligations, assignments of contracts. Furthermore, two new rules dealing with inconsistent behaviour (art. 1.8) and release by agreement (art. 5.1.9) were inserted. Accordingly, the number of articles in the Principles has increased from 119 to 185 and the numbering of some of the existing articles has changed.

Towards a new edition of the UNIDROIT Principles

The Publication of the UNIDROIT Principles 2004 does not signal the end of work on this project³⁸: already by adopting the 2004 edition, the Governing Council pointed out that this was by its very nature an on-going project and therefore should remain as an on-going item on the UNIDROIT

³⁶M.J. Bonell, *UNIDROIT Principles 2004 – The New Edition of the Principles of International Commercial Contracts adopted by the International Institute for the Unification of Private Law*, ULR, 2004, 1, p. 18.

³⁷The only significant amendment is represented by the addition of two new paragraphs (paragraph 4 and 6) to the Preamble.

³⁸ R. Zimmermann, *The UNIDROIT Principles of International Commercial contracts 2004 in Comparative Perspective*, The Tulane European and Civil Law Forum, 2006, 21, p. 28

working program³⁹. Accordingly, at its 84th session in 2005, the Governing Council set up a new Working Group of nineteen members with the task of preparing a third edition of the UNIDROIT Principles to include the following new topics: unwinding of failed contracts; illegality; plurality of debtors and of creditors; conditions; termination of long-term contracts for just cause. The Working Group for the preparation of a third edition of the UNIDROIT Principles of International Commercial Contracts held its first session in Rome from 29 May to 1 June 2006. Significantly, an unprecedented number of international organizations and arbitral institutions sent their representatives to attend as observers: the Cairo Regional Center for International Commercial Arbitration, the International Bar Association, the Swiss Arbitration Association, the New York City Bar, the German Arbitration Institution, the Milan Chamber of National and International Arbitration, the United Nations Commission on International Trade Law (UNCITRAL), the Study Group for a European Civil Code, the ICC International Court of Arbitration, the London Court of International Arbitration, to mention only a few. The Working Group attached to this fact particular importance: by accepting the invitation to send observers, such organisations clearly demonstrated their interest in the project, and therefore it is expected that they would do their best to further promote the use of the Principles within their respective spheres of influence⁴⁰. During the same session, the Working Group appointed the Rapporteurs for each of the five topics alleged to be included in the third edition of the Principles, which were asked to prepare on their respective topics preliminary draft rules, together with explanatory notes to be submitted to the Group for discussion at its next plenary sessions. At the time of writing, two more sessions have so far taken place: one from 4 to 7 June 2007 and the other from 26 to 29 May 2008. The next session is to be held from 25 to 29 May 2009. It is difficult to foresee when the work on the envisaged third edition of the UNIDROIT Principles will be accomplished, although 2010 or 2011 seems to be a reasonable target⁴¹.

³⁹ M.J. Bonell, *UNIDROIT Principles 2004*, cit., p. 39

⁴⁰ Working Group for the Preparation of Principles of International Commercial Contracts (3rd), Note on the first Session (2006), available on <http://www.unidroit.org/english/workprogramme/study050/main.htm>

⁴¹ M.J. Bonell, *The UNIDROIT Principles a Decade After Their First Appearance: What Have They Achieved and What Are Their Prospects for the Future?* In Swiss Institute of Comparative Law (ed), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification- Reports of the IDSC Colloquium 8/9 June 2006*, Schulthess, 2007, p. 264; S. Vogenaurer, *Introduction*, in S. Vogenaurer and J. Kleinheitsterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford University Press, 2009, p. 20

The drafting method: “common core” and “best solution” approach

The idea of drafting a restatement of the law of international commercial contracts entailed that the Working Group's effort was not directed towards the unification of existing national contract laws, but rather toward the elaboration of principles common to most existing legal systems. The literature usually refers to this first approach to the drafting of the Principles as the “common core” approach. But on the other hand, the task of those engaged in the work of harmonisation, whether it takes the form of a convention, a set of standard contract terms, a model law or a scholarly restatement, is to find best solutions to existing problems, and thus to improve the law, not merely to reproduce it⁴². As a result, when a common solution could not be found, the Working Group attempted to select the rule which seemed best adapted to the special requirements of international trade⁴³: this second approach is usually known as the best solution approach. But not every legal system had an equal influence on every issue considered in the preparation of the Principles: whenever it was necessary to choose between conflicting rules, what was decisive was not just which rule was adopted by the majority of countries, but rather which of the rules under consideration had the most persuasive force or appeared to be well-suited for international transactions. In particular, among national contract laws or compilations of law, greater attention was given to those which were the most recent ones at the time of drafting and which represented rare examples of national legislation that was specifically designed for international transactions rather than domestic ones⁴⁴, such as the United States Uniform Commercial Code and the Restatement (Second) of the Law of Contract, the Algerian Civil Code of 1975, the 1985 Foreign Economic Contract Law of the People's Republic of China, the drafts of the new Dutch Civil Code and of the new Civil Code of Quebec, which entered into force in 1992 and 1994 respectively. The Working Group's sources of inspiration were not only national, but also international and non-national systems. As far as international legislation was concerned, the most important reference was the 1980 Vienna Convention on Contracts for the International Sales of Goods (CISG), which at that time was the most important instrument regulating international contracts. Finally, special attention was also given to non-legislative instruments drafted by professional bodies, trade associations or formulating agencies and widely used in international trade, such as the International

⁴²R. Goode, *International Restatements of Contract and English Contract Law*, ULR, 1997, 2, p. 234

⁴³M. J. Bonell, *An International Restatement of Contract Law*, cit., p. 31

⁴⁴S. Vogenaurer, *Introduction*, in S. Vogenauer and J. Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford University Press, 2009, p. 9

Commercial Terms (INCOTERMS) and the Uniform Customs and Practice for Documentary Credits, published by the International Chamber of Commerce and the UNCITRAL Legal Guides on Electronic Funds Transfer and on International Countertrade Transactions.

An example of “best solution” rule designed to meet the special needs of international trade practice is art. 1.10 of the UNIDROIT Principles, which defines the written form as any mode of communication that preserves a record of the information contained therein and is capable of being reproduced in tangible form: this statement takes into account the fact that nowadays communications are usually exchanged in a paperless fashion by electronic means. Other examples are represented by the many *favor contractus* rules, i.e. those provisions aiming at preserving the contract by limiting the number of cases in which its existence or validity may be questioned, or in which it may be terminated beforehand, such as art. 3.2 on the irrelevance of “consideration”, “cause” and similar requirements for the valid conclusion of a contract, or arts. 6.2.1-6.2.3 on hardship. Finally, other “best solution” rules are inspired by political considerations in a broad sense, and namely by the special conditions existing in North-South and East-West economic relationships. The most important provisions among this group are arts. 6.1.15-6.1.18 on public permission requirements affecting the valid conclusion or the performance of the contract, which states frequently impose on foreign trade counterparts.

It is difficult to assess to what extent the UNIDROIT Principles' provisions follow the first rather than the second approach: the drafters decided not to include the comparative notes referring to national laws in order to explain the origin of the solution adopted⁴⁵. This was done with a view to underlying the Principles' character of autonomous source with respect to the various legal systems taken into consideration⁴⁶: as we have seen, it was inevitable in the preparation of the UNIDROIT Principles that the laws of some countries played a more significant role than those of others; consequently, it might have been counterproductive to highlight this fact by including comparative

⁴⁵Some Rapporteurs of the Working Group have nonetheless stressed that the objective of enunciating rules which were common to most legal systems played a less significant role with respect to that of finding best solutions more tailored to the needs of international trade. Cp M. Furmston, *The UNIDROIT Principles and International Commercial Arbitration*, in Institute of International Business Law and Practice (ed), UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria?, ICC Publication 490/1, 1995, p. 205: <<it is important to emphasise that the Working Group did not attempt to find a lowest common denominator of contract rules; (...) the Working Group tried to produce a set of principles which was internally coherent. Obviously, this objective could not be reached simply by taking a series of majority views on a whole range of contract problems>>. Similarly, B. Favarque-Cosson, France, in M.J. Bonell (ed.), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts*, Kluwer, 1999, p. 97: <<[Les Principes UNIDROIT] s'inspirent de solutions en vigueur dans très nombreuses pays et opèrent une synthèse étrangère à tout système existant. [Ils] sont donc le fruit d'un travail beaucoup plus créatif. L'objectif n'était pas de rechercher le plus petit dénominateur commun aux contrats, mais de dépasser les législations nationales pour poser une série de principes internationalement cohérents>>.

⁴⁶This purpose is confirmed in the Introduction to the official text of the UNIDROIT Principles: <<The objective of the UNIDROIT Principles is to establish a neutral and balanced set of rules designed for use throughout the world irrespective of the legal traditions and economic and political conditions of the countries in which they are to be applied>> (UNIDROIT (ed) *Principles of International Commercial Contracts*, 1994, p. VIII).

notes in the official text of the Principles⁴⁷. This has raised some criticism, since the indication of the national sources underlying the solutions adopted in the UNIDROIT Principles would have conferred upon them greater authoritative force. By contrast, this lack of transparency, justified with the need to emphasise the international character of the Principles, risks to undermine the credibility of the entire project⁴⁸. As neither the black letter rules nor the Official Comments explain the criteria underlying the Working Group's choices it is difficult to verify whether these choices indeed represent “common” or “best” solutions. Moreover, concerns that the Working Group has almost exclusively relied on Western sources and that at many stances the rapporteurs were not willing to detach themselves from their own legal background and favoured the solution of their own jurisdiction are hard to dispell. As we will see in more detail in the following paragraphs, this lack of transparency has posed some problems to the acknowledgement of the Principles as a set of general principles of law.

The structure and legal nature of the UNIDROIT Principles

The UNIDROIT Principles 1994 are composed of a Preamble and 119 articles set out in seven chapters: “General Provisions”, “Formation”, “Validity”, “Interpretation”, “Content”, “Performance”, “Non-Performance”. By contrast, the UNIDROIT Principles 2004 consist of a Preamble and 185 articles divided into ten chapters, namely “General Provisions”, “Formation and Authority of Agents”, “Validity”, “Interpretation”, “Content and Third Party Rights”, “Performance”, “Non-Performance”, “Set-Off”, “Assignment of Rights, Transfer of Obligations, Assignments of Contracts”, “Limitation Periods”. The articles (the so-called “black letter rules”) read like ordinary legislative provisions in a domestic contract law statute or in an international convention, so that, by looking exclusively at the Principles' black letter rules one may have the impression of a non-binding codification that attempts to provide a complete and coherent set of rules for the area of general contract law⁴⁹. Nonetheless, unlike in ordinary domestic statutes and international treaties, in both editions each article is accompanied by comments and, where

⁴⁷M. J. Bonell, *An International Restatement of Contract Law*, cit., p. 88

⁴⁸S.Vogenaurer, *Introduction*, cit., p. 11

⁴⁹S.Vogenaurer, *Introduction*, cit, p. 13

appropriate, by factual illustrations intended to explain the reasons for the black letter rule and the different ways in which it may operate in practice. Comments and illustrations are part and parcel of the Principles and were designed as a key to the interpretation of the rules⁵⁰. Moreover, as far as the drafting style is concerned, some provisions are very concise and formulated in general terms (e.g. art. 1.1, which lays down the principle of freedom of contract), while others (e.g. art. 6.1.9 on the currency of payment) are more detailed. This has raised the criticism that the UNIDROIT Principles' drafters have departed from the original idea of elaborating a set of general and neutral principles of law and ended up creating a set of precise and technical rules having little to do with the notions of common principles and *jus commune*⁵¹. However, the fact that the UNIDROIT Principles contain, in addition to specific rules of a technical character, general statements of principles and standards, far from being a defect or inconsistency, on the contrary makes the Principles an autonomous normative system⁵²: the interaction between detailed rules and general principles is an essential feature of any normative system⁵³, and also in the case of the UNIDROIT Principles the exact meaning of the detailed rules can only be determined by referring to the general principles laid down in the introductory chapter.

In order to enhance their neutral and transnational character, the UNIDROIT Principles deliberately avoid the use of terminology typical of a particular legal system and privilege those expressions which are commonly adopted in international contract practice: this is the case, for instance, with the term “hardship”, which covers situations otherwise known within the various legal systems as “impracticability”, “frustration of purpose”, “imprévision”, “Wegfall der Geschäftsgrundlage”, “eccessiva onerosità sopravvenuta” and so on; another example is provided by the term “non-performance”, which replaces the traditional notions of “default”, “breach”, “Nichtleistung wegen Unmöglichkeit”, “indadempimento”, etc.

The UNIDROIT Working Group's choice to abandon traditional legislative approaches to the unification and harmonisation of international trade law in favour of the elaboration of a collection of non-binding rules and principles has raised a major problem concerning the legal nature of this unconventional instrument. The UNIDROIT Principles do not fit into any of the traditional categories of legal instruments that have so far been conceived at international level⁵⁴. They are not simple contract forms, nor are they cast in the form of an international convention. They partly

⁵⁰K. Boele-Woelki, *Principles and Private International Law: The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply them to International Contracts*, ULR, 1996, p. 655; O. Lando, *Is Codification needed in Europe? Principles of European Contract Law and the Relationship to Dutch Law*, ERPL, 1993, p. 167.

⁵¹C. Kessedjian, *Un exercice de Rénovation des Sources du Droit des Contrats du Commerce International*, cit., p. 655.

⁵²M. J. Bonell, *An International Restatement of Contract Law*, cit., p. 44

⁵³K. P. Berger, *The Creeping Codification of the Lex Mercatoria*, Kluwer Law International, 1999, p.

⁵⁴M. J. Bonell, *General Report*, in ID (ed), *A new Approach to International Commercial Contracts*, cit., p. 3

constitute a collection of international usages and partly a doctrinal attempt, a sort of scholarly study⁵⁵, to identify the best rules for international trade. Also the attempt to define them as an expression of the modern *lex mercatoria* is not convincing. As we have seen above⁵⁶, the very notion of *lex mercatoria* is highly disputed. Whatever its meaning – a set of non-national rules and practices developed by the interested business circles themselves, or a mixed system composed of both trade usages and universally recognised principles of law – the identification of the UNIDROIT Principles with such a notion would appear rather problematic. The Principles do not claim to lay down rules which are all generally accepted at international level as general principles of the law or *lex mercatoria*. As the Preamble reads, they simply “*may be applied when the parties have agreed that their contract be governed by general principles of law, *lex mercatoria* or the like*”. This means that they represent only one of the various sources available to determine the content of these (or similar) rather vague expressions used by the parties⁵⁷. In no way are judges and arbitrators bound to apply them to solve their disputes: the Principles do not have any binding force as such and will be applied in practice by reason of their persuasive value only. Accordingly, judges and arbitrators are free to use other means to attain knowledge of general contractual principles if they find them more suitable or convincing.

The existing legal instrument to which UNIDROIT Principles bear the closest resemblance is the American Restatement⁵⁸, which in the US legal system is used not only to re-state the law, but also to “gently push” the common law into a direction that it is favoured by the drafters of the Restatements themselves⁵⁹. The UNIDROIT Working Group pursued a similar approach: they adopted solutions that were not necessarily common to all the legal systems of the world, but were best suited to the needs of international trade. This choice is in line with the particular nature of international trade law, which is a process in constant evolution: every attempt to unify this field of the law must therefore take into account the possible future developments and consequently assume a creative rather than a descriptive quality⁶⁰.

Despite this background similarity, there are two important differences between the two projects. The first concerns the geographical scope of the projects. The scope of the American Restatement is limited to an area with a more or less homogeneous socio-economic structure, whereas the UNIDROIT Principles are designed to be applied all over the world and accordingly they cover

⁵⁵In this sense see C. Kessedian, *Un Exercice de Rénovation des Sources du Droit des Contrats du Commerce International*, cit., p. 651-652

⁵⁶ See *supra* pp. 85 ff.

⁵⁷ M. J. Bonell, *General Report*, M.J. Bonell (ed.), *A New Approach to International Commercial Contracts*, cit., p. 5

⁵⁸ See *supra* pp. 113 ff

⁵⁹ K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, cit., p. 154

⁶⁰ K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, cit., 154

areas with totally different legal cultures and utterly heterogeneous socio-economic structures. This much broader scope has made not only the Working Group's research more demanding, but also the degree of uniformity which may be accomplished much lower than in the case of the American Restatements. Besides, given this extreme heterogeneity, the UNIDROIT principles' drafters needed to resort more often to creative solutions, with the ultimate consequence that this new rules might not be accepted in legal practice, because they were perceived as not reflecting the existing principles within the international business community.

The second is related to the fact that the American Restatements are embedded in a well-defined legal tradition based on the generally acknowledged "stare decisis doctrine", whereas in the context of the UNIDROIT Principles the very existence of the rules reproduced therein is vividly disputed⁶¹. In this respect, the American Restatements are endowed with a higher degree of authoritative force than the UNIDROIT principles⁶².

Yet, despite the appropriateness of such a comparison at a purely descriptive level, the question of the legal nature of the UNIDROIT Principles still remains largely unanswered. What is the point in drawing a parallel between the UNIDROIT Principles and the American Restatements if even within the United States the precise nature of the latter instruments is highly controversial? How then could the characterisation of the UNIDROIT Principles as an international restatement be more conclusive, given the much less homogeneous legal framework in which they operate?⁶³

The fact is that the UNIDROIT Principles challenge the traditional categories of law. Their legal nature can only be assessed by a new approach to legal theory, which overcomes the traditional conception that law-making is an exclusive prerogative of the state and admits that the borders between state and non-state law are increasingly overlapping⁶⁴: in this respect, the UNIDROIT Principles can be considered as one of the most important examples of "global law without the state". However, only the future will tell if they will grow into something different, in the sense of establishing themselves as the most genuine expression of the general principles of law or the *lex mercatoria* in the field of contract law⁶⁵.

⁶¹ A. S. Hartkamp, *Principles of Contract Law*, in A. S. Hartkamp, M. W. Hesselink, E. H. Hondius, C. Jouxtra, E. Du Perron (Eds), *Towards a European Civil Code*, Kluwer Law International, 1994, p. 39

⁶² K.P. Berger, *The Creeping Codification of the Lex Mercatoria*, cit., p. 156

⁶³ M.J. Bonell, *General Report*, cit., p. 4

⁶⁴ J. Basedow, *Germany*, in M.J. Bonell (ed.), *A New Approach to International Commercial Contracts*, cit., p. 128

⁶⁵ M.J. Bonell, *General Report*, cit., p. 5

The scope of application of the UNIDROIT Principles

Despite their worldwide vocation, the UNIDROIT principles apply to a restricted range of legal relations, namely international commercial contracts⁶⁶. The international character of the transactions covered by the Principles draws a clear line between them and national codes and statutes, which mainly purport to regulate domestic transactions. It follows that, in order to fully understand the exact scope of the Principles, one has to determine the meaning of the concepts “international contracts” and “commercial contracts”. Nonetheless, the Working Group refrained from providing a definition of these two terms. The reason was that, on account of past experiences in the field of unification of the law⁶⁷, the drafters believed that an attempt to reach an agreement on a definition of these criteria would have seriously hampered the unification process itself. In the general context of the unification of international commercial law, disputes around the internationality of a certain transaction stem from the fact that this concept determines the extent to which states will accept the loss of sovereignty which is necessarily connected with the creation of a uniform law⁶⁸. In the more specific context of the UNIDROIT Principles, the definition of the internationality of the contract determines the parties’ freedom to choose the applicable law and to evade the mandatory norms of the otherwise applicable domestic legal system. Similar uncertainties surround the term “commercial”: in some jurisdictions this concept is defined according to subjective criteria (commercial are those contracts in which both parties have the status of merchants), in others according to objective criteria (commercial are those contracts having a commercial object or involving a commercial transaction), in others the distinction between commercial and non-commercial contracts is unknown. Given such implications, as had already happened in the case of other uniform law instruments, the drafters of the UNIDROIT Principles preferred to leave the questions of the internationality and the commercial character of the contract to the case law of domestic courts and of international arbitral tribunals⁶⁹.

Yet, the Comment to Article 1 of the UNIDROIT Principles provides important guidelines for the ascertainment of what an international and commercial contract is: the concept of internationality should be interpreted in the broadest way possible, so as to exclude only those situations where no

⁶⁶Cp. the Preamble to the UNIDROIT Principles: <<These Principles set forth general rules for international commercial contracts>>.

⁶⁷In particular, the controversial discussions related to the definition of internationality in the drafting of the Hague Sales Law, the CISG and the UNCITRAL Model Law on International Commercial Arbitration. Cfr G. de Nova, *Quando un contratto è internazionale*, Rivista trimestrale di diritto e procedura civile, 1978, pp. 666 et seq

⁶⁸J. Honnold, *Uniform Law of International Sales*, Kluwer, 1987, p. 58

⁶⁹G. Delaume, *What is an International Contract? An American and a Gallic Dilemma*, ICLQ 1979, 28 p. 258

international element at all is involved, i.e. where all the relevant elements of the contract in question (nationality of the parties, applicable substantive law, place of performance, etc.) are connected with one country only⁷⁰.

Likewise, as to the restriction to “commercial” contracts, in order to ensure the widest possible application of the Principles, the Comment suggests that only consumer contracts, i.e. those contracts which relate to transactions involving a party which is not acting in the course of his trade or profession, fall outside the concept of commercial contracts and are therefore excluded from the scope of the Principles⁷¹. This broad interpretation of the term “commercial contracts” allows the UNIDROIT Principles to be applied not only to the classical exchange contracts of cross-border trade, but also to more complex contracts, such as investment, concession, joint ventures, licensing, technical assistance, franchising, leasing and other highly specialized contracts.

The UNIDROIT Principles and the Principles of European Contract Law (PECL): differences and similarities

The UNIDROIT Principles are often associated to a similar project in the field of harmonisation of contract law in the European context, the Principles of European Contract Law (PECL), so that the two instruments are commonly referred to as “the Principles”⁷² or “sister projects”⁷³. The PECL consist of 131 articles laying down what in the drafters’ opinion are the most appropriate common contract rules for Europe. They have been drawn up by the Commission on European Contract Law

⁷⁰A similarly broad concept of “internationality” is also adopted in the UNCITRAL Model Law on International Commercial Arbitration: according to art. 1(3) of the Model Law, an arbitration is international not only if the parties to an arbitration agreement have, at the time of the conclusion of the agreement, their places of business in different states, but also if either the place of arbitration or the place with which the subject-matter of the dispute is most closely connected are situated outside the state in which the parties have their place of business, or even if the parties have expressly agreed that the subject-matter of the arbitration agreement relates to more than one country.

⁷¹Again, also the footnote to art. 1 of the Model Law on International Commercial Arbitration suggests a broad interpretation of the term “commercial”: <<relationships of a commercial nature include, but are not limited to, the following transactions: any trade transaction for the supply or exchange of goods and services; distribution agreement; commercial representation or agency; factoring; leasing; construction of works; consulting; engineering; licensing; investment; financing; banking; insurance; exploitation agreement or concession; joint venture and other form of industrial or business cooperation; carriage of goods or passengers by air, sea, rail or road>>.

⁷²K. Boele-Woelki, *Principles and Private International Law*, cit., p. 653

⁷³A. S. Hartkamp, *Principles of Contract Law*, cit. p. 37

– a research group gathering both academics and practicing lawyers from various European jurisdictions, founded in 1982 by the Danish professor Ole Lando – and have been published for the first time in 1995⁷⁴; updated issues have been published in 2000⁷⁵ and 2003⁷⁶. They cover all the main areas of general contract law, such as formation, validity, interpretation, performance of contractual obligations and remedies for non performance.

Not only are the two sets of principles resembling in formal or structural terms, but also, and more importantly, in the solutions they provide to legal problems. First of all, they resemble one another in the membership of the working groups which were in charge of drafting them. Like the UNIDROIT Working Group, the Commission on European Contract Law was composed by academics and practitioners in their personal capacity, that is they were not representative of their national governments. Some experts were even members of both working groups⁷⁷; but, whereas in the UNIDROIT case experts were selected from all over the world, in the PECL case membership was obviously restricted to lawyers from the member states of the European Union. Secondly, the working method followed in both projects was characterised by a large use of comparative analysis among not only national laws, but also international instruments of uniform law, such as the CISG, the UNCITRAL model laws, and INCOTERMS. Moreover, each working group was aware of the work being conducted by the other, since, as already mentioned, a number of members were common to both working groups. Thirdly, as far as structural features are concerned, the two sets of principles essentially consist of a collection of articles divided into a number of chapters laying down provisions regarding the general part of contract law: every article is then supplemented by a Comment, explaining the scope of the rule and the interrelations with the other rules of the Principles and by an Illustration, a brief summary of cases providing examples of practical applications of the rule⁷⁸.

⁷⁴ O. Lando and H. Beale (Eds), *Principles of European Contract Law, Part I: Performance, Non-performance and Remedies*, Martinus Nijhoff Publishers, 1995.

⁷⁵ O. Lando and H. Beale (Eds), *Principles of European Contract Law, Parts I and II Combined and Revised*, Kluwer Law International, 2000

⁷⁶ O. Lando, E. Clive, A. Prum and R. Zimmermann (eds), *Principles of European Contract Law, Part III*, Kluwer Law International, 2003

⁷⁷ Apart from Bonell and Lando, there three other scholars who were members of both working groups are: Drobnig, Hatkamp and Tallon.

⁷⁸ There is in this respect a difference between the PECL and the UNIDROIT Principles: in the PECL, articles are also accompanied by notes identifying the main sources used in drafting the rule and also describing how the issue regulated by the rule itself is dealt with in the various member states' legal systems, whereas the UNIDROIT Principles systematically refrain from stating the legal systems constituting the origin of the various rules. This particular choice makes the UNIDROIT Principles' structure, which are expressly excluded as being an attempt of codification on a global scale, more similar to that of a code; whereas the presence of Notes in the PECL's structure, which are claimed by some as constituting a first step towards the codification of European contract law, makes them more similar to a Restatement. This inconsistency is anyway only apparent: the UNIDROIT Principles' drafters deliberately sought to avoid any reference to national laws, because they intended to elaborate a system of non-national rules applicable to international transactions, whereas the PECL were meant from the outset as a potential civil code for Europe and therefore they needed to be founded on the common core of member states' national legal systems.

Given all these formal and structural similarities, it is no surprise that the two projects have produced the same substantive rules in many respects, so as to have been rightly defined as “sister projects”. About 70 out of the 119 articles constituting the UNIDROIT Principles have corresponding provisions in the European Principles. Among these, some are even reproduced *verbatim* in the the PECL, while others contain substantially the same rules⁷⁹.

Of course, the PECL cannot be considered as a mere duplication of the UNIDROIT Principles, since there are important differences between the two instruments. The most important differences regard the scope and the purpose the two sets of principles intend to serve. The UNIDROIT Principles have been drafted in order to be applied on a worldwide scale: they are deemed to operate in a context where differences among the various legal systems will inevitably remain strong for many years to come and therefore their scope is limited to those transactions which are less dependent on state control and more likely to be regulated by non-national rules, namely international commercial contracts. Conversely, the PECL operate in a more restricted and homogeneous region of the world – the European Union – which aims at abolishing the differences between national and cross-border transactions, and in which a legal regime of consumer protection has reached a considerable degree of harmonisation⁸⁰. It is thus essential to the main purpose they have been conceived for – promoting the smooth functioning of the common market – that they apply to all kinds of contracts, including both national and cross border contracts and both “B2B” and “B2C” contracts. Accordingly, the UNIDROIT Principles' scope of application is at once wider and narrower than that of the PECL: wider because it is meant to be universal, whereas the PECL are designed for contracts within Europe; narrower, because it is limited to international commercial contracts, whereas the PECL apply to all types contracts, whether domestic or international and whether commercial and non-commercial⁸¹.

This difference in terms of scope and purpose is also reflected in divergent provisions. One group of different provisions is due to the fact that the UNIDROIT Principles address only international commercial contracts, whereas the PECL cover all types of contracts, including domestic contracts. For example, whereas the PECL adopt a general definition of good faith and fair dealing⁸², building on the way these concepts are intended in most of member states' national legal systems, the

⁷⁹Cfr e.g. art 2.5 Unidroit (Rejection of Offer) and 2.203 Pecl (rejection); art 2.6 (1) Unidroit (Mode of Acceptance) and art 2.204 Pecl (acceptance); art 3.6 Unidroit (Error in Expression or Transmission) and art 4:104 Pecl (Inaccuracy in Communication); art 3.9 Unidroit (Threat) and art 4:108 Pecl (Threats); art 4.1 Unidroit (Intention of the Parties) and art Article 5:101 (1) (3) Pecl (General Rules of Interpretation); art 6.1.1 Unidroit (Time of Performance) and art 7:102 (Time of Performance); art 6.1.11 Unidroit (Costs of Performance) and art 7:112 Pecl (Costs of Performance).

⁸⁰ M.J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?*, ULR, 1996, 2, p. 242

⁸¹R. Goode, *International Restatement of Contract and English Contract Law*, ULR, 1997, 2, p. 235

⁸² Art 1:201(1) PECL (Good Faith and Fair Dealing) Each party must act in accordance with good faith and fair dealing.

UNIDROIT Principles do not refer to the way these concepts are intended in most of the states of the world, but refer to the special meaning they assume in international trade⁸³. Other important substantial differences are due to the fact that the UNIDROIT Principles are concerned only with B2B contracts, whereas the PECL apply also to consumer contracts and therefore cannot adopt solutions suitable only for parties having the same bargaining power⁸⁴. For example, as far as the function of standard contract terms is concerned, according to the UNIDROIT Principles, a mere reference to the standards terms is regarded as sufficient to incorporate them in the contract⁸⁵; on the contrary, the PECL specify that a mere reference is not sufficient for incorporation: the terms will be binding only if the party invoking them demonstrates that he has taken appropriate steps to bring the other party's attention to them before or when the contract was concluded⁸⁶.

Despite these important divergences, it is nonetheless a fact that the two harmonisation projects have in many cases produced similar, if not identical, results. This substantial convergence has led some commentator to suggest that divergences among the various national laws of the world applicable to international commercial transactions are not so unbridgeable and accordingly the unification of general contract law on a global scale does not appear a project entirely far from reality as many consider to be⁸⁷.

Even without going that far, the "striking" resemblance between the two sets of principles may be considered as a strong indication of the emergence of a transnational system of rules which seek to combine the best solutions from the various laws and traditions of the world in order to meet the needs of globalised markets⁸⁸. This new global order does not depend on the authority of a state or a supranational entity, but will develop only to the extent that it is able to embody the values of the global community that makes use of commercial contracts⁸⁹.

⁸³ Article 1.7(1)Unidroit (Good Faith and Fair Dealing) Each party must act in accordance with good faith and fair dealing *in international trade*.(emphasis added)

⁸⁴ M.J. Bonell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?*, cit. p. 239

⁸⁵ Article 2.19(1) (Contracting Under Standard Term) Where one party or both parties use standard terms in concluding a contract, the general rules of formation apply, subject to Articles 2.20 - 2.22.

⁸⁶ Article 2:104 (1) (Terms Not Individually Negotiated) Contract terms which have not been individually negotiated may be invoked against a party who did not know of them only if the party invoking them took reasonable steps to bring them to the other party's attention before or when the contract was concluded.

⁸⁷ A.S. Hartkamp, *The UNIDROIT Principles for International Commercial Contracts and the Principles of European Contract Law*, ERPL, 1994, 2, p. 357; ID, *Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope*, ULR, 2003, 1/ 2, p. 88-89; ID, *Principles of Contract Law*, in *Towards a European Civil Code*, ch 7. In these articles the author has cautiously supported the old idea suggested by Schmitthoff and recently relaunched by the former Secretary of UNCITRAL Herrmann, of a Global Commercial Code, which would <<weld together and systematise a number of existing instruments of international trade law>>, but not constitute an international convention on the general part of the law of contracts.

⁸⁸ M.J. Bonell, *The UNIDROIT Principles – A Modern Approach to Contract Law*, in H.L. Weyers (Ed), *Europaisches Vertragsrecht*, 1997, Baden-Baden, p. 9

⁸⁹ A. Rosett and M. Wallace Gordon, *United States Report*, in M.J. Bonell (Ed), *A New Approach to International Commercial Contracts*, the Unidroit Principles of International Commercial Contracts, Kluwer Law, 1999, p. 390

The substantive content of the UNIDROIT Principles

Freedom of contract

One of the most fundamental ideas underlying the UNIDROIT Principles is freedom of contract, spelled out in art. 1.1, which states: <<the parties are free to enter into a contract and to determine its content>>. This article encompasses two aspects of the principle of freedom of contract: the freedom of concluding contracts with any other person, irrespective of their legal status and their nationality, and the freedom of the parties to determine the content of their contract. The first aspect is stated in the UNIDROIT Principles only in very broad terms, since its full implementation falls outside their scope and depends on the particular trade policy adopted by each single State and by the community of states as a whole⁹⁰. The second aspect is further specified in art. 1.5, which lays down the freedom of the parties to derogate from or vary the provisions of the Principles, except for the mandatory rules envisaged by the Principles themselves: <<the parties may exclude the application of these Principles or derogate from or vary the effect of any of their provisions, except as otherwise provided>>. In most cases, the mandatory character of the provisions is expressly declared: for example, art. 1.7 on good faith and fair dealing, art. 5.7(2) on price determination and art. 7.4.13(2) on agreed payment for non-performance. Exceptionally, however, the mandatory character of a provision may follow from the content and purpose of the provision itself, as in the case of art. 7.16 on exemption clauses⁹¹.

At first sight, it may seem contradictory that Principles, which have only a soft law character, should incorporate mandatory rules of any kind. Yet, this may not be as strange as it seems, if one takes into account the various ways in which the UNIDROIT Principles may be used in practice. In the first place, where the parties select the Principles as the rules of law governing the contract, they

⁹⁰M. J. Bonell, *An International Restatement of Contract Law*, cit, p. 106

⁹¹See Comment on art. 1.5

implicitly agree to be subject to their mandatory rules. Secondly, where the UNIDROIT Principles are applied by judges or arbitrators, in the absence of an express reference to them by the parties, provisions expressly declared as mandatory make it less likely that a court or arbitral tribunal will conclude that those provisions have been impliedly excluded by a contract term which is difficult to reconcile with them. Thirdly, where the Principles are merely incorporated as terms of the contract, their adoption will indicate an intention to give overriding effect to those rules envisaged as mandatory, to the extent that this is not incompatible with the construction of the contract as a whole. Fourthly, where the Principles serve as a model for national and international legislators, their mandatory provisions are an indication to provide some rules with binding force in the enacting law.

In addition to the mandatory provisions contained in the UNIDROIT Principles, freedom to determine the content of the contract is further restricted by otherwise applicable mandatory rules, be they of national, international or supranational origin. This is stated in art. 1.4: <<nothing in these Principles shall restrict the application of mandatory rules, whether of national, international or supranational origin, which are applicable in accordance with the relevant rules of private international law>>. Yet, the Principles deliberately refrain from indicating which mandatory rules are applicable in each given case: whether only mandatory rules applying regardless of any governing law (the so-called internationally mandatory rules or *lois d'application necessaire*), or also the other rules from which the parties cannot derogate (so-called internal or ordinary mandatory rules) and whether in addition to the mandatory rules of the forum and of the *lex contractus* also those of other states are to be taken into consideration: these very controversial issues have been left to the relevant rules of private international law.

Good faith and fair dealing

One of the UNIDROIT Principles' main purposes is to provide to the largest possible extent fair and equitable conditions in international transactions. The fundamental provision serving this purpose is art. 1.7, which lays down in broad terms the principle of good faith and fair dealing and is further specified in a number of other articles of the Principles. An analysis of such provisions shows that good faith displays three distinctive features within the system of the UNIDROIT Principles. First of all, this duty is to be observed throughout the life of the contract, also during pre-contractual

negotiations. Accordingly, the Principles provide numerous specific applications of the duty of good faith for every aspect of contract law. For example, art. 2.15(1) imposes liability on a party who acts in bad faith during negotiations; art. 2.4, which relates to the formation of the contract, provides that an offer cannot be revoked, if it was reasonable for the offeree to rely on the offer as being irrevocable and the offeree has acted in reliance on the offer; art. 4.8, on the interpretation of the contract, refers to good faith and fair dealing as one of the criteria to be used whenever it becomes necessary to supply a term on which the parties have failed to agree, but which is important for determining their rights and duties; likewise, art. 5.2, concerning performance, indicates good faith and fair dealing among the sources of the parties' implied obligations arising out of a given contract; art. 7.1.7 on force majeure excludes a party's liability for non-performance due to an impediment beyond that party's control and which could not have been reasonably expected to be taken into account at the time of the conclusion of the contract.

Secondly, although no definition is given as to what is meant by “good faith”, the fact that this term is coupled with “fair dealing” makes it clear that it is to be understood in an objective sense, as a synonym of “reasonable commercial standards of fair dealing” and not in the subjective sense, of a state of mind or “honesty”⁹².

Thirdly, the UNIDROIT Principles refer to “good faith and fair dealing in international trade”, therefore the definition of good faith and fair dealing is not to be found in the laws of any one nation state, but is to be located in an international context⁹³: domestic standards may be taken into account only to the extent that they are shown to be generally accepted among the various legal systems⁹⁴.

Important applications of the principle of good faith and fair dealing are to be considered the series of provisions laying down remedies against the unfair behaviour of a party: the choice of including such rules in the UNIDROIT Principles is a departure from the traditional belief that in the so-called “B2B transactions” the parties have equal bargaining power and therefore there is no weaker party deserving protection⁹⁵; quite on the contrary, business people may have different levels of education and technical skills and are no less likely than the rest of humanity to yield to the temptation to exploit the weaknesses or needs of others⁹⁶. Worth mentioning among this group are

⁹²cp. O. Lando and H. Beale (eds), *Principles of European Contract Law: parts I and II*, Kluwer, 2000, p. 115: <<“Good faith “ means honesty and fairness in mind, which are subjective concepts (...). Fair dealing means observance of fairness in fact which is an objective test>>.

⁹³R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, Oxford University Press, 2007, p. 529

⁹⁴Comment 2 to art. 1.7

⁹⁵ cp. U. Drobnič, *Protection of the Weaker Party*, in M.J. Bonell and F. Bonelli (eds.), *Contratti Commerciali Internazionali e Principi UNIDROIT*, Giuffrè, 1997, p.217

⁹⁶M. J. Bonell, *An International Restatement of Contract Law*, cit, p. 151

art. 3.8, according to which a party may avoid the contract whenever it has been led to conclude the contract by the other party's fraudulent representation or non-disclosure of relevant facts; art. 2.20 on surprising terms, that is terms contained in standard terms, which, by virtue of their content, language and presentation, are of such a character that the other party could not reasonably have expected them: such terms are ineffective, unless they have been expressly accepted by that party⁹⁷; and art. 7.4.13 on the so-called "penalty clauses", i.e. those contract terms providing for the payment of a specified sum in the event of non-performance, irrespective of the correspondence between the sum and the anticipated or actual harm: the agreed sum may be reduced to a reasonable amount whenever it is grossly excessive in relation to the actual harm caused by the non-performance and other circumstances.

The duty of good faith is so widely recognized by the UNIDROIT Principles that it can even constrain the other fundamental idea of this restatement, namely freedom of contract. This is acknowledged in art. 1.7(2), which expressly gives to the general duty of good faith and fair dealing a mandatory character, so that it may not be excluded or limited by agreement of the parties. This raises the problem of whether all the specific applications of the same principle of good faith and fair dealing are also beyond the parties' power to exclude them. A number of these provisions are explicitly declared as mandatory, such as those on fraud, threat and gross disparity; as far as those not expressly designated as mandatory are concerned, they seem to be mere default rules: they provide what may be considered the most appropriate solution in the generality of cases, but the parties are free to depart from them in order to accommodate their particular expectations and needs⁹⁸.

Openness to usages

Another essential characteristic of the UNIDROIT Principles is the central role usages and practices play in the determination of the rights and duties of the contractual parties. The reason for this is to

⁹⁷The *ratio* of protecting the weaker party underlying this provision is clearly expressed in Comment 1 to this article: <<to avoid that a party which uses standard terms taking undue advantage of its position by surreptitiously attempting to impose terms on the other party which that other party would scarcely have accepted had it been aware of them>>.

⁹⁸For example, the parties are free to agree that, contrary to what is provided for in art. 5.8, each of them may end the contract without advance notice; similarly, the parties are free to exclude in case of hardship any right to request renegotiation.

be found in the general objective pursued by the UNIDROIT Principles to provide a regulation sufficiently flexible to permit the constant adaptation of its rules to the ever-changing technical and economic conditions of international trade⁹⁹. As art. 1.8 states, not only are the parties bound by any usage to which they have agreed and any practices which they have established between themselves, but also by a usage that is widely known and regularly observed in international trade by parties in the particular trade concerned, except where the application of such a usage would be unreasonable. The UNIDROIT Principles restrict the range of relevant trade usages to those which are widely known and regularly observed in international trade, with the consequence that usages of a purely local or national origin are not normally applicable without explicit reference thereto by the parties¹⁰⁰. Two other important provisions where usages play a crucial role are art. 4.3 on contract interpretation, establishing, *inter alia*, that usages have to be taken into account in establishing the common intention of the parties or the meaning that reasonable persons of the same kind as the parties would give to the statement or conduct or to the contract in question; and art. 5.2, indicating usages as a possible source of implied obligations.

Favor contractus

Most provisions of the UNIDROIT Principles are inspired by the idea of *favor contractus*, that is the aim of preserving the contract whenever possible, thus limiting the number of cases in which its existence or validity may be questioned or in which it may be terminated before time. For example, art. 2.1, in establishing that a contract may be concluded not only by the acceptance of an offer, but also by the conduct of the parties which is sufficient to show agreement lays down the rule that a contract may be formed without the traditional process of offer and acceptance¹⁰¹. The comment to this article explains that this rule reflects commercial practice in that contracts, especially when related to complex transactions, are often concluded after prolonged negotiations, without an

⁹⁹M. J. Bonell, *An International Restatement of Contract Law*, cit, p. 113

¹⁰⁰Comment 4 to art. 1.8 states that national or local usages may be relevant even without express reference by the parties in the case of usages existing on certain commodities exchanges or at trade exhibitions or ports, provided that they are regularly followed vis à vis foreigners also, or whenever business persons have already entered into a number of similar contracts in a foreign country, so that they should be bound by the usages established within that country for such contracts.

¹⁰¹J.M. Perillo, *UNIDROIT Principles of International Commercial Contracts: the Black-letter Text and a Review*, Fordham Law Review, 1994, 63, p. 284.

identifiable sequence of offer and acceptance. In such cases, it may be difficult to determine if and when a binding agreement has been reached; it is therefore important to establish that a contract may be considered to be concluded even though the moment of its formation cannot be determined, provided that the conduct of the parties is sufficient to show agreement¹⁰². Likewise, the hotly-debated¹⁰³ art. 3.2 challenges the traditional process of contract formation: by establishing that a contract is concluded by the mere agreement of the parties, without any further requirement, it does away with a series of elements – *in primis* consideration or cause, but also the delivery of the thing in the so-called real contracts – which are considered essential to the valid formation of the contract in many national laws. Another group of provisions inspired by the idea of *favor contractus* is a number of exceptions to the traditional “mirror image rule”, i.e. the rule that an acceptance must be the mirror image of the offer, so that a reply to an offer which purports to be an acceptance, but contains additional or different terms, amounts to a counter-offer. For instance, art. 2.11(2) provides that a reply to an offer which purports to be an acceptance, but contains additions or modifications, may nonetheless lead to the conclusion of a contract, if the additional or different terms do not materially alter the terms of the offer and the offeror does not object to the discrepancy without undue delay: accordingly, if the offeror does not object, the terms of the contract are the terms of the offer with the modifications contained in the acceptance. An important provision within this group, which provides a solution to a problem emerging very frequently in practice, is art. 2.22 on the so-called battle of the forms, that is the situation where, during negotiations, both parties exchange forms containing standard terms which differ. The battle of the form is solved in the UNIDROIT Principle by the so-called “knock-out rule”, whereby the conflicting terms “knock”

¹⁰²This latter expression used by the Principles is a rather broad and sweeping statement, which leaves much to the interpretation of the courts and arbitral tribunals as to what constitutes a conduct “sufficient to show agreement” (G. A. Moens, L. Cohn and D. Peacock, *Australia*, in M.J. Bonell (ed.), *A New Approach to International Commercial Contracts*, cit., p. 29).

¹⁰³Legal scholars are divided on the opportunity of narrowing down to the mere agreement the number of requirements necessary to the formation of the contract. Most of the debate has been focusing on the opportunity of doing away with the element of consideration or cause. Some common lawyers observe that the doctrine of consideration is being progressively eroded by case law (see e.g. G.H. Treitel, *The Law of Contract*, Sweet and Maxwell, 1995, pp. 147ff and M. Chen-Wishart, *Consideration: Practical Benefit and the Emperor's New Clothes*, in J. Beatson and D. Friedmann (eds.), *Good Faith and Fault in Contract Law*, Clarendon press, 1995, pp. 123ff), others that, at least in the context of international commercial contracts, neither consideration nor cause serve any substantially useful purpose (M. Furmston, *United Kingdom*, in M.J. Bonell (ed.), *A New Approach to International Commercial Contracts*, cit., p. 384). French lawyers suggest that in the UNIDROIT Principles system the functions of cause have been taken over by an enlarged notion of gross disparity, which consequently renders superfluous the need for a contractual cause (B. Favarque-Cosson, *France*, in M.J. Bonell (ed.), *A New Approach to International Commercial Contracts*, cit., p. 100-101; similarly, A.Di Maio, *I “Principles” dei contratti commerciali internazionali tra Civil Law e Common Law*, Riv. Dir. Civ., 1995, 1, p. 620 and J. Gordley, *An American Perspective on the UNIDROIT Principles*, Centro di Studi e ricerche di diritto comparato e straniero: saggi e conferenze e seminari n. 22). Finally, some English lawyers underline that, although the consideration requirement is normally of minimal importance in international trade, there are still some cases in which the enforcement of a commercial obligation has been called into question on the ground of the absence of consideration, such as the bank's abstract obligation to pay the beneficiary of a letter of credit or a bank guarantee (R. Goode, *Commercial Law*, Sweet and Maxwell, 1995, p. 986).

each other out, so that only those terms of each party's respective standard terms which are not contradictory are incorporated into the contract¹⁰⁴. This approach departs from the traditional “last shot rule”, adopted in common law systems and under the CISG, whereby only the party's standard terms that are referred to last are incorporated into the contract. The last shot rule is derived from the principle of the “mirror image” rule: reference to different standard terms in an acceptance is considered as a modification of the terms of the offer and therefore constitutes a counter-offer¹⁰⁵. By contrast, the approach adopted by the UNIDROIT Principles is justified by the fact that parties often refer in practice to their respective standard terms, without paying much attention to them: in such cases, they will normally not even be aware of a conflict between their respective standard terms, with the result that they should not be allowed to subsequently question the existence of the contract or, if performance has commenced, to insist on the application of the terms last sent or referred to. Only where a party clearly indicates in advance, or later and without undue delay informs the other, that he does not intend to be bound by a contract which is not based on his own standard terms, can he exclude the application of the knock out doctrine and therefore avoid being bound by a contract consisting of terms different from its own¹⁰⁶.

But probably the most innovative solution provided by the UNIDROIT Principles and inspired by the *favor contractus* is the provision on hardship. Hardship is defined in art. 6.2.2 as an unexpected event fundamentally altering the equilibrium of the contract, by either increasing the cost of a party's performance or by decreasing its value. Where hardship occurs, art. 6.2.3 entitles the aggrieved party to request the renegotiation of the contract in order to adapt its terms to the changed circumstances; if the parties fail to reach agreement within a reasonable time, either of them may resort to the court or arbitral tribunal, which is authorised either to terminate the contract or to adapt it with a view to restoring its equilibrium. By contrast, many national systems, both of civil and common law origin, provide no remedy in case that an unexpected event occurs which does not make performance impossible, but merely more onerous and, if they do, they only allow discharge of the contract¹⁰⁷. Consequently, the UNIDROIT Principles provision on hardship is innovative, because it provides courts and arbitrators with greater flexibility required by international trade. In

¹⁰⁴K. P. Berger, *Private Dispute Resolution in International Business: Negotiation, Mediation, Arbitration*, vol. II: Handbook, Kluwer, 2006, p. 406.

¹⁰⁵K. P. Berger, *Private Dispute Resolution in International Business*, cit., p. 6 and 405.

¹⁰⁶Comment 3 to art. 2.22

¹⁰⁷ In a number of civil law countries, such as Germany, Italy, Switzerland, Greece, Argentina, Brazil, courts are empowered to modify the terms of the contract to adapt them to the changed circumstances; in France this possibility is recognised only with respect to public law contracts (*contrats administratifs*) by the doctrine of *imprévision* developed by the *Conseil d'Etat*. Finally, common law countries generally adopt an “all-or nothing” approach: they either deny any effect to the unexpected event or consider the contract terminated as a consequence thereof. Yet, in US case law there have been two cases in which the court has modified the contract (*ALCOA v. Essex Group Inc.*, 499 F. Supp 53 (WD Pa 1980)) and compelled renegotiation (*In re Westinghouse Elec. Corp. Uranium Contracts Litig.*, 517 F. Supp 440 (E.D. va. 1981)), in order to adapt it to changed circumstances.

case of long-term contracts, what often happens in practice is that parties tend to avoid termination and prefer to have their contract adapted to the changed circumstances: in fact, sophisticated international trade agreements of long duration typically contain a “hardship clause”, allowing the right of renegotiation or other adaptation means, which provide flexibility to the relationship. If such a clause is lacking, it might be that it has been rejected by one or more parties, but it is more likely to have been overlooked by unsophisticated parties or deliberately omitted by a sophisticated drafter¹⁰⁸. In the last two cases, reasons of fairness require that the court or the arbitral tribunal shall be authorised to intervene in order to restore the equilibrium of the contract.

¹⁰⁸J.M. Perillo, *UNIDROIT Principles of International Commercial Contracts*, cit., pp. 301-302

SECTION II: THE PURPOSES OF THE UNIDROIT PRINCIPLES AND THEIR APPLICATION IN INTERNATIONAL COMMERCIAL ARBITRATION

The purposes of the UNIDROIT Principles: introduction

The Preamble to the UNIDROIT Principles 2004 sets out six possible ways in which they may be applied in practice: as rules governing the contract expressly chosen by the parties; as *lex contractus* where the parties have not chosen any law to govern their contract; as a source of general principles of law or *lex mercatoria*; as means to interpret and supplement international uniform law instruments; as means to interpret and supplement domestic law; as a model for international and international legislators. Yet, given the soft-law character of the Principles, this list is not meant to be exhaustive, so that other options are also conceivable. Thus, some of the additional applications of the Principles, which have emerged in practice and scholarly writings, but had not been originally conceived by its drafters, have been encompassed in a Comment to the Preamble added in the 2004 edition. It was feared that too long a list of possible applications might have detracted the parties' attention from the main purposes of the Principles, that should have remained those for which they had originally been conceived¹. As a result, the new Comment 8 to the Preamble envisages three additional uses of the Principles: as a guide for drafting contracts, as course material in legal education, and as a substitute for the domestic law otherwise applicable. This latter purpose was originally included in the black-letter rules of the 1994 Preamble, but, due to its scarce practical application, was downgraded to an additional use.

The UNIDROIT Principles as a guide for drafting contracts

Although confined to Comment 8 of the Preamble as an additional purpose of the Principles, the use of the UNIDROIT Principles as a guide in contract negotiations and drafting has turned out to be

¹UNIDROIT 2003 Study L – Misc. 25, Working Group for the Preparation of Principles of International Commercial Contracts, Sixth Session 2-6 June 2003, Secretariat Report, par. 585

one of the most important use². In 1996 the UNIDROIT Secretariat launched an inquiry with a view to gathering information as to the different ways in which the Principles had been used so far: roughly two thirds of those who replied declared that they had used the UNIDROIT Principles during contract negotiations. In particular, the use of the UNIDROIT Principles in contract negotiations and drafting may serve two essential purposes: they may represent an instrument to overcome language barriers³ and they may assist the parties in identifying the main legal issues underlying the negotiation and suggest possible solutions. Parties to international commercial contracts belong by definition to different countries and may therefore find it difficult to communicate with each other on the basis of a terminology which is taken from a specific national system: in this sense, the UNIDROIT Principles provide a neutral glossary of uniform definitions, which is available in some of the main languages of the world. Moreover, especially in cases where one or both parties lack sufficient expertise to conduct contract negotiations at an international level, the Principles may represent a checklist of the most important issues to be dealt with and offer examples of possible solutions⁴. For instance, the rule laid down in art. 1.9(2), whereby a notice is effective when it reaches the person to whom it is given, should draw the attention of the parties to the fact that normally the risk of loss, mistake or delay in the transmission of the message lies on the sender: therefore, if under the specific circumstances of the case, this does not appear suitable or fair, the parties should provide differently in the contract; again, articles 5.4 and 5.5 draw the parties' attention on the distinction between the duty to achieve a specific result and the duty to use best efforts: accordingly, given the different degrees of diligence required in the performance of the obligation, the parties should be urged to indicate in the clearest way possible in their contract the type of duty involved.

On the other hand, the use of the UNIDROIT Principles as a model for contract drafting has some drawbacks. The Principles do not contain provisions for specific types of contracts and are incomplete even for matters of general contract law⁵; moreover, their often general and open-ended style is frequently not in accordance with the needs for specificity and accuracy in contract practice⁶. Arguably, these drawbacks restrict their use in this regard; as a result, some author has suggested that, rather than as a model for contracts, the Principles are designed as background law

²M. J. Bonell, *An International Restatement of Contract Law: The UNIDROIT Principles of International Commercial Contracts*, Transnational Publishers, 1997, p. 238

³The 1996 inquiry has also shown that, among those who declared to have used the Principles during negotiations, one third have done so in order to overcome language barriers.

⁴M. J. Bonell, *An International Restatement of Contract Law*, cit., p. 177 ; G. de Nova, *The UNIDROIT Principles as a Guide for Drafting International Contracts*, in Institute of International Business Law and Practice (ed.), *UNIDROIT Principles for International Commercial Contracts: a New Lex Mercatoria?*, ICC Publication n. 490/1, 1995, p. 129

⁵G. de Nova, *op. cit.*, pp. 133-134

⁶R. Michaels, *Preamble I: Purposes of the PICC*, in S. Vogenauer and J. Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford University Press, 2009, p. 78

for contracts to be used in order to clarify unclear terms or address issues arising under the contract, but not directly dealt with by its terms⁷.

The UNIDROIT Principles as a model for national and international legislatures

As stated in paragraph 6 of the Preamble, the UNIDROIT Principles may constitute a model law on which national and international legislators may rely for the elaboration of new legislation in the field of general contract law or with respect to special types of transactions. The use of the Principles as a model for legislation has become perhaps their most successful one⁸. In particular, at the national level they may turn out to be useful for two categories of countries⁹: countries lacking a developed body of rules relating to contracts and which therefore intend to update their law to current international standards, and countries with a well-defined legal system which, after recent dramatic changes in their socio-political structure, have an urgent need to rewrite their laws, in particular those relating to economic and business activities.

To the first category belong the developing countries: the opportunity to use the UNIDROIT Principles as a model for the revision and improvement of national contract laws in the ASEAN countries has been repeatedly emphasised¹⁰ and in one ASEAN country – Cambodia – the Principles have already exerted some influence in the drafting of the 2007 Civil Code¹¹. The UNIDROIT Principles have also served as source of inspiration of the latest codification reforms in

⁷M. Fontaine, *The UNIDROIT Principles: An Expression of Current Contract Practice?*, ICC International Court Bulletin, Special Supplement on the UNIDROIT Principles, ICC Publication, 2002, p. 95; M. Scherer, *Preamble II: The Use of the PICC in Arbitration*, in S. Vogenauer and J. Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford University Press, 2009, p. 101.

⁸R. Michaels, *Preamble I: Purposes of the PICC*, cit., p. 68.

⁹Comment 7 to the Preamble

¹⁰ B. S. Hardjowahono, *The UNIDROIT Principles and the Law Governing Commercial Contracts in Southeast Asia*, ULR, 2002, 4, p. 1013. Yet, ASEAN's current co-operation efforts with regard to trade law, let alone contract law are for the time being mostly confined to preliminary accords on general objectives and the overall framework of such cooperation.

¹¹ M. Monichariya and T. Kazuko, *Drafting a New Civil code and Code of Civil Procedure in Cambodia with Japanese Technical Assistance*, ULR, 2002, 4, p. 1051. Cambodia is a telling example of a country <<lacking a developed body of rules>>: when the royal government was established in 1993, the Cambodian society was without those basic institutions and structures normally associated with the protection of fundamental rights and the functioning of a market economy, that is to say it had no independent judiciary, no legal professionals, no effective civil service, no free press and so on. In 1996 the Cambodian government announced the first Social and Economic Development Plan to launch the necessary judicial and legal reforms which were supported by countries such as France (mainly in drafting the Criminal Code and the Code of Criminal Procedure) and Japan (preparation of the Civil Code and the code of Civil Procedure). The Cambodian Civil Code was passed and promulgated in December 2007, but the date of enforcement has not yet been fixed.

many developed countries: this is said for the new Dutch Civil Code¹², the 2001 reform of the Law of Obligations in German Law¹³, the drafts for the revision of art. 2 on Sales of the United States Uniform Commercial Code¹⁴, and the proposal of the reform of the Spanish Commercial Code¹⁵.

To the second category belong essentially the former soviet countries, which are or have been under a process of transition to a market economy: in some Eastern European countries the UNIDROIT Principles (together with the PECL) have been taken into account as one of the most important and authoritative terms of reference in the drafting of new contract laws complying with international standards¹⁶. But the most significant examples of countries belonging to this group are undoubtedly the Russian Federation and China. In the former, the adoption of the new Civil Code has confirmed the transition to private law principles in regulating economic activities¹⁷: although part one of the Code, which includes general rules of contract, was completed before the Principles were officially adopted and published¹⁸, it is beyond dispute that they were often relied upon as the document best reflecting in concise form the current state of and recent tendencies in modern contract law¹⁹. Likewise, the UNIDROIT Principles 1994 inspired many rules of the 1999 Chinese

¹²The drafting of the Dutch Civil Code, which entered into force on 1 January 1992, was carried out in parallel with that of the UNIDROIT Principles 1994: many scholars have underlined the mutual interactions between the two instruments, so that it is fair to say that they share a common ideology of the law of contract and are based on largely similar rules and concepts (cp. e.g. A.S. Hartkamp, *The UNIDROIT Principles for International Commercial Contracts and the New Dutch Civil Code*, in Festschrift Christian Johan Henri Brunner, Kluwer, 1994, p. 137; P. Van Schilfgaarde, *System, Good Faith and Equity in the New Dutch Civil Code*, ERPL, 1997, p. 6; B. Volders, *The UNIDROIT Principles of International Commercial Contracts and Dutch Law*, in E. C. Cashin Ritaine and E. Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification-Reports of the IDSC Colloquium 8/9 June 2006*, Schulthess, 2007, pp. 137-139).

¹³O. Meyer, *Principi Internazionali del Diritto dei Contratti nella Riforma del Diritto Tedesco delle Obbligazioni, Contratto e Impresa – Europa*, 2004, 2, pp. 824-833; R. Zimmermann, *The New German Law of Obligations: Historical and Comparative Perspectives*, Oxford University Press, 2005, p. 77.

¹⁴A. Rossett and M.W. Gordon, *United States*, in M.J. Bonell (ed.), *A New Approach to International Commercial Contracts: The UNIDROIT Principles of International Commercial Contracts*, Kluwer, 1999, p. 393.

¹⁵In 2004 the Spanish Ministry of Justice published a proposal for the reform of the Spanish Commercial Code, drafted by the General Commission of Codification: this proposal is aimed at modifying the regulation of domestic commercial contracts, contained in the 19th century Spanish Commercial Code, in order to adapt it to the current needs of trade. The draft shows the strong influence of the UNIDROIT Principles and the PECL, notwithstanding some differences in matters such as invalidity, limitation periods and assignment of rights (A. M. Canellas, *The Influence of the UNIDROIT Principles on the Proposal of the Reform of the Spanish Commercial Code*, in E. C. Cashin Ritaine and E. Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification*, cit., p. 215).

¹⁶This is the case of Estonia, Lithuania and Czech Republic.

¹⁷A.S. Komarov, *The UNIDROIT Principles of International Commercial Contracts: a Russian View*, ULR, 1996, 2, p. 250.

¹⁸Part One of the Russian Civil Code was approved by the State Duma on 21 October 1994 and entered into force on 1 January 1995.

¹⁹A.S. Komarov, *The UNIDROIT Principles of International Commercial Contracts: a Russian View*, cit., p. 248. The most important provisions of the Russian Civil Code which were directly inspired by the UNIDROIT Principles were arts. 451 and 452 on substantial alteration of contractual equilibrium. These provision, which were patterned after arts. 6.2.1- 6.2.3 of the UNIDROIT Principles on hardship represent completely new rules for Russian law. The importance of these provision lies in the fact that Russia's unstable development during the period of transition towards a market economy (especially in the light of the financial crisis of the 90s) has turned the problem of hardship into one of the greatest issues in Russian law: whereas in the former socialist system the problem of changed circumstances was considered of small importance, now arts. 451 and 452 of the Russian Civil Code allow the disadvantaged party to request the court to adapt the contract to the changed circumstances. (cp A.G. Doudko, *Hardship in Contract: The*

Contract Law²⁰, especially those which, within a context of market economy, strike a balance between economic efficiency and social justice, such as the validity of an acceptance containing a non-material modification of the offer or the principle of pre-contractual liability²¹.

The diffusion of the UNIDROIT Principles as a model for national legislation has a number of common features²². First, despite their international character, they have often been used for domestic rather than international contract law reform. This seems to be an indication of the fact that the distinction between international and domestic contracts tends to blur, as most domestic laws on commercial contracts are now drawn also with international commerce in mind. Secondly, the Principles have rarely been used as a model in their entirety; more frequently, only individual chapters or even individual rules thereof have been relied on. This is because not all provisions of the Principles represent “common” or “best” solutions, but their suitability for the particular national context must be verified on a case by case basis. Thirdly, where the Principles have exerted substantial influence, this was frequently due to the presence of individual advisors in law reform committees who had participated to the drafting of the Principles themselves or had been particularly active in their scholarly diffusion. This is the case for example of Zimmermann for the reform of the German Law of Obligation and Komarov for the reform of the Russian Civil Code.

At an international level, the UNIDROIT Principles may become an important term of reference for the drafting of new conventions, model laws and other harmonisation tools in the field of international contract law. Apart from the mutual influences between the two “sister-projects” of the UNIDROIT Principles and the PECL, the most significant instance is represented by the Uniform Act on Contract Law (*Acte uniforme sur le droit des contrats*) drafted by the Organisation for the Harmonisation of Business Law in Africa (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires, OHADA*)²³. In 2002 the OHADA Secretariat approached the International Institute for

Approach of the UNIDROIT Principles and Legal Developments in Russia, ULR, 2000, 3, pp. 483-509).

²⁰According to the statistics published quoted in Z. Shaohui, *L'Influence des Principes d' UNIDROIT sur la Réforme du Droit Chinois des Obligations*, ULR, 2008, 1/2, pp. 161-162, 47.3% of the provisions of the General Part of the 1999 Chinese Contract Law have been remarkably influenced by the UNIDROIT Principles.

²¹J. Xi, *The Impact of the UNIDROIT Principles on Chinese Legislation*, in E. C. Cashin Ritaine and E. Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification- Reports of the IDSC Colloquium 8/9 June 2006*, Schulthess, 2007, p. 113. During the drafting process of the Chinese contract law there have been discussions concerning what rules should be adopted from which legal systems. Whereas no one disputed the necessity of borrowing rules from outside the Chinese legal system, some expressed their concern that such borrowed rules necessarily carried some unique social and political characteristics of the country concerned and therefore they may be incompatible with Chinese social reality. This concern gave further incentives to the drafters to thoroughly consider the UNIDROIT Principles as rules drafted by jurists representing all the major systems of the world and thus not reflecting the legal tradition of any particular country (L. Hx, *Controversies in the drafting Process of Chinese Contract Law*, in China Law Web, available at www.iolaw.org.cn).

²²R. Michaels, *Preamble I: Purposes of the PICC*, cit., p. 69.

²³The Organisation for the Harmonisation of Business Law in Africa (*Organisation pour l'Harmonisation en Afrique du Droit des Affaires, OHADA*) was set up by a treaty signed on 17 October 1993 and its main purpose is to promote regional integration and economic growth and to ensure a secure legal environment through the harmonization of business law within its member states (Benin, Burkina Faso, Cameroon, Central Africa, Comoros, Congo, Ivory Coast,

the Unification of Private Law in order to ask assistance in the drafting of a uniform act on contract law. UNIDROIT agreed to the OHADA's request and proposed that one of the members of the UNIDROIT Principles Working Group – Marcel Fontaine – be entrusted with the preparation of a preliminary draft. To this aim, the rapporteur completed three exploratory missions in nine OHADA member states selected by the OHADA Secretariat, in the course of which more than one hundred interviews with local jurists (such as senior civil servants, magistrates, lawyers, notaries, academics, representatives of the business world) were carried out, with a view to collecting information on the current state of contract law in the countries concerned, the uniquely African features to be taken into account, the guiding principles to be adopted in the drafting of the future act and the opportunity of choosing the UNIDROIT Principles as a model for the act itself²⁴.

In 2005 a preliminary draft comprising 213 articles was prepared and it is currently under examination before the OHADA national commissions: once it is approved by the OHADA Ministry Council, the Uniform Act will be directly applicable and binding within the OHADA Member states. Following the suggestions stemming from the earlier consultations, it was decided to stick to the model of the UNIDROIT Principles as close as possible: most of the articles of the draft are very similar and at times identical to the text of the UNIDROIT Principles. Accordingly, the draft Uniform Act represents a complete codification of general contract law²⁵: like the UNIDROIT Principles, it covers formation, validity, interpretation, content, performance and non-performance, transfer of obligations and limitation periods. Moreover, new provisions have been added covering subject-matters not yet addressed by the UNIDROIT Principles, such as

Gabon, Guinea, Bissau Guinea, Equatorial Guinea, Mali, Niger, Senegal, Chad, Togo; the Democratic Republic of Congo has officially announced its decision to become an OHADA member). The OHADA institutional structure includes four main bodies: the Council of Ministers which is made up of the Finance and Justice Ministers of the member states and is the executive and legislative body in charge of adopting the uniform acts; the Permanent Secretariat which is the administrative body and implements the adopted texts; the Common Court of Justice and Arbitration which is the supreme authority in charge of reviewing decisions rendered by Courts of Appeal of the member states in cases involving the application of the OHADA uniform law; the Regional Training School of the Judiciary, providing for the training of judges and judiciary staff and ensuring their specialization in the OHADA uniform laws. The OHADA Council of Ministers has so far adopted following uniform laws: General commercial law, Corporate law and rules concerning different types of joint ventures, Laws concerning secured transactions (guarantees and collaterals), Debt recovery and enforcement law, Bankruptcy law, Arbitration law, Accounting law. Law regulating contracts for the carriage of goods by road. According to art. 10 of the OHADA Treaty, Uniform Acts adopted by the Council of Ministers are directly applicable and overriding in the contracting states. The OHADA Council of Ministers made the decision in 2001 to go ahead, within a rapid time frame, with the unification of the following additional business and legal regulations: competitions law intellectual property law, banking law, laws related to unincorporated forms of business, law of contract and law of evidence.

²⁴M. Fontaine, *Explanatory Note to the Preliminary Draft OHADA Uniform Act on Contract Law*, ULR, 2008, 1/2, par. 4, p. 634.

²⁵The question of the scope of application of the future Act has been for the moment left open: in view of the rapporteur's preference for a unified contract law, the preliminary draft makes an a priori case for a Uniform Act applicable to both commercial and non-commercial contracts; yet, a variant has also been included whereby the Act would apply to commercial contracts only, but national legislators would have discretion to extend its scope to contracts in general. (M. Fontaine, *Explanatory Note to the Preliminary Draft OHADA Uniform Act on Contract Law*, cit., p. 634).

conditional, joint and several obligations and the protection of creditors²⁶. On the other hand, the elaboration of the preliminary draft has also followed a second guiding principle, namely seeking appropriate adjustments to accommodate the specific features of Africa's legal, social and cultural context, such as the widespread illiteracy and scant legal culture²⁷. Nonetheless, it is still doubtful whether OHADA Uniform Act on Contract Law will be successful²⁸. Concerns have been raised on OHADA's influence on its member states, since its uniform acts are not yet widely enforced. Furthermore, the question has been raised whether unification of the law of contract on the basis of a text conceived by drafters foreign to African legal traditions is legitimate. Finally, the fact that French is the exclusive language of OHADA may pose problems given the degree of affinity the UNIDROIT Principles have towards the common law and given that most of their materials are in English.

The impact of the UNIDROIT Principles on national legislations is also fostering the emergence of a particular legislative technique, which is becoming the standard for national or international codification of private law²⁹. This drafting approach is characterised by two main features: an extensive comparative law research underlying the elaboration of each provision, which takes into account an even larger number of foreign sources of both national and non-national origin; the involvement in the drafting process of a wide range of outside experts and stakeholders not belonging to the state or formulating agency's bureaucracy, in order to strengthen the legitimacy of the harmonisation tool and facilitate its reception in practice³⁰. In turn, the diffusion of such national and international instruments, reflecting widely accepted contract rules, ends up constraining the choice of legislatures embarking on new law-making projects, since they need to provide reasonable grounds every time they decide to adopt rules departing from internationally accepted standards³¹.

²⁶M. Fontaine, *L'avant-projet d'Acte Uniforme OHADA sur le Droit des Contrats: Vue d'Ensemble*, ULR, 2008, 1/2, p. 214

²⁷Most African lawyers are illiterate and therefore legal rules are frequently ignored or very badly known by them. In case of dispute, very few resort to the judiciary or legal professionals; most people prefer non-legal mechanisms of dispute settlement or self-help. cp. M. Fontaine, *Harmonisation du Droit des Contrats en Afrique*, in E. C. Cashin Ritaine and E. Lein (eds), op. cit., p. 99

²⁸R. Michaels, *Preamble I: Purposes of the PICC*, cit., p. 71

²⁹B. Volders, *The UNIDROIT Principles of International Commercial Contracts and Dutch Law*, in E. C. Cashin Ritaine and E. Lein (eds), op. cit., p. 142; D. Tallon, *The New Dutch Civil Code in a Comparative Perspective – a French View- Point*, ERPL, 1993, p. 190

³⁰B. Volders, *The UNIDROIT Principles of International Commercial Contracts and Dutch Law*, cit., pp. 139-141

³¹B. Volders, *The UNIDROIT Principles of International Commercial Contracts and Dutch Law*, cit., pp. 142-143

The adoption of the UNIDROIT Principles in the form of a model law

Shortly after the publication of the first edition of the UNIDROIT Principles, the early idea of drafting a binding code of international commercial contracts, which had already emerged during the 1971 Steering Committee's work, rekindled: some UNIDROIT Working Group members suggested that it would be worthwhile to resume and continue the Working Group's work in UNCITRAL with a view to preparing an international convention on the general part of the law of contracts³², or even a binding Global Commercial Code³³. Yet, the conversion of the UNIDROIT Principles into a binding instrument in the form of an international convention is not, for the time being, a realistic objective³⁴. Already in the early 1980s, when the Working group embarked upon the preparation of the UNIDROIT Principles, the prolonged negotiations leading to the CISG had clearly showed that this Convention was the maximum that could be achieved at the legislative level³⁵; nowadays it is very unlikely that governments will be willing to embark upon a far-reaching project such as the adoption of the UNIDROIT Principles by an international convention³⁶. Nonetheless, less radical but more feasible options for the further diffusion of the UNIDROIT Principles need to be taken into consideration. Given the remarkable influence exerted by the Principles on national legislations, an increasing number of scholars is now claiming for their adoption in the form of a model law³⁷. The direct involvement of governments would enhance the UNIDROIT Principles' authority; at the same time, the most innovative rules contained therein would not constitute an obstacle to their enactment in the various national systems, given the non-binding nature of the model law. Finally, a further advantage would stem from the different path of diffusion of the model law with respect to a restatement. Whereas the latter is primarily addressed to contracting parties, judges and arbitrators throughout the world, with the consequent difficulties in ensuring its diffusion among such a huge and indefinite multitude of people, the model law is addressed to national legislatures, which are much more identifiable and limited in number.

³² J.P. Beraudo, *Les Principes d'UNIDROIT relatifs au droit du commerce international*, La Semaine Juridique, 1995, 1, p. 194

³³ O. Lando, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?*, ULR, 2003, 1, p. 132

³⁴ M. J. Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, ULR, 2007, 2, p. 244

³⁵ M. J. Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, cit., p. 234

³⁶ M. J. Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, cit., p. 239

³⁷ A. S. Hartkamp, *Modernisation and Harmonisation of Contract Law: Objectives, Methods and Scope*, ULR, 2003, 1/2, pp. 88-89; O. Lando, *Principles of European Contract Law and UNIDROIT Principles: Moving from Harmonisation to Unification?*, cit. pp. 132-133; M. J. Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, cit., pp. 244-245; for a skeptical note, see E.A. Farnsworth, *Modernization and Harmonization of Contract law: an American Perspective*, ULR, 2003, 1/2, pp. 103-106. *Contra*, R. Michaels, *op. cit.*, p. 69, who argues that a binding global code seems both improbable and unattractive; whereas a non-binding global code would presumably not look very different from the UNIDROIT Principles as they exist now.

Accordingly, the adoption of the UNIDROIT Principles in the form of a model law might enhance their diffusion within the international community, since it would address directly those who, within their respective national governments, are in charge of adopting legislation in the field of international commercial law. Of course, an adequate promotional work should be carried out, with a view to convincing national legislatures of the need for reforming outdated national contract laws in accordance to international standards and of the advantages stemming from the adoption of the UNIDROIT Principles as a model for these reforms. This persuasive work may be facilitated by the fact that the experts who at the national level are entrusted with the task of preparing legislative drafts in the field of contract law are frequently involved in the UNIDROIT activities, either directly as members or as external observers. As a result, the epistemic community within UNIDROIT may benefit from the “double-track” activity of its members, acting as experts at both international and national level: once persuaded of the usefulness of the UNIDROIT Principles as a model law for national legislatures, the UNIDROIT expert members may exert a considerable pressure on their respective governments to enact legislative reforms on the pattern of the UNIDROIT Principles.

It is still to be seen whether the UNIDROIT Principles should be the subject of a model law on its own or be part of a broader project, such as a non-binding Global Commercial Code to be adopted in the form of a model law by UNCITRAL in co-operation with other interested international organisations. Such a Code would be a sort of consolidation of existing uniform law instruments (e.g. the CISG, various transport law conventions, the UNIDROIT Conventions on leasing and factoring, INCOTERMS)³⁸, or a universal glossary of commercial terms to be used in future harmonisation projects. The UNIDROIT Principles may be included as the general contract law of this Code, applicable to the specific contracts regulated therein, unless otherwise agreed by the parties.

The UNIDROIT Principles as governing law chosen by the parties

The second paragraph of the Preamble states that the UNIDROIT Principles shall be applied when the parties have agreed that their contract be governed by them. Despite the very scarce number of

³⁸M. J. Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, cit., p. 244.

practical applications in this respect, speculations on the use of the Principles as *lex contractus* have given rise to a burgeoning amount of literature. This issue is fascinating for legal theory³⁹, since ideological clashes on what constitutes “law” come into play when deciding whether the Principles may be employed as governing law of the contract. One of the most disputed questions is whether national courts are bound to apply the UNIDROIT Principles in case that the parties expressly refer to them as the law governing their contract. The prevailing opinion is that state courts are bound to apply their own national law, which includes the relevant conflict of law rules and the latter restrict the choice of the laws applicable to international contracts to the law of a state, to the exclusion of any supra-national or non-national set of rules. The reasons underlying this opinion are that only a state can create a law which protects equally and fairly the interests of parties to a contract and provides legal certainty; moreover, only state law rules, as recognised by a sovereign State, can be enforced by a state court⁴⁰. This view is confirmed by the 1980 Rome Convention on the Law Applicable to Contractual Obligations, which unifies the conflict of law rules with respect to contracts within the member states of the EU: by repeatedly referring to the “law” of a country or a contracting state⁴¹, it leaves no doubt as to the fact that the law applicable in the respective cases must necessarily be the law of a particular State. Accordingly, a reference by the parties to the Principles as the law governing their contract will be normally interpreted by state courts as a mere agreement to incorporate them into the contract as standard terms, with the consequence that the *lex contractus* will still have to be determined on the basis of private international law rules of the forum⁴². Yet, in the wake of the profound change in circumstances occurred since the Rome Convention was drafted, some commentators have claimed for a broader interpretation of this instrument. In particular, they have emphasised the growing number of autonomous uniform regulations in international commercial law, of which the UNIDROIT Principles represent one of the most important examples. These set of non-national rules are now both coherent and indicate ways of filling possible lacunae; consequently, they may be chosen by the parties as the law governing the contract⁴³. Accordingly, the meaning of “law” within the Rome Convention should be

³⁹H. van Houtte, *The UNIDROIT Principles of International Commercial Contracts*, Arbitration International, 1995, 11, 4, p. 374

⁴⁰J.C. Wichard, *Die Anwendung der UNIDROIT-Prinzipien für internationale Handelsverträge durch Schiedsgerichte und nationale Gerichte*, *Rabels Zeitschrift für ausländisches und internationales Privatrecht*, 1996, 60, p. 269 quoted in M. Heidemann, *Methodology of Uniform Contract Law- the UNIDROIT Principles in International Legal Doctrine and Practice*, Springer, 2007, p. 152

⁴¹Cp art. 2 <<law of a Contracting State>>; art. 3(3) <<foreign law>>; art. 4(1) <<law of the country with which the contract is most closely connected>>; art. 5(2) <<law of the country in which the consumer has his habitual residence>>.

⁴²Comment 4a to the Preamble

⁴³K. Boele-Woelki, *Principles and Private International Law- The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: How to Apply Them to International Contracts*, ULR, 1996, 4, p. 666

expanded in light of the on-going emergence of a body of rules relating to the law of contract outside the boundaries of national laws⁴⁴. In addition, it has been suggested that the purpose of choice of law rules is not the protection of the interest of a state to apply its own law, but rather the idea of letting the parties find the best law to govern their contract according to subjective considerations⁴⁵. Parties know the best way of regulating their own affairs: under the Rome Convention system, the principle of free choice is of such fundamental importance that it cannot be limited by a restricting interpretation of its provisions⁴⁶. In fact, according to the Rome Convention, the parties are allowed to choose any law of any country, even if it is totally unrelated to themselves and their contract, and even if the contract is purely domestic. It is therefore a small step from there to allow parties also to designate non-national law as the governing law of the contract, taking into account that the mandatory provisions of the law of the connected countries are to be applied via art. 7 of the Convention⁴⁷. This doctrinal debate has exerted a significant influence on the drafting of the EU Regulation on the Law Applicable to Contractual Obligations (the so-called Rome I), which is due to replace the Rome Convention. The EU Commission has put forward a proposal containing a revised version of art. 3 of the Rome Convention reading that <<the parties may also choose as the applicable law the principles and rules of the substantive law of contract recognised internationally or in the Community>>⁴⁸. As the commentary to this article expressly states, <<the form of words used would authorise the choice of the UNIDROIT Principles, the Principles of European Contract Law or a possible future optional Community instrument, while excluding the *lex mercatoria*, which is not precise enough, or private codifications not adequately recognised by the international community>>. Had this proposal been accepted, it might have encouraged contracting parties to make greater use of the UNIDROIT Principles and the PECL even in the context of litigation; moreover, it would have eliminated the totally unjustified differentiation in the parties' freedom to choose the applicable law depending on whether they decide to have their disputes settled by arbitration or in court⁴⁹. Yet, the proposal advanced by the EU Commission has not been retained in the final text of Regulation (EC) No. 593/2008 on the Law Applicable to Contractual Obligations (Rome I)⁵⁰, which has been adopted on 17 June 2008 by the European

⁴⁴O. Toth, *The UNIDROIT Principles of International Commercial Contracts as the Governing Law – Reflections in Light of the Reform of the Rome Convention*, in E. C. Cashin Ritaine and E. Lein (eds), op. cit., p. 201

⁴⁵M. Heidemann, *Methodology of Uniform Contract Law*, cit., p. 152

⁴⁶J. Basedow, *Germany*, in M.J. Bonell (ed.), *A New Approach to International Commercial Contracts*, cit., p. 146

⁴⁷K. Boele-Woelki, *Principles and Private International Law*, cit., p. 666

⁴⁸Proposal for a Regulation of the European Parliament and the Council on the Law Applicable to Contractual obligations (Rome I), COM (2005) 650 Final, 2005/0261 (COD), 15 December 2005.

⁴⁹M. J. Bonell, *Towards a Legislative Codification of the UNIDROIT Principles?*, ULR, 2007, 2, p. 243

⁵⁰Regulation (EC) No. 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), 2008, OJ L 177/6.

Parliament and the Council. Accordingly, also within this new regime the parties' choice of the law applicable to their contractual obligations is restricted to the law of a state.

The situation is entirely different where the parties have chosen the UNIDROIT Principles as *lex contractus* and have at the same time opted for arbitration to settle their dispute. It is a well-established rule under most national arbitration laws that arbitrators are not bound to base their decision on a particular domestic law: all “Model Law countries” have adopted the solution provided for in art. 28(1) of the 1985 UNCITRAL Model Law on International Commercial Arbitration, whereby <<the arbitrator shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute>> and a similar solution is found in the law of most countries, which have not enacted the Model Law but have nonetheless a long tradition in arbitration⁵¹. As we have seen above⁵², it is unanimously recognised by legal scholars and arbitration practitioners that the term “rules of law” indicates that the arbitrators are not confined to national laws, but may apply rules not stemming from a national or supra-national legislator to the substance of the dispute, such as the *lex mercatoria* or the UNIDROIT Principles⁵³. Accordingly, the diffusion of the UNIDROIT Principles is essentially related to international commercial arbitration, since it is in this context that they find the most favourable conditions for their application⁵⁴. Subject to any applicable mandatory rules⁵⁵, where the parties have expressly chosen the Principles as the law governing their contract, their application should not be left to the arbitrator's discretion. This results both from art. 28 of the Model Law and par. 2 of the Preamble to the UNIDROIT Principles, which envisage that in this case the arbitral tribunal *shall* apply them to the dispute. Not surprisingly, Comment 4 to the Preamble recommends that parties wishing to adopt the UNIDROIT Principles as rules applicable to their contract should combine such reference to the Principles with an arbitration agreement.

⁵¹cp. art. 1496 of the French Code of Civil Procedure, art. 182 of the Swiss Law on Private International Law and art. 46(1) of the English Arbitration Act.

⁵² See *supra* pp. 230 ff

⁵³K. P. Berger, *The Creeping Codification of the Lex Mercatoria*, Kluwer Law International, 1999, p. 80; D. Oser, *The UNIDROIT Principles of International Commercial Contracts: a Governing Law?*, Martinus Nijhoff Publishers, 2008, p. 25.

⁵⁴Cp P. Meyer, *The Role of the UNIDROIT Principles in ICC Arbitration Practice*, in The UNIDROIT Principles of International Commercial Contracts – Special Supplement 2002, ICC International Court Bulletin, p. 105 <<Parties never (or practically never) make their contracts subject to the UNIDROIT Principles and the courts do not see it as their job to apply them unasked. So, it is arbitrators who are likely to ensure their success, so much so that they become a true *lex mercatoria*, albeit of a different kind from that imagined forty years ago. At the other extreme, arbitrators could frustrate the potentiality of the principles in this field by applying them only when they have been expressly chosen by the parties>>.

⁵⁵These mandatory rules are not purely domestic mandatory rules (rules applicable despite any agreement to the contrary on the assumption that the relevant domestic law applies), but overriding super-mandatory rules (the so-called *Eingriffsnormen* or *règles d'application immédiates*) applicable irrespective of the governing law.

Yet, it is extremely rare in practice that parties provide in express terms that their contract shall be governed by the UNIDROIT Principles⁵⁶. Cases in which the UNIDROIT Principles are found to be applicable as a result of the consent of the parties tend to be cases in which the contract does not contain a choice of law clause, but the parties subsequently consent to the application of the Principles to the contract by the arbitrators⁵⁷. The most serious obstacle to the application of the UNIDROIT Principles as *lex contractus*, wholly replacing the national law otherwise applicable, is the fact that they do not represent a complete body of contract law, let alone a fully developed and self-sufficient legal system⁵⁸: a number of issues, such as capacity and validity, are explicitly excluded; moreover, they yield to all relevant mandatory rules of domestic law⁵⁹. For this reason, a footnote added to the Preamble in the 2004 edition provides for a model clause which parties opting for the UNIDROIT Principles as governing law are advised to include in their contract: <<this contract shall be governed by the UNIDROIT Principles (2004)⁶⁰ supplemented, where necessary, by the law of (country x)>>. The inclusion of this clause has nonetheless raised some concern: suggesting the parties to supplement the choice of the Principles with a reference to domestic law seems to be at odds with the most important idea underlying the elaboration of the Principles itself, namely that of overcoming the problems related to the application of national law to international commercial contracts and promoting instead the use of a non-national body of rules better tailored to the needs of international trade⁶¹.

⁵⁶One of the few examples of awards applying the UNIDROIT Principles by virtue of an express choice made by the parties in their contract is a decision of the Centro de Arbitraje de Mexico dated 30 November 2006: the Mexican arbitral tribunal expressly confirmed the validity of the parties' choice of the Principles and their character of rules of law within the meaning of art. 1445 of the applicable Mexican Commercial Code. See www.unilex.info

⁵⁷R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, Oxford University Press, 2007, p. 520.

⁵⁸M. J. Bonell, *An International Restatement of Contract Law*, cit., p. 192

⁵⁹H. van Houtte, *The UNIDROIT Principles*, cit., p. 373

⁶⁰The model clause carefully specifies the edition of the UNIDROIT Principles which is to be applied. In the absence of such specification by the parties, the question may arise of which version of the UNIDROIT Principles applies. If the choice of the Principles is made after 2004, it can be presumed to be the 2004 edition: this has been the solution adopted by the Mexican arbitral tribunal in the case referred to above in n. 48. If the choice was made earlier, the issue arises whether the choice is a dynamic one (designating the Principles in whatever the version is current at the time of the dispute) or a static one (designating the Principles in the state in which they are at the time of choice). The traditional solution in private international law is to interpret parties' choice as dynamic. R. Michaels, *Preamble I: Purposes of the PICC*, in S. Vogenauer and J. Kleinheisterkamp (eds), *Commentary on the UNIDROIT Principles of International Commercial Contracts (PICC)*, Oxford University Press, 2009, p. 40.

⁶¹D. Oser, *The UNIDROIT Principles of International Commercial Contracts: a Governing Law?*, cit., pp. 35-36

The UNIDROIT Principles as a source of general principles of law and *lex mercatoria*

The third paragraph of the Preamble states that the UNIDROIT Principles may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* and the like.

Parties to an international contract who cannot agree on the choice of a particular domestic law as the law applicable to their contract sometimes provide that it shall be governed by “the general principles of law”, “*lex mercatoria*”, usages and customs of international trade”, “principles common to the domestic laws of all the parties concerned”, “principles of law normally recognised by civilized nations in general”. Whatever the expression used, the parties' common purpose in such cases is to “internationalise” the legal regime of the contract at issue, by avoiding the application of any particular domestic legal system⁶². In arbitration practice, this particular choice of the parties is frequently referred to as “negative choice”, i.e. the situation in which the parties are assumed to have, by tacit agreement, excluded the application of any given national law and authorised the arbitral tribunal to resort to non-national sources of law⁶³. Nonetheless, the precise nature and content of the principles and rules in question remain extremely uncertain. In order to avoid, or at least considerably reduce, the uncertainty related to such vague concepts, it might be advisable to have recourse to a systematic and well-defined set of rules such as the UNIDROIT Principles⁶⁴. However, the possibility of recognising the UNIDROIT Principles as an expression of general principles of law or *lex mercatoria* is highly disputed. The most significant criticism is that the Principles' aim is not simply to reflect common rules or existing practices, but to adopt, where appropriate, best solutions to old and new issues of contract law. To the extent that the Principles prescribe such innovative solutions, it is difficult to see how they may be considered as part of the *lex mercatoria* when they are not based, and do not claim to be based, on any established practice⁶⁵. Accordingly, the Principles are only an indication of the existence of a transnational legal rule, a possible source of *lex mercatoria*⁶⁶ and therefore should not automatically be applied in case of such a reference. But it would be presumptuous for a text drafted by a group of academic experts to claim

⁶²M. J. Bonell, *An International Restatement of Contract Law*, cit., p. 204

⁶³P. Lalive, *The UNIDROIT Principles as Lex Contractus, With or Without an Explicit or Tacit Choice of Law: An Arbitrator's Perspective*, in *The UNIDROIT Principles of International Commercial Contracts – Special Supplement*, ICC International Court of Arbitration Bulletin, 2002, p. 81; D. Oser, *The UNIDROIT Principles of International Commercial Contracts: a Governing Law?*, cit., p. 47.

⁶⁴Comment 4b to the Preamble

⁶⁵R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit., pp. 522-523

⁶⁶K. P. Berger, *The Creeping Codification of the Lex Mercatoria*, cit., p. 179

to be the genuine expression of the law merchant⁶⁷. As the careful language of par. 3 of the Preamble makes clear⁶⁸, the Principles do not demand their direct and exclusive applicability as general principles of law or *lex mercatoria*, but they merely provide for the possibility to resort to them as one of the various sources available to determine the content of these (or similar) vague formulations by the parties⁶⁹. As a result, the question whether the Principles are part of the *lex mercatoria* is not susceptible of a single answer: it will be necessary to verify on a case by case basis whether the single provision at issue is in line with current practice in international trade⁷⁰.

There is, however, great uncertainty how arbitrators should actually assess whether the Principles provisions do reflect general principles of law or *lex mercatoria*. Some arbitral decisions have, in view of this difficulty, forgone any verification process and adopted the UNIDROIT Principles in their entirety as genuine expression of the parties' choice. The most frequently quoted decision in this respect is the ICC interim award No. 7110, rendered on 13 July 1995, which has been considered as the official *entrée* of the Principles into international arbitration⁷¹. A choice by the parties of "principles of natural justice" was interpreted by the arbitral tribunal as a "negative choice": the arbitration agreement should be interpreted as indicating that the parties intended their contract to be governed by rules and principles which, though not necessarily enshrined in any specific national legal system, are specifically adapted to the needs of international transactions and enjoy wide international recognition. The arbitral tribunal had no hesitation to affirm that such rules and principles were primarily reflected in the UNIDROIT Principles and this although the arbitration agreement was concluded over fifteen years prior to the publication of the Principles. Five reasons were given: 1) the Principles are a restatement of law drafted by distinguished, neutral and independent experts; 2) the Principles are largely inspired by the CISG, which already enjoys wide international recognition and reflects international trade usages and practices; 3) the Principles were especially designed to deal with cases such as the one at issue; 4) the Principles may apply when the parties have agreed that their contract be governed by general principles of law, *lex mercatoria* or the like and this appeared the case where parties referred to natural justice; 5) rather than providing vague rules and general guidelines, the Principles are clearly articulated and organised in a coherent and systematic way and this characteristic makes them well fit for application to concrete cases⁷². Despite the variety of grounds put forward in order to justify its choice of the UNIDROIT

⁶⁷D. Oser, *The UNIDROIT Principles of International Commercial Contracts: a Governing Law?*, cit, p. 50

⁶⁸In par. 3 the expression "may" instead of "shall" is adopted

⁶⁹M.J. Bonell, *An International Restatement of Contract Law*, cit, pp. 211-212

⁷⁰R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit. p. 523; D. Oser, *The UNIDROIT Principles of International Commercial Contracts: a Governing Law?*, cit, p. 56

⁷¹K. Boele-Woelki, *Principles and Private International Law*, cit., p. 661

⁷²F. de Ly, *The Netherlands*, in M.J. Bonell (ed.), *A New Approach to International Commercial Contracts*, cit., p. 223
K. Boele-Woelki, *Principles and Private International Law*, cit., p. 661

Principles, the arbitral tribunal failed to clarify to what extent they reflected general principles of law enjoying wide international recognition. Indeed, when faced with the decision on the merits in the 4 May 1998 final award, the arbitral tribunal appeared less enthusiastic on the Principles: for example, when dealing with the question of hardship, the tribunal held in one sentence that the theory of changed circumstances does not form part of widely recognised and generally accepted legal principles and therefore did not rely on the corresponding hardship provisions of the UNIDROIT Principles; this indicates that in fact the arbitral tribunal did not consider them as the primary law governing the contract, but only as a source which may help it to find general principles of law⁷³.

Other arbitral tribunals have taken a more cautious approach. In the ICC award No. 7375 of 5 June 1996⁷⁴, the arbitral tribunal, although recognising the UNIDROIT Principles' universal acceptance, pointed out at the same time that not all of their provisions could be considered to reflect the international consensus and therefore held that it would take them into account only in so far as they could be regarded to comply with generally accepted principles and rules. In particular, this cautious approach has been frequently adopted where issues of hardship were involved⁷⁵. We have already mentioned the final award related to the ICC case No 7110; a similar but clearer rationale has been followed in another ICC award rendered in 1997, in which the tribunal held that the provisions of the UNIDROIT Principles on hardship do not correspond, at least presently, to current practices in international trade and consequently can be applied only where the parties have expressly referred to them in their contract⁷⁶.

In conclusion, the current applications of the Principles as a source of transnational law seem to be at odds with the purpose of par. 3 of the Preamble, which is to reduce considerably the uncertainty and unpredictability affecting the decisions of arbitrators called upon to apply general principles of law or *lex mercatoria* to the dispute.

⁷³F. de Ly, *op. cit.*, pp. 231-232 and p. 234.

⁷⁴ICC No. 7375/1996, in M.J. Bonell (ed), *The UNIDROIT Principles in Practice: Caselaw and Bibliography on the Principles of Commercial Contracts*, Transnational Publishers, 2002, p. 425

⁷⁵R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit., p. 523 ; P. Meyer, *The Role of the UNIDROIT Principles in ICC Arbitration Practice*, in the UNIDROIT Principles of International Commercial Contracts, ICC International Court of Arbitration Bulletin, Special Supplement 2002., p. 112; nonetheless, the author observes that in ICC cases 7356 and 9479 the Principles provisions on hardship have been applied unhesitatingly.

⁷⁶ICC No. 8873/1997 in M.J. Bonell (ed), *The UNIDROIT Principles in Practice: Caselaw and Bibliography on the Principles of Commercial Contracts*, cit., p. 499; more recently, in the ICC case 10422/2003 (quoted by E. Jolivet, *The UNIDROIT Principles in ICC Arbitration*, in UNIDROIT Principles: New Developments and Applications, in ICC International Court of Arbitration Bulletin, 2005 Special Supplement, p. 67), the arbitral tribunal stated that the Principles were part of *lex mercatoria* inasmuch as they constitute a faithful transposition of the rules which business people involved in international trade recognize as applicable to international contracts; this qualification led the arbitrator to exclude some of the Principles provision from the scope of *lex mercatoria*, including, notably hardship.

The application of the UNIDROIT Principles in the absence of a choice of law by the parties

The final version of the 1994 edition of the UNIDROIT Principles had expressly excluded the proposal that the Principles may be applied when the parties have not chosen any law to govern their contract. This exclusion was aimed at avoiding to take a stance on such highly controversial issue among the various national legislatures. Some arbitration laws had adopted the solution provided in art. 28(2) of the Model Law, whereby, failing any designation of the applicable law by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable (the so-called *voie indirecte*)⁷⁷, but most of them had opted for the different *voie directe* solution⁷⁸; finally, a significant number of countries, including some “Model Law countries” have even enabled the arbitrator to apply on its own initiative the rules of law⁷⁹. Despite the uncertainty in the various arbitration statutes, the revised versions of the arbitration rules of the main arbitral institutions had provided, in essentially identical terms, that the arbitral tribunal, failing the parties' designation of the applicable law, shall apply such laws or rules of law as it determines to be appropriate. The parties' decision to submit their dispute to an arbitral institution had been normally interpreted as an incorporation of the latter's arbitration rules into the contract, including those on the applicable law: given the non-mandatory character of these rules, the parties' reference to institutional arbitration had been generally considered as an implicit derogation to the choice-of law provisions of the relevant domestic law. Relying on the more flexible approach envisaged by the arbitration rules of most arbitral institutions, arbitrators have increasingly applied transnational rules in situations where no law had been chosen by the parties, because of the international character of the contract and the suitability of transnational rules for the resolution of transnational disputes⁸⁰. As far as the specific issue of the application of the UNIDROIT Principles

⁷⁷See e.g. Sec. 46(3) of the English Arbitration Act

⁷⁸See e.g. Sec. 1051(2) of the German Arbitration Act and Art. 39(2) of the 1994 Egypt Law enacting a Law concerning Arbitration in Civil and Commercial Matters

⁷⁹See e.g. Art. 1054(2) of the Dutch Code of Civil Procedure, art. 187(1) of the Swiss Private International Law Act; art. 1496 of the French Code of Civil Procedure and, among the Model Law countries, S. 1297.283 of the California International Conciliation and Arbitration Code and S. 2712.53 of the Ohio Arbitration Code.

⁸⁰ The leading case was the *Norsolor* award (YBCA, XI, 1986, p. 484). No applicable law had been agreed by the parties, nor had the parties given the arbitrators the power to act as *amiable compositeurs*. The arbitral tribunal had applied no single national law, but had simply based its decision on a rule of *lex mercatoria* requiring good faith in business relations. The court of Appeal of Vienna set aside part of the award reasoning that, under the applicable arbitration rules, the arbitral tribunal was required to ground its decision on a national law and could not refer to *lex mercatoria*. The Austrian Supreme Court reversed the decision, since it argued that the award did not violate any mandatory provision of either of the relevant national laws which might otherwise have applied. Further, recognition

in these situations was concerned, the arbitral tribunal in the above-mentioned ICC case No. 7110 made clear that the UNIDROIT Principles cannot decisively determine their own criteria for application, the Preamble not preventing arbitrators from making their own determination on the basis of the arbitration agreement and the applicable arbitration rules⁸¹. Accordingly, in view of the fact that there was a growing body of international case law where arbitrators applied the Principles as the *lex contractus* in case of negative choice of law by the parties⁸², during the last session of the Working Group for the preparation of the 2004 version of the UNIDROIT Principles, it was eventually decided to add a fourth paragraph to the Preamble expressly providing for this purpose of the Principles⁸³.

It should however be noted that the situation of absence of choice should be distinguished from the above mentioned negative choice⁸⁴. The latter occurs where the parties, in phrasing their choice of law clause, have used expressions that impliedly show their will to exclude the application of any national law to their dispute; the former, which is sometimes referred to with the misleading expression “implied negative choice”, occurs where the parties have made no choice of law whatsoever. In case of negative choice, it is difficult to imagine a more logical or appropriate solution for the arbitrator than to consider the particular expression used by the parties as a general reference to transnational principles or to the *lex mercatoria*; by contrast, in case of absence of choice, the application of transnational rules to the dispute is not so straightforward: much, if not everything, will depend on the positions and arguments adopted by the parties and their counsel before the arbitral tribunal⁸⁵. The lack of a choice of law clause may be due to a number of reasons, none of which necessarily indicates the parties' intention to “transnationalise” their contract. Accordingly, the arbitrator faced with the absence of a choice by the parties will have to look for positive, objective criteria which justify the application of transnational law, such as the special character of the legal problems involved, which would be difficult to solve under domestic law, the conduct of the parties during negotiations, which may provide sufficient and clear evidence of the parties' rejection of any domestic law, or the fact that the contract presents connecting factors with

and enforcement of the award was granted in France.

⁸¹F. de Ly, *op. cit.*, p. 225

⁸²For example, in the above-mentioned ICC case No. 7335, the arbitral tribunal found that, in the circumstances of the case, the absence of a choice-of-law clause revealed that neither party was prepared to accept the other party's domestic law. Referring expressly to award 7110, it decided to apply truly international standards as reflected in, and forming part of, the so-called general principles of law. This, it argued, would maintain the equilibrium between the parties and meet the reasonable expectations of both of them. Moreover, it decided to take into account the UNIDROIT Principles, as far as they can be considered to reflect generally accepted principles and rules.

⁸³UNIDROIT 2003 Study L – Misc. 25, Working Group for the Preparation of Principles of International Commercial Contracts, Sixth Session 2-6 June 2003, Secretariat Report, pars. 406-409.

⁸⁴P. Lalive, *The UNIDROIT Principles as a Lex Contractus with or without an Explicit or Tacit Choice of Law: an Arbitrator's Perspective*, in *The UNIDROIT Principles of International Commercial Contracts*, ICC International Court of Arbitration Bulletin, Special Supplement 2002, p. 82

⁸⁵*Ibidem*

many countries, none of which is predominant enough to justify the application of one domestic law to the exclusion of all the others⁸⁶. This objective approach in case of absence of choice of law by the parties has for example been followed in the ICC case 9875/1999⁸⁷ which concerned a licence agreement between a French and a Japanese company, which did not contain a choice of law clause. The arbitral tribunal observed that from the contract provisions it was impossible to imply a decisive connection with a particular national law, since they contained references to France and other European and non-European countries, as well as to Japan; the licence was granted for patents held by Japanese companies; technical assistance would be provided at the claimant's factory in France or at the defendant's premises in Japan and royalties were to be paid in Japanese currency. Moreover, although in licence agreements the characteristic performance was often considered that of the licensor, the arbitral tribunal argued that the obligations contemplated in the contract were wider than those related to the licensor's transfer of technology to the licensee and therefore there were some doubts as to what the most characteristic obligation of the contract exactly was. Accordingly, the difficulties in finding decisive factors qualifying either Japanese or French law as applicable to the contract showed that the latter was not appropriately governed by the national law of either party, failing an agreement on such a choice. The arbitral tribunal concluded that the most appropriate rules of law to be applied to the merits of the case were those of the *lex mercatoria*, defined as the rules which have been gradually elaborated by different sources, such as the UNIDROIT Principles.

The Principles as a means to interpret and supplement the applicable domestic law

A provision concerning the use of the Principles as means of interpretation and supplementation of domestic law was not included in the original 1994 version: yet, given the importance this use had shown in practice, it was decided to highlight this particular application in the Preamble of the 2004 edition⁸⁸. Indeed, the UNILEX database⁸⁹ suggests that the UNIDROIT Principles have been mostly

⁸⁶ Comment 4 to the Preamble

⁸⁷ICC 9875/1999 of 20.1.1999, in M.J. Bonell (ed), *The UNIDROIT Principles in Paractice: Caselaw and Bibliography on the Principles of Commercial Contracts*, cit., p. 581

⁸⁸UNIDROIT 2003 Study L – Misc. 23 pars. 594 and 603.

⁸⁹See *infra* p. 373

used to interpret and supplement the applicable domestic law: nearly half of the reported cases show that the Principles have been applied in this respect⁹⁰. These cases are not exclusively related to arbitral disputes: the UNIDROIT Principles have entered state courts predominantly under this title of application⁹¹. The cases cited in this category are an interesting mix⁹². In a first group of decisions the UNIDROIT Principles have been referred to in a confirmatory role, i.e. to demonstrate that the solution found by the arbitrators and judges under the applicable domestic law conforms to internationally accepted standards. In an award rendered in 1996⁹³, the arbitral tribunal had regard to the Principles, although they were not directly applicable to the dispute, for the purpose of comparing the conclusions which resulted from the application of the proper law with the conclusions that would be obtained, were the tribunal to apply general principles of international commercial contracts. In this way, the UNIDROIT Principles have provided support for the conclusion the arbitrators had reached in the application of the relevant domestic law, i.e. the enforceability of the parties' express obligation to negotiate in good faith, which was contemplated in many articles of the Principles. In a state court decision rendered by the Court of Appeal of Grenoble⁹⁴, the judge held a standard contract term providing for limitation of liability as invalid, on the grounds that it ran counter to the principle of acceptance of full liability spelled out in the contract. Whereas his conclusion rested on the application of French law, the judge reinforced his argument by stating that there was a principle in international trade law that, in the event of incompatibility between a standard clause and a non-standard clause, the latter prevails (UNIDROIT Principles, art. 2.21) and that if contract terms are unclear, an interpretation against the party that supplied them is preferred (UNIDROIT Principles, art. 4.6).

In other cases, the role of the Principles has been to “gently push” the development of the chosen domestic law in a particular direction, especially where the latter did not provide a clear answer to the question which had arisen on the facts of the case. In one ad hoc arbitration rendered in 1995⁹⁵, the law governing the contract was the law of New Zealand: the question arose whether post-contractual conduct by the parties could be taken into account for the purpose of interpreting the contract. Since on this point the law of New Zealand was found to be uncertain, the arbitrators sought confirmation in art. 4.3(c) of the UNIDROIT Principles as a “definitive contemporary

⁹⁰UNIDROIT 2003 Study L – Misc. 25, par. 594.

⁹¹D. Oser, *op. cit.*, p. 132

⁹² R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit., p. 525

⁹³ICC 8540/1996 of 04.09.1996, in M.J. Bonell (ed), *The UNIDROIT Principles in Paractice: Caselaw and Bibliography on the Principles of Commercial Contracts*, cit., p. 441.

⁹⁴*Société Harper Robinson v. Société Internationale de Maintenance et de Realisations Industrielles (SIMRI) et autres*, ULR, 1997, 1, p. 181

⁹⁵Quoted in M.J. Bonell (ed), *The UNIDROIT Principles in Paractice: Caselaw and Bibliography on the Principles of Commercial Contracts*, cit., p. 369

international statement governing the interpretation of contractual terms”, in order to establish that they could actually take such conduct into account in interpreting the contract. But the provision of the UNIDROIT Principles which has most frequently been applied in this respect is art. 1.7 on good faith⁹⁶. This has been done in order to foster the acceptance of this principle in international trade, and in particular in common law jurisdictions⁹⁷. For instance, in a case before the Federal Court of Australia, the dispute had arisen between a Californian company and an Australian governmental agency after the latter awarded the contract to another bidder. The court was asked to rule on the issue whether a duty of good faith and fair dealing was implied by law in pre-award contexts: after reviewing the controversial judicial and scholarly opinions on the matter, it concluded in the affirmative. In support of its conclusions it stated that a general duty of good faith and fair dealing was a fundamental principle to be honoured in international commercial contracts, as envisaged by art. 1.7 of the UNIDROIT Principles. Although the Principles have exerted some influence in persuading common law courts to recognise the existence of a duty of good faith and fair dealing in international trade, it would be too hazardous to conclude that, as a result of art. 1.7 of the UNIDROIT Principles, all differences between common law and civil law systems have been eliminated on this issue, since common law systems still remain generally reluctant to enforce a duty of good faith and fair dealing⁹⁸.

The Principles as an instrument to interpret and supplement international uniform law instruments

The UNIDROIT Principles may be used to provide existing international instruments with an internationally oriented interpretation. Nowadays judges and arbitrators increasingly seek to interpret and supplement international instruments according to autonomous and internationally uniform principles. The assumption underlying this approach is that international law, even after its incorporation into the various national legal systems, from a substantive point of view does not lose its original character of a special body of law autonomously elaborated at international level and intended to be applied in a uniform manner throughout the world. Accordingly, were each court to

⁹⁶R. Michaels, *Preamble I: Purposes of the PICC*, cit., p. 67.

⁹⁷R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit., p. 526

⁹⁸R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit., p. 529.

interpret international law in accordance to its own domestic criteria, the goal of achieving uniformity would be undermined. Until now, such autonomous principles and criteria had to be found in each single case by the judges and arbitrators themselves; the Principles could considerably facilitate their task in this respect⁹⁹.

Most of all, the Principles have been applied to supplement the CISG: art 7.1 CISG expressly provides that in the interpretation of the Convention regard is to be had to its international character and to the need to promote uniformity in its application. Relying on this provision, the application of the UNIDROIT Principles to interpret and supplement the CISG has been generally justified on the grounds that the UNIDROIT Principles are an expression of the general principles on which the CISG is based¹⁰⁰.

The UNILEX database contains 25 cases in which they have been used in this respect. Almost half of the reported cases refer to art. 78 CISG, which makes provision for the entitlement to recover interest but is silent on the rate at which interest is payable and the time from which it is payable. For example, in two awards rendered by the International Court of Arbitration of the Federal Chamber of Commerce of Vienna¹⁰¹, the arbitral tribunal filled the gap found in the CISG as to the applicable interest rate by referring to the average bank short-term lending rate applied with respect to the currency of payment in the creditor's country (as the payment had to be made there) and in support of this solution it expressly relied on art. 7.4.9(2) of the UNIDROIT Principles; in other awards, art. 7.4.9(2) has been interpreted as allowing 1% or 2% to be added to the Interbank offered rate¹⁰², even if the Principles do not provide for this when mentioning “the average bank short-term lending rate to prime borrowers”.

Conclusions: assessing the impact of the UNIDROIT Principles on commercial practice

⁹⁹Comment 6 to the Preamble

¹⁰⁰Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien, SCH-4366, and SCH-4318, 15-06 -1994 in M.J. Bonell (ed), *The UNIDROIT Principles in Paractice: Caselaw and Bibliography on the Principles of Commercial Contracts*, cit., p. 351 and p. 357

¹⁰¹Internationales Schiedsgericht der Bundeskammer der gewerblichen Wirtschaft – Wien, SCH-4366, and SCH-4318, 15-06 -1994 in M.J. Bonell (ed), *The UNIDROIT Principles in Paractice: Caselaw and Bibliography on the Principles of Commercial Contracts*, cit., p. 351 and p. 357

¹⁰²e.g. ICC 8128/1995 at www.unilex.info

Given the confidentiality of arbitration, there are very scarce data on the application of the UNIDROIT Principles in commercial practice. The only two institutions which have so far published statistics on this issue are the ICC and, of course, UNIDROIT. Nonetheless, in both cases such statistics are incomplete and therefore it is impossible to have a clear picture of the effective impact of the UNIDROIT Principles in practice. The most recent ICC statistics on the UNIDROIT Principles show that out of the approximately 600 awards rendered during the period 1999-2000, only 14 were found to have applied the Principles¹⁰³ and that in 2005 the ICC received around fifteen new cases making reference to the Principles¹⁰⁴. Assuming that this figure has remained constant until now and considering that the total amount of awards rendered every year by the ICC is currently around 350-400¹⁰⁵, it follows that in ICC case law the UNIDROIT Principles are referred to in roughly 2% of the total cases. However, ICC statistics do not show for which purposes the Principles are more frequently applied. Some indication in this sense can be found in the UNILEX database, the database maintained by UNIDROIT in collaboration with the University of Rome “La Sapienza”, which attempts to collect all decisions and awards referring to the UNIDROIT Principles¹⁰⁶. Since the publication of the 1994 edition of the Principles, UNILEX has so far collected around 170 decisions. It must however be noted that the UNILEX database collects decisions indistinctively from arbitral tribunals and courts throughout the world and therefore we must assume that each arbitral institution or court of the globe adopts the same approach vis à vis the UNIDROIT Principles. The UNILEX database shows that the Principles are mostly used as means to interpret and supplement the applicable domestic law: more than half of the reported decisions (96 out of 171) refer to the application of the UNIDROIT Principles in this respect. The second most popular use of the Principles is as means to interpret and supplement international uniform law instruments (31 reported decisions, 25 of which referring to CISG); the cases in which the Principles have been applied as a source of general principles of law and *lex mercatoria* amount to 15; those in which they have been taken into account as relevant trade usages are 11; those in which they have been applied in the absence of a choice of law in the contract are 9. If we compare these data, which refer to the end of 2008, with those available at the end of 2005, we find that in the past three years the amount of decisions available in the UNILEX database has increased of nearly 50% (the cases were 113 at the end of 2005 and are now 171), but the only two applications

¹⁰³P. Mayer, *The Role of the UNIDROIT Principles in ICC Arbitration Practice*, in the UNIDROIT Principles of International Commercial Contracts, ICC International Court of Arbitration Bulletin, Special Supplement 2002, p. 106

¹⁰⁴E. Jolivet, *The UNIDROIT Principles in ICC Arbitration*, in UNIDROIT Principles: New Developments and Applications, in ICC International Court of Arbitration Bulletin, 2005 Special Supplement, p. 72

¹⁰⁵ According to the statistics published on the ICC website, in 2005 325 awards were rendered, in 2006 293, in 2007 349 and in 2008 407.

¹⁰⁶The database is accessible online at www.unilex.info.

in which a significant increase has been registered are those related to the gap-filling functions of the Principles: in 2005 the cases in which the UNIDROIT Principles have been employed as means to interpret and supplement the applicable domestic law and international instruments were 50 and 13 respectively, whereas in 2008 they have increased to 96 and 31 respectively.

As far as the diffusion of the UNIDROIT Principles among business and practitioners circles is concerned, the most recent surveys have shown contradictory results. We have already mentioned the survey launched in 1996 by the UNIDROIT Secretariat, which emphasised the Principles' successful reception in commercial practice by showing that 13% of the respondents had at least once expressly chosen the Principles as the applicable contract law and that 60% had used them in the course of contract negotiations. Yet, it must be considered that in this case the questionnaires had only been sent to persons who had shown a particular interest in the UNIDROIT Principles during their preparation and/or after their publication¹⁰⁷. More recent surveys conducted by more independent bodies have shown more modest results. According to an online survey carried out between August 2006 and May 2007 among 236 individuals mostly from the USA, two thirds of them practitioners and roughly a quarter of them legal academics, only 20% of the respondents felt "thoroughly" or "moderately" familiar with the Principles; moreover, almost two thirds of the US practitioners never applied them in their contracts¹⁰⁸. Nonetheless, a recent survey conducted in 2008 among 100 in-house counsel of European businesses by the Oxford Institute of European and Comparative Law showed more widespread use of the UNIDROIT Principles: nearly 40% had, in the course of a cross-border transaction, at least once agreed that the contract be governed by the Principles or had incorporated them into their contracts, but only 4% claimed that they had done this often¹⁰⁹.

By reading these statistics, one may conclude that the wealth of scholarly writings devoted to the UNIDROIT Principles seems to stand in stark contrast to the paucity of reported cases in which they have found application. Fifteen years after their publication they are still far from representing an authentic governing law or a veritable source of *lex mercatoria*. Nonetheless, the keen attention paid by scholars to the UNIDROIT Principles is largely driven by the hope that past experience is no necessary guide of future practice¹¹⁰ and that in order to enhance their use in practice a long and patient work of persuasion is needed. It has been repeatedly stressed that it is necessary to urge arbitral institutions to publish more often and in full the arbitral awards referring to the Principles, so that a body of case law concerning their interpretation and clarifying their wording can be

¹⁰⁷M.J. Bonell, *An International Restatement of Contract Law*, cit., p. 235

¹⁰⁸P.L. Fitzgerald, *The International Contracting Practices Survey Project*, J L & Com, 2008, 27

¹⁰⁹Survey quoted by S.Vogenauer in *Introduction*, cit., p. 19.

¹¹⁰R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law*, cit., p. 520

formed¹¹¹. However, one of the reason why parties often resort to arbitration in lieu of court litigation is that the former's proceedings and decisions will not become a matter of public record or knowledge¹¹². Moreover, many arbitrators shy away from idea that their awards should set precedents, since they consider that their role is only to render justice in the best way possible in the individual case and, without an overarching authority ensuring uniform interpretation in international arbitration, there will probably be too many contradictions among awards for them to be cited as precedents¹¹³. Nonetheless, should the decisions referring to the UNIDROIT Principles become numerous and consistent, they might be relied on as an expression of the consensus within the business community providing the court or arbitral tribunal with reassurance that it would be not too far from prevailing wisdom to apply the Principles to the relevant case¹¹⁴

Whereas the literature on the UNIDROIT Principles has so far almost exclusively focused on assessing their role in arbitration and litigation, comparatively less attention seems to have been paid in evaluating their impact on national and international law-making. This appears somewhat paradoxical, since, as we have seen above, the UNIDROIT Principles have exerted a significant influence on the drafting or reform of many national and international legal systems. As a result, it might turn out useful to further explore the UNIDROIT Principles' potentials as a model for national and international legislations. The uniform rules provided by this international restatement seem to have reached a sort of “tipping point”, whereby any law-maker involved in the drafting of a piece of legislation on international commercial contracts cannot avoid taking them into consideration and providing reasonable justifications when it decides to depart from this model. It may therefore be worth considering whether the Principles may be turned into either a model law or a sort of uniform glossary for law-makers, in order to promote their impact on national and international legislations.

¹¹¹E. Jolivet, *op. cit.*, p. 70

¹¹²G. G. Lettermann, *UNIDROIT's Rules in Practice: Standard International Contracts and Applicable Legal Rules*, Kluwer, 2001, p. 262

¹¹³F. Dessemontet, *Use of the UNIDROIT Principles to Interpret and Supplement Domestic Law*, in, The UNIDROIT Principles of International Commercial Contracts, ICC International Court of Arbitration Bulletin, Special Supplement 2002, p. 45; cp ICC award 7375/1996, in M.J. Bonell (ed), *The UNIDROIT Principles in Paractice: Caselaw and Bibliography on the Principles of Commercial Contracts*, cit. p. 433: <<the tribunal does not wish to refer extensivley to other cases, because no other case would qualify as a “precedent”. This tribunal must reach, and in actual fact has reached, its decision independently of what other tribunals in the past may have considered and decided in somehow comparable situations>>.

¹¹⁴G. G. Lettermann, *op. cit.*, p. 263

CHAPTER SIX: THE HARMONISATION OF THE ENFORCEMENT STAGE- DRAFTING AND DIFFUSION OF THE 1958 NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS

SECTION I: THE 1958 NEW YORK CONVENTION ON THE RECOGNITION AND ENFORCEMENT OF FOREIGN ARBITRAL AWARDS: LEGISLATIVE HISTORY, SCOPE OF APPLICATION AND GENERAL FEATURES

The enforcement problem

When litigation proceedings come to an end, and a judgment is rendered, all national legal systems provide for the enforcement of the court's judgment: enforcement is one of the most important prerogatives of state sovereignty. If enforcement is sought in a country other than that where the judgment was rendered, recourse has to be made to an international treaty, for example the Lugano or Brussels Convention¹, which provides that decisions from one of the member states' courts must be enforced in all the other member states, save a limited number of cases envisaged by the treaty itself. In case of foreign court judgments, the basis for their international enforcement is therefore that each member state respects the sovereignty of the other member states.

As far as arbitration is concerned, the enforcement of the award is not a consequence of state sovereignty. Arbitration rests upon the parties' agreement, which has specifically been stipulated for the purpose of settling disputes arising out of or in connection with a particular contract.

¹ The Convention of 16 September 1988 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the so-called Lugano Convention) and the Convention of 27 September 1968 on Jurisdiction and the Enforcement of Judgments in Civil and Commercial Matters (the so-called Brussels Convention) were agreed among the EU member states in order to regulate the allocation of jurisdiction in international legal disputes of a civil or commercial nature involving persons resident in a member state of the European Union. Now the two conventions have been largely replaced by a European regulation, the so-called Brussels I Regulation (Council Regulation (EC) No 44/2001 of 22 December 2000 on the jurisdiction, recognition and enforcement of judgments in civil and commercial matters). The discipline introduced by the Brussels I regulation is largely similar to the previous conventions and has come into force on March, 1 2002.

Accordingly, the arbitral tribunal is a private tribunal which does not have sovereign powers: once it has rendered its final award, its mandate is terminated and in no case can it provide for enforcement. Enforcement depends on specific national provisions which assign national courts the task of recognizing and enforcing arbitral awards. Accordingly, when it comes to the enforcement of the award, the arbitration system is confronted with a paradox: on the one hand, the parties have opted for arbitration because they wanted to avoid litigation (the relative autonomy of arbitration with respect to litigation is what renders the former particularly attractive); on the other hand, the parties must ultimately rely on domestic courts for the enforcement (or rejection) of their award². Contemporary statutes and treaties dealing with the issue of enforcement of arbitral awards attempt to accommodate this paradox by resorting to two principles: 1) a general presumption in favour of enforcement of arbitral awards; 2) a limited number of grounds on which enforcement of these awards may be refused. As we will see below, this is also the path followed by the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards.

Recognition and enforcement may be regarded as two different stages of the parties' set of rights and obligations arising after an award has been rendered³. Recognition relates to the acknowledgment of what has been decided by the arbitral tribunal in the award. It is a defensive process aimed at preventing an attempt to bring new proceedings raising the same issues as those dealt with in the award in respect of which recognition is sought⁴. Enforcement goes a step further than recognition: it is aimed at altering the parties' positions in order to reflect the decision taken by the arbitral tribunal. By resorting to enforcement, the successful party seeks the court's assistance in order to ensure that the award is carried out and it can obtain the redress to which it is entitled.

Legislative history

The most important treaty regulating the matter of recognition and enforcement of arbitral awards in the field of international arbitration is undoubtedly the 1958 New York Convention on the

²D. P. Stewart, *National Enforcement of Arbitral Awards under Treaties and Conventions*, in R. B. Lillich and C. N. Brower (eds), *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?*, Transnational Publishers, 1994, p. 164

³ D. di Pietro and M. Platte, *Enforcement of International Arbitration Awards: The New York Convention of 1958*, Cameron May Publisher, 2001, p. 22

⁴ R. Goode, H. Kronke, E. McKendrick, *Transnational Commercial Law: Text, Cases and Materials*, Oxford University Press, 2007, p. 674

Recognition and Enforcement of Foreign Arbitral Awards, which can be considered as the most important treaty in the field of arbitration and a cornerstone of current international commercial arbitration⁵. In order to understand the important innovations envisaged by this convention, it may be useful to briefly overview the main provisions of the previous treaties which regulated the matter of the enforcement of international arbitral awards before the New York Convention came into force.

In the aftermath of the First World War the newly established International Chamber of Commerce decided to promote an international convention aimed at the removal of what was perceived as one of the most serious hurdles to the development of international commercial arbitration: the limited enforceability of the arbitral clause⁶. This proposal was subsequently taken over by the League of Nations and eventually resulted in the 1923 Geneva Protocol on Arbitration Clauses⁷. Article 1 of the Geneva Protocol recognized the validity of arbitration agreements between parties belonging to different contracting states, whether relating to existing or future disputes, and whether or not the arbitration was to take place in a country to whose jurisdiction none of the parties was subject. The protocol also provided for the obligation of the court's contracting state to refer the parties to arbitration if it was called upon to judge over a dispute which was the object of an arbitration agreement under art. 1 of the Protocol. The international validity and enforceability of arbitral clauses being established, the next step was the international enforcement of arbitral awards. This objective was achieved not long after the Geneva Protocol by the 1927 Geneva Convention on the Execution of Foreign Awards⁸. This Convention regulated the enforcement of arbitral awards made in pursuance of an arbitration agreement falling under the 1923 Geneva Protocol. Although the Geneva treaties represented two important accomplishments in the development of international enforcement of arbitral awards, they were still considered inadequate⁹. Their field of application

⁵ A.J. Van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, Kluwer Law, 1981, p. 1; A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, 1991, p. 63.

⁶ Section 1026 of the German code of civil procedure which was in force at that time provided for example that an arbitral agreement concerning future disputes is not effective if it does not refer to a definite legal relationship and the legal disputes arising therefrom. Accordingly, under the German law of civil procedure, an agreement establishing that all disputes arising between the parties from their business relations shall be submitted to arbitration was invalid. Only an arbitration agreement referring to disputes arising under a specific contract was considered valid. Likewise, art 1006 of the French code of civil procedure required that the arbitration agreement should designate the object of the dispute and the name of the arbitrators, thus limiting the validity of this kind of agreement to already existing disputes between parties. Cfr E. G. Lorenzen, *Commercial Arbitration. International and Interstate Aspects*, The Yale Law Journal, 1934, 43, p. 721-722.

⁷ LNTS 158, 1924, available online at www.interarb.com/vl/g_pr1923; Cfr also A. Nussbaum, *Treaties on Commercial Arbitration: A Test of International Private Law Legislation*, Harvard Law Review, 1942, pp. 219-244

⁸ Convention for the Execution of Foreign Arbitral Awards signed at Geneva, September 26, 1927, League of Nations Treaty Series (1929-1930), Vol. XCII, p. 302 available online at www.interarb.com/vl/g_co1927.

⁹ Cfr P. Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, Am J Comp Law, 1959, 8, 3, p. 290 <<without necessarily subscribing to the views of the writers who regard the Geneva treaties as total failure, it must be concluded that they did not live up to the

was limited: the parties had to be subject to the jurisdiction of different contracting States¹⁰ and the arbitral award had to be made in a contracting state¹¹. Moreover, the Geneva Convention placed upon the party seeking enforcement the heavy burden of proving the conditions necessary to the enforcement. One of these conditions was that the award had to become final (i.e. not subject to any form of appeal, such as *opposition appel*, or *pouvoir en cassation*, or the equivalent) in the country where it was made (the country of origin). Since a leave for enforcement was also needed in the country where enforcement was sought, the enforcement system under the Geneva Convention amounted in practice to a double *exequatur* requirement. Another drawback was that, according to article 2 of the Geneva Protocol, the arbitral proceedings, including the constitution of the arbitral tribunal, should be regulated by the law of the country where the arbitration took place (the *lex loci arbitri*). Especially this latter condition prompted the ICC to launch a project for a new international convention after the Second World War. According to the ICC, the Geneva Convention's main defect was the requirement that, in order to be enforced, an award must be strictly in accordance with the rules of procedure laid down in the law of the country where arbitration took place¹². Consequently, the Draft Convention which the ICC completed in 1953 advocated the idea of an international award, i.e. an award completely independent of national laws, and suggested that awards based on the will of the parties should be automatically enforceable. To this aim, the ICC Draft Convention envisaged as the most important requirement for the enforcement of the award that the composition of the arbitral authority and the arbitral procedure must be in accordance with the agreement of the parties. Only in the absence of such an agreement should the composition of the arbitral authority and the arbitral procedure comply with the law of the place of arbitration. Another important innovation proposed by the ICC was the omission of the requirement of the finality of the award, regarded as a provision fostering dilatory measures. But the idea of a truly international award, completely detached from national law, was unacceptable for most states¹³. The

expectations of those who had viewed them as a decisive step in the progress of international commercial arbitration>>.

¹⁰ Some commentator underlined also the ambiguity of the expression <<subject to the jurisdiction of different contracting States>> : it was not clear whether the scope of application of the Geneva treaties should be meant in terms of nationality or residence of the parties. Cfr P. Contini, *International Commercial Arbitration: The United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards*, cit., p. 289 ; A. Nussbaum, *Treaties on Commercial Arbitration: A Test of International Private-Law Legislation* , cit., p. 235

¹¹ Art. 1 of the Geneva Convention stated that an arbitral award falling within the scope of the Convention << shall be recognised as binding and shall be enforced in accordance with the rules of the procedure of the territory where the award is relied upon, provided that the said award has been made in a territory of the High Contracting Parties to which the present Convention applies and between persons who are subject to the jurisdiction of one of the High Contracting Parties>>.

¹² International Chamber of Commerce, *Enforcement of International Arbitral Awards. Report and Preliminary Draft Convention*, ICC Brochure n. 174, 1953, reproduced in UN DOC E/C.2/373

¹³ For example, Greece, while recognizing the merits of the ICC draft in general, emphasized that the Convention should only apply if all the parties to the arbitration are nationals of states which are bound by the Convention itself; Luxembourg regarded the idea of the internationalized, or better denationalized, award as producing an anarchical state of affairs, which could unsuitably be translated into juridical reality; Yugoslavia observed that the ICC draft did not

United Nations Economic and Social Council (ECOSOC), to which the ICC Draft Convention was presented, elaborated another draft convention, which was much closer to the Geneva treaties. The ECOSOC established an ad hoc Committee of governmental experts from eight countries¹⁴. The Committee met in New York in March 1955 and prepared a Draft Convention on the Recognition and Enforcement of Foreign Arbitral Awards. Although unwilling to support the idea of the international arbitral award¹⁵, the Committee considered as vague and ambiguous the Geneva treaties provisions limiting their application to awards made between persons subject to the jurisdiction of different contracting states. Accordingly, the Committee's draft omitted this latter requirement and extended the application of the convention to awards made in any other State (i.e. also in non-contracting states), anywhere outside of the state where enforcement is sought. At the same time, it provided the possibility for any contracting states to limit the scope of the Convention to awards rendered in the territory of other contracting states and to awards relating to commercial disputes¹⁶. Apart from an extended scope of application, the committee's draft did not overcome what had been identified by the ICC as the Geneva's Treaties major drawbacks. In particular, it still left on the party invoking enforcement the onus of proving the existence of the enforcement requirements and it reintroduced the requirement of the finality of the award, which was deliberately omitted in the ICC project. Finally, as far as the thorny question of the law governing the arbitral procedure was concerned, the draft convention adopted a compromise text between the cumbersome Geneva treaties' solution prescribing that the arbitral procedure should follow in all details the requirements of the national *lex loci arbitri*, and the idea of an arbitral procedure completely detached from national law, which would have entailed an unacceptable exclusion of

guarantee the principle of reciprocity, which was seen as an expression of the equality between states enshrined in the UN Charter . Cfr UN Doc E/ AC.42/1 - Comments received from Governments regarding the Draft Convention on the Enforcement of International Arbitral Awards

¹⁴ The opening statement found in the Committee's Report reveals the awareness of its member that they constitute an epistemic community and not a mere intergovernmental body bound to their respective states' instructions. The first general consideration expressed by the Committee members was that they were aware of being appointed as government members; nonetheless, in view of the technical nature of the subject matter, they considered themselves as acting essentially as technical experts with the understanding that the views expressed by them in the course of the Committee's deliberations would not necessarily constitute the position of their respective governments.

¹⁵The Committee recognized that it would be desirable to establish a new Convention, which, while going further than the Geneva Convention in facilitating the enforcement of foreign arbitral awards, would at the same time maintain generally recognized principles of justice and respect the sovereign rights of states: E/2704 par. 14. According to van den Berg, the fact that the Committee's draft convention no longer referred to <<international>> but to <<foreign>> awards is an indication of the will of differentiating the new project from that elaborated by the ICC. Cfr A.J. van den Berg, *op. cit.*, pp. 7-8. Yet, while in the Report the Committee expressly emphasised the will of differentiating its Draft Convention from the project elaborated by the ICC, it also decided to use the latter as a <<working paper>> for its deliberations. Moreover, the Committee clarified that the referral to "foreign" instead of "international" was due to the fact that it more accurately reflected the object of the Convention. The expression "international arbitral awards" – the Committee observed – normally refers to arbitration between states, whereas the Convention did not deal with arbitration between states, but with the recognition and enforcement in one country of arbitral awards made in another country: pars. 15-17.

¹⁶ Pars. 22-23

any control by national courts and might have led to injustice and abuse. The compromise finally agreed upon by the Committee members envisaged that the recognition or enforcement could be refused if either the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, to the extent that such agreement was lawful in the country where the arbitration took place. On this reading, the agreement of the parties would be valid even if the arbitral procedure established therein did not follow in all respects the provisions of the law of the country where arbitration took place, provided that such agreement was lawful in that country¹⁷. The Committee's draft convention also specified that, in the absence of party agreement on these issues, recognition and enforcement could be refused if the constitution of the arbitral authority and the arbitral procedure were not in accordance with the law of the place of arbitration¹⁸.

The draft was sent to governments and interested organizations for comments¹⁹. In the light of the comments received, ECOSOC decided to convene a diplomatic conference, known as the New York Conference of 1958, which was due to conclude an international convention on the basis of the draft prepared by the *ad hoc* Committee. The conference was held in the headquarters of the United Nations in New York from May 20 to June 10, 1958, with the participation of 45 States. The decision-making method adopted by the Conference was to consider the UN draft article by article and, where necessary, to refer specific matters to small working groups, before completing discussions on those matters in plenary meetings. Votes were taken on the various amendments to the provisions of the draft Convention and upon each article as a whole. A two-thirds majority was required for adoption²⁰. On its last day, the Conference adopted the Convention on the Recognition

¹⁷ During the New York Conference the Committee's formula was hotly disputed. What should be understood by "lawful in the country where the arbitration took place"? On the one hand, France, Germany and Switzerland pointed out that this expression could cause the frustration of awards if any difference, however small and insignificant, would be found between the arbitral procedure agreed upon by the parties and the law where the arbitration took place. On the other hand, Italy, Norway and Turkey wished to keep the formula, on the grounds that the impression should not be left that the parties could agree on the composition of the arbitral tribunal and the arbitral procedure independent of any national law. Eventually, it was decided to delete the committee's formula and to adopt the text which is now embodied in art V(1) (d) of the Convention, which is similar to that envisaged by the ICC draft: the composition of the arbitral authority or the arbitral procedure should be in accordance with the agreement of the parties; failing this agreement, they should be in accordance with the law of the country where the arbitration takes place. However, it does not seem that with this formula the drafters wanted to support the ICC's idea of an international award. As the Italian representative made clear, the final text was agreed <<on the understanding that the parties enjoyed discretion only to the extent that they could select the national law applicable to the matter>> (CONF 26/SR 17). Consequently, art V (1) (d) should not be interpreted to mean that the parties could agree to disregard all national laws and determine some special procedure applicable to their case alone (P. Contini, op. cit, p. 303)

¹⁸ Pars.43-46

¹⁹ By July 16, 1956, twenty-eight governments and six non-governmental organizations (including the International Chamber of Commerce, the Chamber of Commerce of the United States, the International Institute for the Unification of Private Law, and the International Law Association) had replied to the ECOSOC 's invitation. Cfr A. Sultan, *The United Nations Arbitration Convention and United States Policy*, Am. J. Int. Law, 1959, 53,4, p. 816.; UN Doc E/2822 and Add. 1-6

²⁰R.Briner and V. Hamilton, *The History and General Purpose of the Convention*, in E. Gaillard and D. di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice*,

and Enforcement of Foreign Arbitral Awards. The Convention was initially signed by 10 States and, within the period open for signature (until December, 31 1958), by 13 more States. It came into force on June, 7 1959.

In sum, and as we will see in more detail in the overview of the New York Convention's main provisions, this treaty has led to three major innovations in the discipline of the enforcement of foreign arbitral awards with respect to the previous 1927 Geneva Convention. The first is that it has eliminated the need for judicial confirmation of the award in the country where it is rendered (i.e. the so-called double *exequatur*); the second is that it has restricted the range of grounds on which enforcement of the awards may be refused; the third is that it has shifted the burden of proof from the enforcing to the resisting party²¹.

Scope of application

The concepts of foreign and non-domestic awards

The New York Convention applies to two categories of arbitral awards: "foreign" and "non-domestic" awards. The first part of article 1 defines a foreign award according to a territoriality criterion: a foreign award is an award made in the territory of a state other than the state where the recognition and enforcement of the award itself is sought. The second part of article 1 leaves the definition of a non-domestic award to the law of the place of enforcement: the Convention – it is stated – also apply to awards not considered as domestic in the state where their recognition and enforcement are sought. The inclusion of these two criteria in article 1 resulted from a highly controversial discussion during the *travaux préparatoires*. The New York Conference was split roughly between the countries of western Europe, on one side, and the common law, Latin American and Eastern European countries on the other²². The delegates of Italy, France and Western Germany were against the territoriality criterion and argued that there were other criteria,

Cameron May, 2008, p. 14

²¹ D. P. Stewart, *National Enforcement of Arbitral Awards under Treaties and Conventions*, in R. B. Lillich and C. N. Brower (eds), *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?*, Transnational Publishers, 1994, p. 165

²² P. Contini, *op. cit.*, p. 292

such as the nationality of the parties, the object of the dispute and most of all the rules of the arbitral procedure, which should be taken into account in determining the nationality of the award. This was because in some countries, like France and Germany, the nationality of the award depended on the law governing the procedure and thus it was observed that states where this criterion prevailed should not be forced by the Convention to regard all awards made abroad as foreign awards, even though some of these awards could be qualified as domestic according to their national arbitration laws. On the other hand, countries such as the United Kingdom, the United States, Argentina and Japan emphasized that the territorial criterion was the only one which could be understood in their jurisdictions in order to determine the nationality of an award. Whereas the territorial criterion was clear, the others were regarded as vague, susceptible of giving rise to diverging interpretations and ultimately not providing the business world with any certainty as to which awards would fall under the scope of the Convention²³. Criteria other than the place of arbitration – they concluded – would doubtless be the joy of jurists, but might be a torment for plaintiffs²⁴. The issue was then referred to a Working Group of ten states, which attempted to strike a balance between the two views by proposing to retain the territorial criterion, which had the merit of clarity, and add a further criterion to encompass awards that might be considered as foreign even though rendered in the territory of the state where enforcement was sought²⁵. Eventually, this was the formulation which the Conference adopted as first paragraph of article 1 of the Convention. Paradoxically, while the Working Group had initially the purpose of finding a compromise which would somewhat restrict the Convention's scope of application, it ended up producing the opposite outcome. According to most commentators, the "non-domestic character" criterion is additional to the territoriality criterion (the letter of article 1 expressly states "it shall also apply...") and therefore the two criteria cannot be used alternatively²⁶. The cumulative application of both criteria entails that the Convention applies to all arbitral awards rendered in a country other than the state of enforcement, whether or not these awards may be regarded as domestic in that state²⁷: it also applies to all awards not considered as domestic in the state of enforcement, whether or not any of such awards may have been rendered in the territory of that state.²⁸ Even admitting the cumulative application of these

²³ P. Contini, *op. cit.*, p. 293

²⁴ UN DOC E/CONF.26/SR.24 p. 10

²⁵ R. Briner and V. Hamilton, *The History and General Purpose of the Convention*, cit., p. 15

²⁶ A.J. Van den Berg, *op. cit.*, p. 25

²⁷ If for example parties have agreed to arbitrate in country A under the arbitration law of country B and enforcement is sought in country B, the Convention will apply by virtue of the territoriality criterion (arbitration has taken place in country A, which is different from country B, the country of enforcement), even if the award is considered as domestic in that country. The second criterion does not apply in this case

²⁸ P. Contini, *op. cit.*, p. 294. If for example parties have agreed to arbitrate in country A under the arbitration law of country B and country A allows to arbitrate under a foreign arbitration law, the latter country will consider the award resulting from this arbitration as non-domestic. Accordingly, if the enforcement of the award is sought in country A, the Convention may be applicable by virtue of the second criterion. If the Convention had not provided for the latter, it

two criteria, the problem still remains of defining what a non-domestic award is. The Convention's legislative history shows that the non-domestic character of the award was included at the insistence of certain civil law countries, whose procedural law allowed parties to agree that an arbitration shall be governed by a *lex arbitri* which is not the *lex loci arbitri*²⁹. On this reading, the Convention's legislative history prevents the interpreter from applying the non-domestic rule to other cases involving some other significant foreign element, such as the nationality or residence of the parties³⁰. If we adopt this restrictive interpretation of the non-domestic rule, then we must conclude that this criterion amounts to a sort of dead letter and that the compromise reached by the working party is strongly unbalanced in favour of the territorialists³¹. Yet, case law referring to article 1 of the Convention does not seem to comply with this interpretation. An example is represented by the US *Bergesen* case³²: the court adopted the view that awards “not considered as domestic” in the sense of art. I(1) NYC meant awards which are subject to the convention not because made abroad, but because made within the legal framework of another country, e.g. pronounced in accordance not only with foreign law, but also involving parties domiciled or having their principal place of business outside the enforcing jurisdiction. Consequently, the non-domestic rule allows a large degree of discretion upon states, since article 1 does not specify which characteristics make an award domestic or non-domestic: such elements are identified differently by different jurisdictions. Moreover, in the absence of legislative provisions on this point, the actual determination is left to the authority dealing with enforcement.

Excluded criteria: parties' nationality and internationality of the award

would not have been applicable in this case, because, according to the territoriality criterion it only applies to an award rendered in another state.

²⁹A.J. Van den Berg, *The New York Convention of 1958: an Overview*, in E. Gaillard and D. di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice*, Cameron May Publisher, 2008, p. 41.

³⁰ As we have seen, the members of the Working Party representing the Western European group agreed to the compromise text, provided that each nation, by relying on the non-domestic rule, would be allowed to exclude certain categories of awards, but at the conclusion of the conference this possibility was omitted.

³¹ A. J. Van den Berg, *When is an Arbitral Award Non-Domestic under the New York Convention of 1958?*, *Pace L. Rev.* 1985, 6, p. 39

³²*Bergesen v. Joseph Muller Corp*, 710 F.2d 928 (2d Cir. 1983), in which the court enforced an award made in New York under New York law between a Norwegian and a Swiss party by relying on the second definition contained in art. I(1) NYC.

The Convention excludes the nationality of the parties as a criterion for its application. As we have seen above, this criterion was envisaged by the Geneva Convention, which required that the parties should be subject to the jurisdiction of different contracting states. The expression “subject to the jurisdiction of a state” had led to diverging interpretations, as some courts had interpreted it in terms of nationality, others in terms of residence of the parties. Thus, the omission of this criterion has made the scope of the Convention broader and clearer with respect to its predecessor. The abolishment of the nationality criterion means that the Convention will apply irrespective of the nationality (or residence) of the parties, namely also where one or even both parties are nationals of a non-contracting state, but the award has been rendered in the territory of a contracting State³³. By the same token, it will also apply where an award has been made abroad in an arbitration between parties of the same nationality³⁴.

In defining the scope of the Convention, no reference is made also to the international character of the transaction underlying the arbitral dispute. It follows that in theory the Convention may also apply to an award made in a foreign country in respect of a matter which is purely domestic for the country where the award was made³⁵. Although there is no reported case so far of the enforcement of an award concerning a domestic affair which is sought abroad, it is not excluded that parties may exploit this possibility in the future. In particular, in cases where the losing party has assets abroad or parties want to overcome the obstacles of an unfavorable arbitration law³⁶, they may decide to resort to arbitration abroad even if their dispute is purely domestic.

³³ Cfr *Imperial Ethiopian Government v. Barauch Foster Corp*, U.S. Court of Appeals (5th cir.), July 19, 1976, YBCA, II, 1977, p. 252, which applied the Convention to an award made in France between a United States corporation and an Ethiopian party, even though Ethiopia was not at the time a contracting state.

³⁴ This aspect of the Convention has caused problems for the Italian courts, since, according to article 2 of the Italian code of civil procedure, the Italian jurisdiction may not be derogated by agreement in favour of a foreign jurisdiction or arbitrators sitting abroad. Relying on this provision, the court of Ravenna refused to enforce an award made in London in an arbitration between two Italian parties (Tribunale di Ravenna, 15 Aprile 1970, *Paolo Agnesi S.p.A. V Augusto Miserocchi*, YBCA, I, 1976, p. 190). The Italian Supreme Court, however, revised the decision on this point. It held that the Convention, as *jus superveniens*, had superseded art 2 of the Italian code of civil procedure (Corte di Cassazione, sez. un. 13 Dicembre 1971, n. 3620, YBCA, I, 1976, p. 190). Nonetheless, in a subsequent case, the court of Milan did not take account of the Supreme Court's decision and rejected the enforcement of an award made in Hamburg between two Italian parties (Tribunale di Milano, 11 Dicembre 1972, YBCA, I, 1976, p. 191). The Court of Appeal, however, corrected what expressly termed as an <<oversight>> by the lower court (Corte d'Appello di Milano, 13 Dicembre 1974, YBCA, II, 1977, p. 247). In subsequent decisions, the Italian courts have stuck to the Supreme Court's statement and thus the issue seems now to be settled.

³⁵ For example, the enforcement of an award in Switzerland made in Paris in a dispute between a merchant from Bordeaux and a retailer of Nice concerning the sale of bottles of French wine may fall under the scope of the Convention.

³⁶ This may happen for example when English parties decide to settle a pure domestic dispute by arbitration abroad in order to avoid the supervision of English courts over arbitration. Section 69 of the 1996 English Arbitration Act envisages the right of appeal on the merits of an award made in England to the High Court, review on the merits is however limited to cases where the award is either “obviously wrong” or has broad public importance and is “open to serious doubt”. Moreover, this right of exclusion is subject to exclusion by parties agreement. The enforcement in the United Kingdom of an award made abroad but regarding a purely domestic dispute would fall under the Convention, thus excluding any form of judicial review of the merits of the arbitral decision. Another situation may be where the country of the parties does not have arbitral institutions to ensure adequate conduct of the arbitration.

Reciprocity and commercial reservations

Paragraph 3 allows states to restrict the scope of application by opting for two reservations when joining the Convention: the reservation of reciprocity and the commercial reservation. The first allows states to limit the application of the Convention only to arbitral awards rendered in the territory of another contracting state, whereas the second restricts the application of the Convention only to awards relating to commercial disputes. The reservation of reciprocity was adopted because during the drafting of the Convention some of the state delegates did not accept the principle of universality, which would have allowed the enforcement of arbitral awards irrespective of the country where the award had been made. As a consequence of the adoption of such reservation, an award made in a non-contracting state does not benefit from the enforcement regime under the Convention in a state which has adopted the reciprocity reservation. This reservation has however lost much of its practical importance, since nowadays most of the leading trading nations are parties to the Convention.

The commercial reservation was adopted because it was believed that, otherwise, it would be impossible for certain civil law countries, whose national legal systems allowed referral to arbitration only for commercial disputes, to adhere to the Convention³⁷. In such countries, arbitration is not extended to those areas of law which are generally considered sensitive, such as family law or labour law, and which should consequently be reserved to the exclusive jurisdiction of national courts. The test as to whether a matter is to be considered commercial is to be carried out with reference to the law of the place of enforcement. Comparative analyses of the case law on this point in the various national systems show that the term “commercial” is understood differently in the various countries, since the idea of commerce may be affected by political, economic, social, historical and even religious beliefs³⁸. On the one hand, most courts have so far given a broad interpretation to the term “commercial”, which is consistent with the goal of achieving a wide,

³⁷ This was for example the case of France, whose 1925 Commercial Code provided that only arbitral clauses concerning commercial matters were valid. Belgium declared at the New York Conference that it could not adhere to the Convention if the possibility to limit its application to commercial transaction was not envisaged. Nonetheless, when it came to the signature of the Convention, Belgium did not resort to the commercial reservation.

³⁸ D. di Pietro and M. Platte, *Enforcement of International Arbitration Awards*, cit, p. 58

uniform application of the New York Convention³⁹. A very clear example of this tendency is represented by a case of the Supreme Court of India decided in 1994⁴⁰. In considering as a commercial transaction the provision of consulting services by a company for promoting a related commercial deal, the Supreme Court argued that the expression “commercial” should be interpreted in light of the aim of the Convention, which is facilitating international trade through the promotion of suitable alternative ways of international dispute settlement. Accordingly, any expression adopted in the Convention should be given a <<liberal>> and <<broad>> interpretation, having regard to the manifold activities which are integral part of international trade nowadays. But on the other hand, countries which are traditionally known for their liberal approach towards international trade have sometimes adopted a narrow construction of the term “commercial”. This is for example the case of the United States, which, while in most cases have relied upon a broad interpretation of the term⁴¹, in a limited number of them have shifted to a narrower approach⁴². Also Indian case law shows contrary examples to the liberal tendency outlined above. This shows the difficulties in interpreting the commercial reservation even within the same state. In an earlier case⁴³ involving transfer of technology, the High Court of Bombay gave a rather restrictive approach of the commercial reservation: the contract underlying the dispute regarded the supply of technical designs and transfer of technical information required for the establishment of a plant in India. The court rejected the commercial nature of this transaction simply on the grounds that the party had failed to submit any statutory provision or any operative legal principle of Indian law which could qualify it as commercial. In order to invoke the Indian Arbitration Act (i.e. the act implementing the New York Convention in India), the Court argued that it was not enough to establish that an agreement is commercial; it must also be proved that it is commercial by virtue of a provision of

³⁹ A. J. Van den Berg, *op. cit.*, p. 51; M. Prylers, *Reservations Available to Member States: the Reciprocal and Commercial Reservations*, in E. Gaillard and D. di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice*, Cameron May Publisher, 2008, p. 178.

⁴⁰ Supreme Court of India, 10 February 1994, *RM Investment & Trading Co. Pvt Limited v Boeing Company*, Supreme Court Journal, 1994, vol. I pp. 657-664, quoted by D. di Pietro and M. Platte, *Enforcement of International Arbitration Awards*, cit, p. 59

⁴¹ Cfr e.g. *Prograph Intl et al v Ralph Barhydt*, 928 FS (n.d. Cal. 1996) p. 983, which qualified the employment of a United States citizen working in his country for a foreign corporation as a commercial relationship related to interstate foreign commerce. Such an approach may arguably not be shared by other jurisdictions where employment contracts and, more generally, labour law issues are not considered as commercial, but sensitive matters in which dispute resolution is only possible through litigation in front of a national court or a mediation/arbitration process under the supervision of a governmental body.

⁴² cfr U.S. District Court of New York, S.D., December 21, 1976, *B.V. Bureau Wijsmuller v. United States of America*, YBCA, III, 1978, p. 290, concerning the qualification as commercial transaction of salvage services rendered to a United States warship. In this case the court rejected their commercial nature: <<whatever uncertainties may arise when agencies of governments engage in commercial transactions, relations arising out of the activities of warships have never been regarded as commercial within the context of sovereign immunity>>. The case, however, involved more considerations of public policy, rather than the mere issue of defining the scope of the term commercial: in the field of sovereign immunity it is not always easy to distinguish between commercial and non-commercial transactions.

⁴³ *Indian Organic Chemical Limited v. Subsidiary 1 (U.S.) Subsidiary 2 (U.S.) and Chemtex Fibres Inc*, YBCA, IV, 1979, p. 271

law or an operative legal principle in force in India. This narrow interpretation hardly complies with the Convention statutory purpose of facilitating enforcement of international commercial arbitration awards. What is more, this approach makes foreign companies uncertain as to whether an arbitral clause relating to a contract concluded under Indian law will be enforceable.

Since the New York Convention contains no provision supporting a uniform interpretation of the term “commercial”, it becomes extremely important for the parties to ascertain whether the state where the future award is likely to be enforced has adopted the commercial reservation and, if so, whether the subject matter of their dispute is considered as commercial under the law of that state. Scholars have however made some suggestions in order to overcome the risk that the commercial reservation turns into a “stumbling-block” for the uniform interpretation of the Convention⁴⁴. Some have attempted to identify a commonly acceptable definition of the term in the international contest. On this reading, it is argued that the commercial character of the transaction is related to the professional status of the parties involved in the transaction. Accordingly, commercial transactions should be considered those where the characteristic performance is rendered by either a person or a body, company or other institution, acting in the sphere of his professional activity. Yet, this definition has the drawback of relying on other uncertain and highly disputed terms such as “characteristic performance” and “professional activity”. Consequently, it does not seem to be able to solve the problem of diverging interpretations, but merely to transfer it to the interpretation of different expressions. Others have recommended that courts whose domestic law gives a narrow definition of the term commercial should nonetheless interpret it under the Convention in a broader sense, by applying by analogy the international public policy test⁴⁵. When it comes to public policy, national courts normally adopt an interpretation of this term which is broader at the international level than that adopted at national level: what is a violation of public policy under their domestic law, they often argue, does not necessarily constitute a violation of public policy at the international level. By the same token, the same may happen with the commercial test, in the sense that what is non-commercial in domestic relations may be considered by the courts as commercial for the purpose of the Convention.

Awards excluded: the issue of a-national and interim awards

⁴⁴ A.J. Van den Berg, *op. cit.*, p. 54

⁴⁵ A.J. Van den Berg, *op. cit.*, p. 54

The letter of the Convention allows the enforcement of only two types of awards: awards made in the territory of a state other than that of enforcement and awards not considered as domestic in the state of enforcement. However, two other categories of arbitral awards have emerged in international commercial arbitration practice: “a-national” awards and interim awards. The question whether these two categories of awards fall within the scope of the Convention is one of the presently most discussed issues of international commercial arbitration.

As we have seen above⁴⁶, the concept of the “a-national” award is related to the theory of the floating or de-localised arbitration. It essentially consists in an award resulting from a de-nationalised or de-localised arbitration, that is an arbitration detached from the ambit of a national arbitration law by means of an agreement of the parties.⁴⁷ On this reading, the arbitration can take place in the same way everywhere, since the place of arbitration would not entail the application of the arbitration law of the country concerned. In the previous pages we have already analysed the *Gotaverken* decision⁴⁸, which is the leading case supporting the delocalisation theory. In this section, we discuss the issue whether the “a-national” award falls within the scope of the Convention. The most important grounds supporting the view that this kind of award falls within the scope of the Convention are related to a particular interpretation of articles I (1) and V (1) (d) respectively. On this reading, article I (1), which states that the Convention applies also to arbitral awards not considered as domestic, would also include “a-national” awards. Article V (1) (d), provides that the enforcement of the award may be refused where the composition of the arbitral authority or the arbitral procedure was not in accordance with the agreement of the parties, or failing such agreement, was not in accordance with the law of the country where arbitration took place. It is argued that, according to the letter of this provision, the agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure ranks first and only in the absence of such agreement should the *lex loci arbitri* be taken into account. It follows that article V (1) (d) should be interpreted in the sense that if there is an agreement of the parties on the composition of the arbitral tribunal and the arbitral procedure, then this agreement need not be governed by a national arbitration law. Despite these arguments, the inclusion of the “a-national” awards within the scope of the Convention does not seem convincing with respect to its history, system and text.⁴⁹ If we read article 1 in conjunction with the other provisions of the Convention, we realise that the latter is premised on the essential requirement that the award should be governed by a national

⁴⁶ See *supra* pp. 177 ff

⁴⁷ A.J. van den Berg, *op. cit.*, p. 29

⁴⁸ See *supra* pp. 182 ff.

⁴⁹ A. J. van den Berg, *op. cit.*, p. 39

arbitration law. In particular, Article V(1)(e) provides that enforcement of an award may be refused if the respondent can prove that the award has been set aside by a court of the country in which, or under the law of which, the award was made. By the same token, article V(1) (a) envisages as a ground for refusing the enforcement the case that an arbitration agreement is invalid under the law to which the parties have subjected it or, failing any indication thereon, under the law of the country where the award was made. Similar arguments may be used to contrast the proposed interpretation of art. V(1) (d): it would be inconsistent with the system of the Convention admitting that, whereas art. V(1)(a) and art. V (1) (e) refer to an award and arbitration agreement regulated by a national law, art. V(d) allows an agreement on the composition of the arbitral authority and the procedure completely detached from a national law. In conclusion, a coherent interpretation of the Convention seems to imply that, for the purpose of the convention itself, the arbitral procedure should always comply with the requirements of the law of the place of arbitration. Such role will be supplementary if parties have provided nothing with respect to this matter, i.e. only the *lex loci arbitri* will be taken into account. The *lex loci arbitri* will play a complementary role where there is an agreement on the arbitral procedure between the parties, i.e. it will regulate the aspects not provided for by the parties in their agreement⁵⁰. More importantly, in no case can the arbitral procedure derogate the public policy provisions of the law of the place of enforcement.

Interim measures are orders issued by the courts aimed at preserving a situation which would otherwise irremediably be affected during the course of the proceedings. As arbitration is becoming more and more institutionalized, the average duration of the proceedings is growing increasingly longer and consequently interim protection has become a frequent necessity also in this field. Nonetheless, the adoption of interim measures in arbitration entails specific problems which are not arising in litigation, namely who is entitled to issue the interim measures and how these measures can be enforced. As far as the first issue is concerned, the approach which is becoming prevalent today is that arbitral tribunals are entitled to issue interim measures, but the parties are also given the opportunity to request them to national courts where they think it is more appropriate. Yet, recourse to national courts, either before the start or during arbitral proceedings, does not amount to a waiver of their right to arbitrate. This is the approach followed by the Model Law on International Commercial Arbitration: article 17 enables the arbitral tribunal to issue interim measures and article 9 expressly states that it is not incompatible with an arbitration agreement for a party to request, before or during arbitral proceedings, from a court an interim measure of protection and for a court to grant such measure.

⁵⁰ A. J. van den Berg, *op. cit.*, p 325

As far as the enforcement of arbitrator-granted interim measures is concerned, there is an ongoing debate on their applicability to the Convention. On one side, it is argued that interim measures differ radically from proper arbitral awards: interim measures are essentially temporary in character, whereas one of the main features of arbitral awards is to finally decide part or the whole dispute. Accordingly, since the Convention expressly refers to arbitral awards, interim measures fall outside its scope. On the other side, despite the undoubted difference between interim measures and final awards, distinguished authors have attempted to promote a broader interpretation of the Convention. These authors are prompted by the consideration that the enforceability of arbitral interim measures under the Convention could greatly enhance the effectiveness of international arbitration. Their main argument is that interim measures present two essential features which are consistent with the requirements envisaged by the Convention. The first characteristic is that the subject matters normally dealt with by interim measures fall in the broad category of “differences between the parties” mentioned in many articles of the convention. The second is that interim measures may be considered as binding between the parties within the meaning of art V(1)(e) of the Convention. Notwithstanding these arguments, most national courts do not seem, for the time being, to take into account these suggestions. The leading case is represented by *Resort Condominiums International Inc. v. Resort Condominiums Ltd*⁵¹, in which the enforcement of an interim measure was sought in front of the Supreme Court of Queensland. The court refused enforcement on the grounds that it was not an arbitral award within the meaning of the New York Convention; the order issued by the arbitral tribunal was clearly of an interlocutory nature and in no way was it meant to finally resolve the dispute or part thereof. On the contrary, it was provisional only and liable to be rescinded, suspended, varied or reopened by the tribunal which had pronounced it. Important contributions to the development of a case-law favourable to the enforcement of arbitrator-granted interim measures are coming from US jurisprudence. Paradoxically, whereas they usually argue that the New York Convention prevents national courts from granting provisional relief in aid of arbitration, they have generally been willing to recognise and enforce arbitral awards of provisional measures, but in doing so they have not relied on the New York Convention, but on the Federal Arbitration Act. Yet, the only case which has so far dealt with the issue whether the New York Convention precludes courts from recognising and enforcing provisional relief ordered by arbitrators has answered in the negative⁵².

⁵¹ *Resort Condominiums International Inc. v. Resort Condominiums Ltd*, Supreme Court of Queensland, 29 October 1993, International Arbitration Report, 1994, 9, 4 quoted by D. di Pietro and M. Platte, *op. cit.*, p. 46

⁵² *Ministry of Finance and Planning v. Onyx Development Corp.*, 1989 U.S. Dist. Lexis 11995 (S.D.N.Y. June 24, 1988), quoted by G. Born, *op.cit.*, p. 980.

The relationship between the Convention and domestic law on enforcement and other treaties in the field of arbitration

Art. VII contains two provisions regulating the relationship between the Convention and concurrent national laws or international treaties concerning the recognition and enforcement of foreign arbitration agreement and awards. The first permits a party seeking enforcement of an award or arbitration agreement to base his request on national law or other treaties, instead of the Convention. This provision is commonly referred to as the most favourable right provision (“mfr-provision”). The second states that the Convention does not affect the validity of other treaties in the field of arbitration and is commonly called the compatibility provision. An exception to these two provisions is envisaged in the second paragraph of art. 7, which states that the Geneva Protocol on Arbitration Clauses of 1923 and the Geneva Convention on the Execution of Foreign Arbitral awards of 1927 shall cease to have effect between the states that become party to the New York Convention.

The purpose of both the mfr and the compatibility provisions is to facilitate the enforcement of foreign arbitral awards and agreements.⁵³ Their rationale is that the Convention shall not deprive any party seeking enforcement of the more favourable possibilities under the national law of the state where enforcement is sought or under the treaties to which that state has adhered. Accordingly, both provisions open the door to more “arbitration-friendly” statutes and treaties, which would otherwise not be applicable: in the absence of art. VII, international law would impose the contracting states to apply the Convention and not their own, possibly more favourable, municipal law as well as the more favourable international treaties they have entered into prior to joining the Convention.⁵⁴ The other side of the coin is that the mfr and compatibility provisions, favourable to enforcement as they may be, may prevent the establishment of a uniform regime for the enforcement of foreign arbitration agreements and awards. The exclusive applicability of the Convention to foreign arbitration agreements and awards would increase the degree of certainty as to which agreements and awards are enforceable and which are not. Pursuant to these provisions, those awards and agreements not complying with the Convention have an uncertain status, since

⁵³ A.J. Van den Berg, *op. cit.*, p. 82

⁵⁴ D. di Pietro and M. Platte, *op. cit.*, p. 171

parties may engage in forum shopping and seek for more favourable regimes on which to rely for enforcement. Art. VII has so far relied on in practice especially for seeking the enforcement of awards which had been set aside in the place of enforcement. An often quoted example is the *Hilmatron* case⁵⁵, in which an award had been made and subsequently set aside in Switzerland. The enforcing party brought the award in front of a French court and relied on art VII of the Convention in conjunction with art. 1502 of the French Code of Civil Procedure, which does not list setting aside by the country where award was made as a ground for resisting enforcement. An important question related to art. VII is whether the domestic law or other treaties must be relied on *in toto*, or whether it is possible to ask for enforcement on a combination between some provisions of the Convention and others stemming from the more favourable national law or treaty. As we will see in the following section, the problem has emerged especially with reference to art II (2) of the Convention, which lays down strict requirements concerning the written form of the arbitration agreement.

The only multilateral arbitration convention which has been applied in connection with the New York Convention is the European Convention on International Commercial Arbitration of 1961⁵⁶, which was signed in Geneva in 1961 under the auspices of the United Nations Economic Commission for Europe as a supplement of the New York Convention. It is designed mainly to deal with the problems of establishing procedures for disputes arising out of contracts between European parties, in particular East-West disputes, even if it does not limit membership to European states. The European Convention deals with several aspects of the arbitral procedure such as the constitution of the arbitral tribunal, the jurisdiction of the courts in relation to arbitration, the law applicable to the substance of the dispute. On account of the complexity of its provision, this Convention has however found scarce application in practice. The relationship between the latter and the New York Convention is problematic because the two conventions have different scopes of application: the main difference is that, contrary to the New York Convention, the European Convention requires that the parties to the arbitration agreement have their habitual residence or their seat in different contracting states⁵⁷. In this respect, the New York Convention's field of application is broader than that of the European Convention. But on the other hand, the European Convention contains provisions for stages of the arbitration to which the New York Convention does not apply⁵⁸, such as the organization and functioning of the arbitral tribunal, the choice of law applicable to the merits of the dispute and the motivation of the arbitral award. In this respect, the

⁵⁵ *Himalton Ltd v OTV*, YBCA, XX, 1995, p. 663

⁵⁶ 1961 United Nations, Treaty Series, vol. 484, p. 364 No. 7041 (1963-1964)

⁵⁷ Cfr art. I(1)(a) of the European Convention. This requirement has been provided for because the object of the Convention is to regulate the conduct of arbitral disputes in East-West trade: A.J. Van den Berg, *op. cit.*, p. 94

⁵⁸ A.J. Van den Berg, *op. cit.*, p. 94

European Convention's scope of application is thus broader than that of the New York Convention. It follows that, when the arbitration agreement or the arbitral award falls under the scope of application of both conventions, the European Convention can be deemed to complement the New York Convention⁵⁹. For example, as far as the form of the arbitration agreement is concerned, art. I(2)(a) of the European Convention contains a definition of "form in writing" which is similar to that provided for in the New York Convention; it adds, however, that the written form is also met, if in relation between states whose laws do not require that an arbitration agreement may be in writing, the agreement is concluded in the form authorised by these laws. Another example can be found in the discipline of the enforcement of the award. Although the latter convention does not contain provisions in this regard, and therefore for this matter one has to refer to the New York Convention, it nonetheless provides a limitation to the right of invoking the ground for refusal of enforcement that the award has been set aside in the country where it was made, as provided in art. V(1)(e) of the New York Convention⁶⁰.

Despite the complementary nature of the European Convention with respect to the New York Convention, the relationship between the two conventions has been more often than that considered by the courts in terms of conflicts of treaties⁶¹ and seldom in terms of complementarity⁶².

Enforcement of the arbitration agreement

Although the title of the Convention only refers to arbitral awards⁶³, this international treaty basically contemplates two actions: the enforcement of the arbitral awards and the enforcement of

⁵⁹ A.J. Van den Berg, *op. cit.*, p. 94

⁶⁰ On this point see *infra* pp. 407 ff.

⁶¹ Cfr Bundesgerichtshof, May 25, 1970, YBCA, II, 1977, p. 237, in which the German Supreme Court justified the application of the European Convention on grounds that the latter <<prevails as being of a younger (sic) date over the New York Convention>>

⁶² Cfr *Tradax v. Carapelli*, Corte d'Appello of Florence, October 22, 1976, YBCA, III, 1978, p. 279 in which the court argued that the European Convention and the New York Convention are integrally related.

⁶³ The Convention does not make any reference to the arbitration agreement in its title, because the drafters' initial intention was to leave the provisions concerning the enforcement of the arbitration agreement to a separate Protocol. Towards the end of the Conference it was however realised that this choice was not desirable, since the purpose of the Convention would be defeated if a court called upon to enforce an arbitral award under the Convention was permitted to refuse recognition of the validity of the arbitration agreement on which the award was based. Accordingly, art. II, dealing with the enforcement of the arbitration agreement, was drafted the last day of the conference in a rush against time omitting any indication as to many crucial issues, such as the arbitration agreements to which the Convention should apply.

the arbitration agreement. The enforcement of the arbitration agreement is envisaged in art. 2 (3), where it is stated that a court of a contracting State, when seized of an action in a matter in respect of which the parties have made an agreement within the meaning of article II, shall, at the request of one of the parties, refer the parties to arbitration, i.e. it must declare itself incompetent⁶⁴ to decide the case and must stay proceedings. Yet, the Convention does not clarify which arbitration agreements fall within its scope. The most common view is that, since the Convention defines its scope with respect to arbitral awards, it should be applied to arbitration agreements which would produce foreign or non-domestic awards subject to its scope of application⁶⁵. Others claim for the application of the Convention to a wider range of agreements, such as those providing for arbitration in the state of the forum and having an international element (foreign nationality of at least one party or international character of the underlying transaction).⁶⁶Article II (1) and (3) set out five requirements that an arbitration agreement should satisfy in order to become enforceable:

- the agreement must be in writing. Art II seems also to provide a definition of what constitutes an agreement in writing under the Convention: “it shall include an arbitral clause in a contract or an arbitration agreement, signed by the parties or contained in an exchange of letters or telegrams”. (The issue of the uniform interpretation of this definition will be dealt with below.)

- it must deal with disputes which have arisen or may arise between the parties

- these disputes must arise with reference to a defined legal relationship, whether contractual or not. This latter specification suggests that also actions framed in tort can be submitted to arbitration, provided that the claims framed in tort fall within the scope of the arbitration agreement⁶⁷.

- the disputes should concern a subject-matter capable of settlement by arbitration (the so-called arbitrability requirement)

⁶⁴ As a consequence of referral to arbitration, the court becomes partially incompetent, i.e. incompetent to try the merits of the case. The court, however, retains competence for procedural matters relating to arbitration, such as the ordering of interim measures, decision on the setting aside of the award, appointment or replacement of arbitrators if the parties have not made arrangements in this respect in their agreement.

⁶⁵ G. B.Born, *International Commercial Arbitration: Commentary and Materials*, Kluwer Law, 2001, p. 124; M. R. Sammartano, *International Arbitration: Law and Practice*, Kluwer Law, 2001, p. 949

⁶⁶ Cfr P. Contini, *op. cit.*, p. 296, who argues that, in the absence of any provision defining the territorial application of article II, the latter should be applied also to arbitration agreements made in the state where their enforcement is sought; see also A.J. van den Berg, *op. cit.*, 61-71. This is also the solution found in the US Federal Arbitration Act, the law implementing the Convention in the United States. According to sections 202 and 206 of this Act, the Convention applies in the first place to all arbitration agreements in which at least one of the parties is a non-US citizen, irrespective of whether the place of arbitration is within or without the United States. In the second place, it also applies to all arbitration agreements between two US parties, irrespective of whether the place of arbitration is within or without the United States, if the agreement relates to a subject matter which is international.

⁶⁷ A. J. van den Berg, *op. cit.*, p. 148. The original text of art. II (1) referred only to contractual relationships (it stated “all or any differences in respect of such contract”). The extension to non -contractual relationships was due to the Italian delegate, who pointed out that there are also non-contractual matters which may be covered by an arbitration agreement, such as the question of damages resulting from a collision at sea. He therefore proposed to introduce in art II the words “in respect of a determined legal relationship, or contract”; eventually the drafting committee adopted the actual text “in respect of a defined legal relationship, whether contractual or not”.

–the agreement must not be null, void, inoperative or incapable of being performed. The expression null and void is generally interpreted as referring to those cases where the arbitration agreement is affected by some invalidity from the very beginning. It would then cover matters such as the lack of consent due to misrepresentation, duress, fraud or undue influence⁶⁸. The word inoperative covers cases where the arbitration agreement has ceased to have effect, for example because the parties have explicitly or implicitly revoked the agreement to arbitrate, or because the same dispute between the same parties has already been decided in arbitration or court proceedings, or because the parties have already settled their dispute on their own before arbitration has started⁶⁹. Finally, the requirement of incapability of being performed applies to cases where the arbitration cannot be effectively set into motion; this may happen where the arbitral clause is too vaguely worded, or other terms of the contract contradict the parties' intention to arbitrate. It may also apply to cases where the arbitrator nominated in the agreement refuses to accept his nomination, or the appointed authority designated in the agreement refuses to appoint the arbitrator.⁷⁰

Another requirement can be implied from article V(1)(1) concerning the enforcement of the award:

–the parties to the arbitration agreement must have legal capacity under the applicable law to them.

The question which must be preliminary answered in order to understand the scope of these requirements is under which law they should be assessed, or in other words which is the law applicable to the arbitration agreement. Most commentators believe that, for the purpose of the Convention, the law applicable to the arbitration agreement is the *lex loci arbitri* and therefore, with the sole exception of the capacity of the parties⁷¹ and the arbitrability⁷², the requirements for the

⁶⁸ A.J. van den Berg, *op. cit.*, p. 156

⁶⁹ A. J. van den Berg, *op. cit.*, p. 158

⁷⁰ A. J. van den Berg, *op. cit.*, p. 159

⁷¹ Art. V. 1(a) provides that the capacity of the parties should be decided under the law applicable to the party without specifying how this law should be determined. The question should therefore be solved by means of the conflict of laws rules of the law of the forum. Although the requisites determining the capacity of a party to enter into an arbitration agreement will vary in different national laws, it may be observed that in general terms any natural or legal person may have the capacity to conclude an arbitration agreement, provided that he has the capacity to enter any other form of contract. This capacity is normally excluded for persons such as minors, bankrupts and persons of unsound mind. Cfr A. Redfern and M. Hunter, *op. cit.*, p. 147-148, A.J. van den Berg, *op. cit.*, p. 276

⁷² Among commentators there is no agreement on which governing law should apply to the issue of arbitrability. As Bockstiegel has put it, <<agreement on the conclusion that there is disagreement seems to be the only common denominator that one can find between arbitrators, courts, and publicists regarding the question which is the applicable law on arbitrability>> (*Public Policy and Arbitrability*, in P. Sanders (ed), *Comparative Arbitration Practice and Public Policy in Arbitration*, ICCA Congress Series No. 3, Kluwer, 1987, p. 184). According to some, although art II (1) is silent on the applicable law, it should be read in connection with art. V(2)(a), concerning the enforcement of the award, which provides that the issue of arbitrability should be governed by the law of the place where the enforcement is sought, i.e. the *lex fori*. On this reading, it may be implied that also for the enforcement of the arbitration agreement the *lex fori* should govern the issue of arbitrability. It is also argued that, since arbitrability is closely linked to public policy, a court would find it difficult to decide on this issue, if it were deemed to do it according to a foreign law. This is because the notion of public policy is difficult to ascertain as it is not generally embodied in statutes, but developed by case-law with all kinds of subtle distinctions. Others interpret arbitrability as a cause of validity of the contract and therefore read art II.1 in connection with not only art V(2)(a), but also V(1)(a). On this reading, in order to determine whether a given dispute is arbitrable, it is necessary to consider at least three different national systems: the law

enforcement of the arbitration agreement should be evaluated according to this law. This view is supported by an analogical interpretation of art V (1) (a) of the Convention, which expressly states that recognition of the award may be refused where the underlying arbitration agreement was invalid under the law to which the parties have subjected it or, failing any indication thereon, the law of the country where the arbitration was made⁷³. Accordingly, the analogical interpretation of art. V (1)(a) would suggest that for the purpose of the enforcement of the arbitration agreement the law governing the latter should be the law of the country where the award will be made. It would make no sense – it is argued – to apply the Convention's uniform conflict rules at the time of the enforcement of the award and the possibly different conflict rules of the forum at the time of the enforcement of the arbitration agreement. It is not consistent with the purpose of promoting uniformity in arbitration to give rise to a situation in which the same arbitration agreement may be governed by two different laws at two different stages of the arbitration proceedings: one law determined according to the conflict rules of the forum at the time of the enforcement of the agreement and the other determined according to art V (1)(a) at the time of enforcement of the award. Only when the place where the arbitration is to be held is not yet known (or the parties have not designated the law applicable to the arbitration agreement) should the conflict rules of the forum be applicable.

Although the requirements for enforcement of the arbitration agreement should be ascertained according to the national *lex loci arbitri*, it is commonly accepted that the interpreter should also take account of the so-called pro-enforcement bias of the Convention and consequently construct these requirements narrowly, so as to declare the invalidity of the arbitration agreement in manifest cases only.⁷⁴ This approach has for example been followed by some US courts, which have claimed for an “internationally neutral” interpretation of the expression “null and void”. They have argued that the parochial interests of any given state cannot be the measure of how the “null and void clause” is to be interpreted. Rather, the clause should be interpreted to encompass only those situations (such as fraud, mistake, duress, and waiver), that can be applied neutrally on an international scale⁷⁵.

governing the arbitration agreement, the law of the place of arbitration, the law of the country of enforcement. Despite the academic debate, in all reported cases related to the issue of arbitrability, the courts decided exclusively under their own law and did not take into account the law of the country where the arbitration was to take place or was taking place.

⁷³ Although this provision envisages as the primary criterion party autonomy and theoretically entails that the parties have the liberty to subject the arbitration agreement to a law of their choice, there are in practice no reported cases in which parties have subjected the arbitration agreement to a law which was different from the law of the country in which the award was made. It follows that the only useful criterion to determine the law applicable to the arbitration agreement is the place where the award is made. Cfr A. Redfern and M. Hunter, *op. cit.*, p. 291 and A. J. van den Berg, *op. cit.*, p. 276

⁷⁴ A. J. van den Berg, *op. cit.*, p. 155

⁷⁵ *Ledee v. Ceramiche Ragno*, 684 F.2d 184 (1st Cir. 1982) quoted by G. Born, *op. cit.*, p. 99

Enforcement of foreign awards

The New York Convention constitutes a great improvement in the regime of enforcement of foreign arbitral awards with respect to the Geneva Convention of 1927. Under the latter, the party seeking enforcement needed to prove the fulfillment of a number of conditions (proof that the award had become “final” in the country in which it was made, proof that the award was falling under the scope of the Convention, proof that the award had been made in pursuance of an arbitration agreement valid under the law applicable thereto, etc.), in order to see his request upheld by the enforcing court. One of the most important innovations of the Convention is the transformation of most of the “positive” conditions to be fulfilled by the party seeking enforcement into “negative” conditions, i.e. grounds for refusal of enforcement to be proved by the party against whom the enforcement is sought⁷⁶. This innovation is due to one of the most important principles of the Convention, the so-called presumption of enforcement (or pro-enforcement bias), whereby each contracting state must, as a general rule, recognise foreign awards as binding and enforce them using procedures comparable with those applicable to domestic awards. The party seeking enforcement needs only to comply with two basic requirements: it shall submit the original award and the original arbitration agreement (or a duly certified copy thereof), accompanied by a translation when necessary. These documents constitute *prima facie* evidence that the party is entitled to obtain enforcement of the award.⁷⁷ Once such requirements are met, article III of the Convention expressly states that there shall not be other substantially more onerous conditions or higher fees or charges for the recognition or enforcement of arbitral awards to which the Convention applies compared to those imposed on the recognition or enforcement of domestic arbitral awards⁷⁸. It is then up to the other party resisting enforcement to prove that enforcement

⁷⁶ A. J. van den Berg, *op. cit.*, p. 247

⁷⁷ P. Sanders, *The New York Convention*, in *International Commercial Arbitration*, vol II, 1960, p. 313; A. J. van den Berg, *op. cit.*, p. 247

⁷⁸ Also this provision, like most of the Convention's provisions, is the result of a compromise. At the beginning of the Conference the United Kingdom proposed that the procedure for the enforcement of arbitral awards under the Convention should not be more complicated or more onerous than that applicable to domestic awards. It was objected that in some countries (e.g. Sweden, Czechoslovakia, El Salvador) the enforcement of foreign arbitral awards is subject to special formalities, and it would be very difficult to change existing procedural law. Accordingly, the Belgian proposal that the same rules of procedure should be applied both to foreign and domestic awards was rejected. The text

should not be granted on the grounds envisaged by the Convention: the respondent has therefore the burden of proof in order to show the existence of the grounds for refusal enumerated in article V⁷⁹. In addition, the Convention's pro-enforcement bias implies that the defences to enforcement are to be interpreted narrowly and accepted in serious cases only.⁸⁰ This is because the Convention's main purpose is to create a truly mobile and universal award which may be readily enforceable in all contracting states.⁸¹

Another important improvement is the elimination of the system of the double *exequatur*. Under the Geneva Convention the party seeking enforcement had to prove that the award had become final in the country where it was made. This meant that the party had to produce an *exequatur* (i.e. a leave for enforcement) issued in the country where the award was made. Since the party had also to obtain a leave for enforcement in the country in which enforcement was sought, this system ended up imposing on the party seeking enforcement a double *exequatur*. The drafters of the New York Convention believed that the requirement of a leave for enforcement in the country where the award was made amounted to an unnecessary and time-consuming hurdle, especially where no enforcement was sought in that country. Moreover, it was feared that it could be easily turned into a delaying device in the hands of the respondent, who could prevent the award from being final by instituting setting aside procedures in the country where the award was made. The elimination of the double *exequatur* system has been carried out by replacing the requisite of the finality of the award with that of its binding character⁸². On this reading, an award need no longer be final in order to be enforceable: a leave for enforcement, stating that the award is not open to any kind of opposition for the purpose of contesting its validity, is no longer necessary.

Recognition and enforcement may be refused only on the basis of the limited criteria laid down in article V, which constitute "fundamental requirements of natural justice and legality"⁸³. These criteria are exhaustive and supersede domestic law in respect of the conditions to be fulfilled by a party seeking enforcement of an award falling under the scope of the Convention⁸⁴. The exhaustive character of these criteria also implies that no review of the merits of the award is allowed: the

finally adopted was similar to the initial UK proposal, since it envisages that arbitral awards covered by the Convention cannot be subject to more onerous enforcement conditions or higher fees or charges than domestic awards. This compromise solution recognises the principle of non-discrimination and at the same time is flexible enough not to require states to apply to foreign awards identical enforcement procedures as to domestic awards. Cfr E/CONF 26/L.11 and E/CONF 26/SR.11, P. Contini, *op. cit.*, p. 297

⁷⁹ A. J. van den Berg, *op. cit.*, p. 264

⁸⁰ R. Garnett, H. Gabriel, J. Waincymer, J. Epstein, *A Practical Guide to International Commercial Arbitration*, Oceana, 2000, p. 101-102; A. J. van den Berg, *op. cit.*, p. 268

⁸¹ R. Garnett, H. Gabriel, J. Waincymer, J. Epstein, *A Practical Guide to International Commercial Arbitration*, *cit.*, p. 102

⁸² On this point, see *infra* pp. 407 ff.

⁸³ C. Schmitthoff, *Finality of Arbitral Awards and Judicial Review*, in J. Lew (ed), *Contemporary Problems in International Arbitration*, Kluwer, 1987, p. 230

⁸⁴ A. J. van den Berg, *op. cit.*, p. 248

exhaustive list of grounds for refusal for enforcement embodied in article V does not include mistake in fact or law by the arbitrator⁸⁵. Notwithstanding this, exclusion of review of the merits does not mean that the court is prevented from looking into the award where it is necessary to ascertain whether a ground for refusal of enforcement is present.⁸⁶ A court may for example look into the award in order to find out whether it contains decisions or matters beyond the scope of the submission to arbitration, or if it violates public policy. However, the court's scrutiny of the award should be strictly limited to ascertaining the presence of elements which may give rise to refusal of the enforcement on one of the grounds envisaged in article V and consequently cannot involve an evaluation of its merits.

The grounds envisaged by art V of the Convention may be divided into two groups. The first group of grounds are embodied in the first paragraph of art. V and must be proved by the resisting party only. They deal with serious defects in the arbitration and the award: the invalidity of the arbitration agreement, the violation of due process, the award *extra* or *ultra petita*, the irregularity in the composition of the arbitral tribunal or arbitral procedure, the non-binding force of the award, the setting aside of the award in the country of origin. The situation is different for the second group of criteria, embodied in the second paragraph of art. V; for these grounds, the court may refuse recognition and enforcement on its own motion, without any application of the parties. This is because the second group of grounds concerns violations of public policy of the law of the forum; these criteria provide the enforcing court with a “safety net” allowing it not to enforce awards violating basic rules and principles of its own jurisdiction.

In both the first and second paragraph of article V the Convention uses the permissive expression “the enforcement may be refused”. This is commonly interpreted in the sense that even if the grounds for refusal are fulfilled the enforcing court still retains some “residual discretion” to enforce the award⁸⁷. This may happen for example where a court decides that, although the award would violate the domestic public policy of the court's own law, the violation is not such as to prevent enforcement of the award in international relations.

⁸⁵ A. J. van den Berg, *op. cit.*, p. 269. On this point, the Convention departs from a number of legal systems which allow appeals to the courts at the seat of arbitration on questions of law, unless agreed otherwise by the parties; see e.g. section 69(1) of the English Arbitration Act and section 38(2) of the 1984 Australian uniform arbitration legislation.

⁸⁶ A. J. van den Berg, *op.cit.*, p. 270

⁸⁷ Cfr *China Nanhai Oil Joint Service Cpn v Gee Tai Holdings co Ltd*, , YBCA, XX, 1995, p. 671, in which the Supreme Court of Hong Kong held that <<even if a ground of opposition is proved, there is still a residual discretion left in the enforcing Court to enforce nonetheless. This shows that the grounds of opposition are not to be inflexibly applied. The residual discretion enables the enforcing court to achieve a just result in all the circumstances>>.

Grounds for refusal of enforcement to be proven by the respondent

Incapacity of the party

The first part of art. V(1)(a) provides that the enforcement of the award may be refused if the parties to the arbitration agreement were, under the law applicable to them, under some incapacity. Unlike the Geneva Convention, which only dealt with incapacity in the sense of irregular procedural representation of the party in the arbitral proceedings⁸⁸, the New York Convention focuses on the substantive aspect of the incapacity, namely the incapacity to conclude the arbitration agreement. This choice is due to the fact that cases related to the improper representation of the party in the arbitral proceedings were considered to occur very rarely in practice, whereas cases related to the incapacity of concluding the arbitration agreement were more frequent⁸⁹. As we have seen *supra*, the Convention leaves open the question of which law should determine the capacity of the parties, which should therefore be solved by means of the conflict of laws rules of the law of the forum. The most important examples of this form of incapacity concern those arbitration agreements in which one of the parties is a state or a public body⁹⁰. In these cases, a first preliminary question is to determine whether the state or the public body has the capacity to agree to arbitration: it may happen that, under the relevant law, those subjects may not be allowed to refer

⁸⁸ Cfr art 2(1)(b) of the Geneva Convention, which envisaged that enforcement of an award should be refused if the court was satisfied, *inter alia*, that the party against whom enforcement was sought, being under a legal incapacity, was not properly represented.

⁸⁹ A. J. van den Berg, *op. cit.*, p. 276

⁹⁰ There are no reported cases in which a state has invoked its incapacity to agree to arbitration in the context of enforcement of the award. However, there are cases in which the incapacity of the state was invoked in the context of enforcement of an arbitration agreement, which can nonetheless be quoted to illustrate how the principle of incapacity of the state has been interpreted by the courts. In the case *Société Tunisienne d'Electricité et de Gaz v. Société Entrepouse* (Court of First Instance of Tunis, 22 March 1976, YBCA, 1978, p. 283) the respondent, a Tunisian public company, had asserted that it was prohibited from resorting to arbitration under Tunisian law. The Tunisian court rejected this defense on the grounds that this prohibition, although existing at national level, should not apply in the case of international commercial arbitration. The court relied on French case law, according to which French public bodies may not resort to arbitration in domestic relations, but are bound by an arbitral clause in international contracts. A similar rationale has been followed by the Italian Supreme Court in a more recent case (Corte di Cassazione, 9 May 1996, no 4342, quoted by D. di Pietro and M. Platte, *op. cit.*, p. 140): <<legal persons of public law may, unless the parties have explicitly agreed otherwise, undoubtedly agree to arbitration, independently of domestic prohibitions, by expressing their consent and sharing in the international marketplace the conditions common to all operators>>.

their disputes to arbitration, or may only be allowed to have their dispute solved by arbitration upon formal permission to be given by a controlling state body⁹¹. This question depends in the first place on the law of the state concerned. However, sometimes it may also depend on either the law of the place where the state is sued or the international conventions to which the state has adhered.

Invalidity of the arbitration agreement

The second ground for refusal is that the arbitration agreement is invalid. As we have seen when dealing with the enforcement of the arbitration agreement, the most important problem in this respect is to determine under which law the invalidity of the arbitration agreement should be ascertained. We have also seen that the Convention envisages in art. V(1)(a) two criteria⁹² determining the law applicable to the arbitration agreement (choice of the parties and law where the award was made), but that the latter has in practice overshadowed the former. Here suffice it to say that the invalidity of the arbitration agreement is not always ascertained according to the criteria laid down in art V(1)(a). In other words, there are some cases of invalidity which fall outside the scope of this article and are consequently ascertained according to special criteria laid down in other provisions of the Convention. This is the case of the invalidity stemming from non-compliance with the written form requirement under art. II (which is the most frequently invoked cause of invalidity), non-arbitrability of the subject-matter (falling under art. V(2)(a) and to be ascertained according to the law of the country where enforcement is sought) and the composition of the arbitral tribunal and the arbitral procedure (falling under art. V(1)(d)). The only cases on which article V(a) may be relied seem to be in practice those concerned with the lack of consent (misrepresentation, duress, fraud, or undue influence).

⁹¹D. di Pietro and M. Platte, *op. cit.*, p. 138

⁹² The question of the law applicable to the arbitration agreement remained unsettled until the very end of the New York Conference. Some delegates thought that the Convention should specify the criteria according to which the law applicable to the validity of the arbitration agreement should be determined, while others maintained that this very controversial issue of private international law should be left to the courts applying their own conflict of laws rules. The Working Party dealing with this issue decided to adopt the latter view and proposed that art V(1)(a) should read: <<the arbitration agreement or the arbitral clause is not valid under the law applicable to it>>. The last day of the Conference the Dutch delegate made another oral proposal which was adopted by the Conference and became the present text of art V(1)(a). Cfr P. Contini, *op. cit.*, p. 300.

Lack of due process

Art. V(1)(b) envisages as a ground for refusal of enforcement the situation in which the party against whom the award is invoked was not given proper notice of the appointment of the arbitrator or of the arbitration proceedings, or was otherwise unable to present his case. This provision is essentially aimed at ensuring that the parties to an arbitration are given a minimum standard of fairness during the arbitral proceedings, i.e. what is commonly known as due process⁹³. The principle of due process constitutes a determining factor for the credibility of any form of dispute resolution and is widely accepted in most jurisdictions, although its actual features are largely affected by the existing differences among the various legal systems. Some jurisdictions, for example, recognize this principle at the constitutional level and leave to national courts the task to determine its actual content in every single case; others have adopted a more detailed regulation of the matter, providing indications as to how the principle at hand should be reflected on the conduction of the hearings. Accordingly, due process as conceived at the place of enforcement may substantially differ from that in force at the place of arbitration. This may in turn lead to a situation of inconsistency between the two jurisdictions involved and to unforeseeable outcomes of the arbitration. This is also the reason why the ground of violation of due process is one of the most frequently invoked defences against enforcement⁹⁴. Nevertheless, claims based on violation of due process have rarely been successful, on account of the restrictive interpretation adopted by the courts on this point. The narrow interpretation of the principle of due process in the field of international arbitration is premised on the idea that the latter should be given a higher degree of freedom as compared to national proceedings; consequently, a violation of domestic notions of due process does not necessarily constitute a violation of due process in a case where the award is foreign, since the principle of due process in international arbitration should be given homogeneous

⁹³D. di Pietro and M. Platte, *op. cit.*, p. 148

⁹⁴ Cfr P. Sanders, *Consolidated Commentary vols III and IV*, YBCA, IV, 1979, p. 248, who argues that the defence of violation of due process has been made by respondents in many cases for a “mere chicanery”. An example of how frivolous the defence grounded on violation of due process may be is represented by a case decided by the Court of First Instance of Zweibruecken. (Landgericht of Zweibruecken, 11 January 1978, YBCA, IV, 1979, p. 262). In this case, the German respondent had asserted that the letter of the claimant to the Secretary of the arbitration institution concerned was not a sufficient notice. The court rejected the claim, as it found that the letter contained sufficient description of the matter in dispute and the relief sought, so that with this letter the respondent could have known that arbitration had started. Moreover, the respondent had been requested three times by the secretary to appoint his arbitrator, which he had not done. Another example is a case decided by the Court of Appeal of Florence (Court of Appeal of Florence, October 8, 1977, YBCA, IV, 1979, p. 289), in which the Italian respondent asserted that he had not been informed in conformity with Section 39 of the Arbitration Rules of the American Arbitration Association (AAA). The court rejected his claim as it found that from the facts of the case it had emerged that the respondent had refused explicitly to participate in the arbitration and the AAA had continued to keep him informed of the progress of the arbitration.

meaning, aimed at preserving the core of the fundamental rights of the parties, that is to say an “internationally neutral” interpretation.⁹⁵

The concept of due process is developed by the Convention with reference to two different aspects of this principle. The first (proper notice) refers to the right of the parties to be given proper notice of the commencement of the arbitral proceedings. The second (inability to present the case) refers to any serious irregularity in the arbitral proceedings which may result in the violation of the right of the parties to be given equal opportunity to be heard. An interesting example of a decision referring to the first aspect of the principle of due process is a case decided by the Mexican Court of Appeal⁹⁶. In this case, the respondents had asserted that they had not been given proper notice of the arbitration proceedings, since all notices (including summons) had been served by mail. Although service by mail was envisaged by the Arbitration Rules of the International Chamber of Commerce and the American Arbitration Association, they argued that it violated Mexican law, under which the first notice of summons should be served personally upon a respondent. The Court of Appeal rejected the claim on the grounds that the parties, by inserting an arbitral clause in the contract, had tacitly waived the formalities established by Mexican procedural legislation and submitted themselves to the Rules of the American Arbitration Association, which permit notices by mail. An example of a decision referring to the second aspect of the principle of due process (equal opportunity to present the case) is represented by a decision issued by the High Court of Hong Kong⁹⁷. The case concerned an arbitration in which three experts had been appointed by the tribunal in order to undertake an inspection of the equipment which constituted the object of the dispute. The expert representing one of the parties was not informed of the inspection and therefore did not attend the session of discovery. The court held that this amounted to a violation of the party's right to present his case: the defendant's expert did not have the opportunity to hearing what the plaintiff's expert said during the inspection and hence he was not able to present his view of the facts in the inspection's report.

Extra petita and ultra petita claims

⁹⁵ A. J. van den Berg, *op. cit.*, p. 297. Cfr the *RAKTA* case (*Parsons & Whittemore Overseas Co Inc v Societe Generale de l'Industrie du Papier RAKTA*, 508 F.2d 969 975 2d Cir. 1974), where the court recognised that the arbitral proceedings differ from those in litigation and that it would be inappropriate to import the entire panoply of due process standards that govern litigation.

⁹⁶ *Malden Mills Inc (U.S.) v. Hilaturas Lourdes S.A.*, Mexican Court of Appeal, 1977, YBCA, IV, 1979, p. 302

⁹⁷ *Politek v. Hebei*, High Court of Hong Kong, 16 January 1998, YBCA, XXII, 1998, p. 666

Art. V(c) deals with cases where the arbitral tribunal has exceeded its authority, because it has decided on issues which either the parties did not intend to refer to arbitration (*extra petita* claims) or fall outside the scope of the arbitration agreement (*ultra petita* claims). The first case concerns claims not contemplated by the arbitration agreement and falling therefore outside the mandate granted by the parties to the arbitral tribunal. The second case concerns situations in which the arbitral tribunal, although deciding on an issue falling within the mandate given by the parties, has gone beyond what the parties themselves have requested to it.⁹⁸ Art. V(c) also provides for the possibility of a partial enforcement of an award containing *extra* or *ultra petita* claims, provided that the part in which the arbitrator has exceeded his authority can be separated from the rest. The rules on excess of authority have encountered very scarce application in practice: it is the least invoked ground of all the grounds for refusal of enforcement envisaged in article V. Moreover, in the few cases where this defence was made, it has always been dismissed⁹⁹. Also the provision concerning partial enforcement has rarely been applied¹⁰⁰.

Irregularity in the composition of the arbitral tribunal or the arbitral procedure

Art. V(d) states that the enforcing court may refuse recognition and enforcement of the award if the composition of the arbitral tribunal or the arbitral procedure was not in accordance with the agreement of the parties, or, failing such agreement, the law of the place where arbitration took place. This provision embodies a fundamental principle regulating the conduct of arbitral proceedings: the supremacy of party autonomy. The arbitral process is in the first place regulated by the agreement of the parties and only in its absence (or for the aspects not regulated by it) can the law of the place of arbitration be resorted to. It follows that if the parties have made an agreement on the composition of the arbitral tribunal and the arbitral procedure, according to art V(1)(d), the alleged irregularity of these matters has to be determined under that agreement alone. Failing such

⁹⁸D. di Pietro and M. Platte, *op. cit.*, p. 160

⁹⁹ An example is given by the *Fertilizer Corporation of India* case (*Fertilizer Corporation of India v IDI Management, Inc.* 517 F. Supp. 948 S.D. Ohio 1981), where the losing party contended, under art. V(1)(c) of the New York Convention, that an award of consequential damages exceeded the arbitrator's mandate because the contract clearly excluded consequential damages. After a careful review of the arbitral tribunal's decision, the court refused to overrule it, because it found it contained at least a <<barely colorable justification>> for the conclusion reached.

¹⁰⁰M. Rubino Sammartano, *op. cit.*, p. 957

agreement, or for the matters not regulated by it, the alleged irregularity of the arbitral procedure will be determined under the law of the country where the arbitration took place. Despite the supremacy of party autonomy, the generally accepted interpretation is that the agreement on the composition of the arbitral tribunal and the arbitral procedure must comply with the fundamental requirements of due process and that a violation thereof constitutes a ground for refusal of enforcement under art. V(1)(b) or V(2)(b). Finally, it should be mentioned that it rarely happens in practice that the arbitral procedure has not been conducted in accordance with the agreement of the parties. This is mainly because the latter usually refers to the arbitration rules of a specific arbitral institution and these rules in turn generally afford wide discretionary powers to the arbitral tribunal as to the conduct of the proceedings.

Award not yet binding or set aside

Art. V(1)(e) contains two distinct grounds for refusing enforcement. The first is the award which has not become binding, the second is the award which has been set aside or suspended. According to the first part of art V(1)(e), enforcement of the award may be refused if the respondent can prove that the award has not become binding on the parties. The term “binding” was heavily discussed during the *travaux préparatoires* and there is still no agreement both in case law and academic writings on its meaning. The Convention's legislative history indicates that this term was chosen in order to eliminate the system of the double *exequatur*, which was considered as one of the most serious hurdles to the enforcement of arbitral awards. In particular, the drafters wanted to abolish the leave for enforcement from the court in which the award was made, which was implied in the requirement of finality of the award provided for under the 1927 Geneva Convention¹⁰¹. This intent has been then confirmed in case law¹⁰². Although there is agreement on what the term “binding” does not mean (binding does not mean final), there is no uniform interpretation as to what it

¹⁰¹ Cfr UN DOC E/CONF.26/SR.17 Summary Records :<<The Working Party agreed that the award should not be enforced if, under the applicable arbitral rules, it was still subject to an appeal which had suspensive effect , but at the same time felt it would be unrealistic to delay enforcement of an award until all the time limits provided for by the statutes had expired or until all the possible means of recourse, including those which normally do not have a suspensive effect, have been exhausted and the award had become “final”>>.

¹⁰² Cfr e.g. Tribunal de Grande Instance of Strasbourg, October 9, 1970, YBCA, II, 1977, p. 244, in which the court rejected the objection for the enforcement of an award made in Germany that no leave for enforcement had been issued in that country. The court held that, since the Convention has done away with the system of the double *exequatur*, it does not require a leave for enforcement from the country in which the award was made.

actually means. In particular, there is no agreement on the question at which moment an award can be considered to have become binding under art. V(1)(e) of the Convention. The most common interpretation is that this question should be determined under the law governing the award. Yet, this view presents two serious drawbacks. The first is that by leaving the interpretation of the term binding to the various national laws, the requirement of the double *exequatur* risks to be *de facto* reintroduced under the enforcement regime of the Convention, if the relevant national law so provides. The second is that national laws are often unclear as to the moment in which an award becomes binding, with the consequence that there may often be diverging opinions on the binding character of an award even within a single national law¹⁰³. Accordingly, some author has claimed for an autonomous interpretation of the term. Relying on the legislative history related to this term¹⁰⁴, it is suggested that an award should be considered binding when it is no longer open to an appeal on the merits. Although this interpretation still implies that the relevant national law has to be relied on in order to ascertain whether the award is open to a recourse on the merits, it exempts the interpreter from difficult inquiries under that law, such as that of determining the moment in which the award becomes binding or that of finding an equivalent of the term “binding” under that law. This autonomous interpretation has so far found limited application by the courts. An often quoted example is the already mentioned *Gotaverken* case: in interpreting the implementing national provision of art. V(1)(e) of the Convention, the Swedish Supreme Court observed that <<the legislative history states unequivocally that the possibility of an action for setting aside the award shall not mean that the award is not to be considered as not being binding. A case in which a foreign award is not binding is when its merits are open to appeal to a higher jurisdiction>>.

The second part of art V(1)(e) envisages as ground for refusal that the award has been set aside or suspended by a competent authority of the country in which, or under the law of which, the award was made. In order to understand this provision, one has to remind that the Convention does not regulate the validity of arbitral awards: it only deals with the enforcement of foreign arbitral awards and the grounds for refusing enforcement. Accordingly, it does not apply in cases where a party

¹⁰³ This has happened for example with the enforcement of German awards. The Court of Strasbourg (Tribunal de Grande Instance of Strasbourg, October 9, 1970, YBCA, II, 1977, p. 244,) has considered an award binding when it had been deposited with a German court, whereas the Court of Basle (Appellationsgericht of the Canton of Basle, September 6, 1968, YBCA, I, 1976, p. 200) held that a German award was binding pursuant to a declaration of enforceability issued by a German court.

¹⁰⁴ At the New York Conference of 1958 the Dutch delegate tried to introduce the distinction between ordinary and extraordinary means of recourse in order to define the meaning of the term “binding”: an award had not become binding, if it was still open to ordinary means of recourse, i.e. those means implying a second decision on the merits of the dispute. On this reading, if an award was still open to the possibility of another decision on the merits, it was not to be considered as binding, whereas if it was open to other, extraordinary means of recourse (i.e. those not involving a decision on the merits but reserved for procedural irregularities affecting the decision), this would not prevent the award from becoming binding. This proposal was not accepted because this distinction was unknown in many common law countries, which would have thus had difficulties in determining the exact meaning of ordinary and extraordinary means of recourse.

seeks to set aside - as opposed to resist enforcement of - a foreign arbitral award. Any challenge to the validity of an award made in a given state must be determined in the courts of that state and in accordance with the *lex loci arbitri*, that is the law of arbitration of that particular state.¹⁰⁵ This principle is confirmed in article V(1)(e), which implies that it is the court of the country in which, or under the law of which, the award was made that has the exclusive competence to decide on the action for setting aside the award. The grounds for setting aside the award are therefore a matter of municipal law, with the consequence that they may vary considerably from one jurisdiction to another. This is considered one of the most serious indirect obstacles undermining the degree of uniformity established by the Convention in the field of award enforcement. The feared effect of this ground for refusal is that if enforcement is denied every time an award has been set aside in the country of origin on all grounds contained in the arbitration law of that country, the grounds for refusal of enforcement under the Convention may indirectly be extended *ad libitum* to include all kinds of particularities of the arbitration law of the country of origin. The solution to this problem has been generally identified in the convergence between the grounds for setting aside in the country of origin and the grounds for refusal of enforcement under the Convention: a party should only be permitted to institute proceedings for setting aside an award if the enforcement of such award could be refused abroad on the basis of article V of the New York Convention¹⁰⁶.

A partial result in this sense has been achieved by the above-mentioned 1961 European Convention on International Commercial Arbitration. According to art. IX(2) of the European Convention, in relations between states that are also party to the New York Convention, the setting aside of awards in the country of origin does not *per se* constitute a ground for refusal of enforcement. Only the grounds mentioned in art. IX(2) of the European Convention can constitute valid grounds for refusal of enforcement under art V(1)(e) of the New York Convention. The grounds mentioned in art. IX(2) of the European Convention mirror exactly the grounds for refusal of enforcement envisaged in art. V(1)(a)-(d) of the New York Convention. On the one hand, this solution has the advantage of excluding that the limited grounds for refusal of enforcement envisaged by the New York Convention may be extended by the particularities for setting aside contained in the various national laws. On the other hand, it has the disadvantage of creating an unequal situation in the field of the enforcement of the award. Where the enforcement is sought in the country of origin, it will be denied in all those cases in which the award has been set aside in that country; whereas, where the enforcement of the same award is sought in another contracting state, the enforcement will be denied only if the award has been set aside on the limited grounds

¹⁰⁵ J. Lookofsky and K. Hertz, *op. cit.*, pp. 785-6

¹⁰⁶ A. Bucher, *Court Intervention in Arbitration*, in R. B. Lillich and C. N. Brower (eds), *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?*, Transnational Publishers, 1994, p. 39

envisaged by the Convention. Accordingly, the best solution to the problem would have been if the European Convention had provided that the award could be set aside in the country of origin only on the grounds listed in the New York Convention as grounds for refusing enforcement . As we have seen above¹⁰⁷, this result is on the way of being achieved as the provisions concerning the setting aside envisaged by the Model Law on International Commercial Arbitration are increasingly adopted in the various national arbitration laws. On the other hand, the scope of this ground for refusal is frequently limited by article VII of the Convention, which allows a party seeking enforcement to base his request on national law instead of the Convention's provisions. Accordingly, even where an award has been set aside in the place where it was made, enforcement may still be possible by invoking art VII of the Convention. This is the solution which was adopted in the leading *Chromalloy* case¹⁰⁸, in which it was held that an award may be enforced under the law of the place of enforcement, if, under such law, the award would have been enforceable as a domestic award notwithstanding the existence of a defence under article V.

Art. VI of the Convention provides that if an application for the setting aside or suspension of the award has been made to a competent authority at the place of arbitration, the enforcing court may adjourn the decision on the enforcement of the award. The purpose of this provision is to avoid that the possibility of applying for the setting aside or suspension of an award turns into a dilatory tactic on which the opposing party may rely in order to delay the enforcement of the award. Contrary to what provided for in the Geneva Convention, in which the mere application for the setting aside of the award in the country of origin was a sufficient ground to refuse enforcement of the award in other contracting states, according to art. VI of the New York Convention the mere application for the suspension or setting aside can possibly lead only to the adjournment of the decision on the enforcement. Art. V(1)(e) of the New York Convention establishes that enforcement may be refused only if the award has been effectively suspended or set aside in the country of origin. Moreover, the enforcing court has discretionary power as to whether adjourn its decision: art. VI expressly states that it may adjourn the decision <<if it considers it proper>>. It may be observed that the court will adjourn its decision on enforcement if it is *prima facie* convinced that the application for the setting aside or suspension of the award in the country of origin is not made on account of dilatory tactics, but is based on reasonable grounds. Finally, art. VI also provides that the enforcing court may, on the application of the party claiming enforcement, order the other party (i.e. the one which has applied for setting aside or suspension) to give suitable security.

¹⁰⁷ See *supra* p. 218.

¹⁰⁸ *Chromalloy Aeroservices v Arab Republic of Egypt*, 939 F Supp 907 (DDC 1996)

Grounds for refusal of enforcement *ex officio*

The concept of public policy

Art. V(2)(b) provides that recognition and enforcement of the award may be refused if the competent authority in the country where recognition and enforcement is sought finds that the recognition and enforcement of the award would be contrary to the public policy of that country. Public policy is a traditional ground for refusal of enforcement of foreign arbitral awards and judgments, as well as for the refusal to apply a foreign law: a public policy provision can be found in almost every treaty dealing with these matters.¹⁰⁹ Public policy is essentially the guardian of the fundamental moral convictions or policies of the forum¹¹⁰. Accordingly, public policy as ground for refusal of enforcement of arbitral awards, embodied in art. V(2)(a), is aimed at preventing that such awards collide with the basic morals and legal principles of the place where enforcement is sought¹¹¹. Although public policy is strongly rooted in the moral beliefs and policies of the various states, a uniform notion thereof is slowly emerging in the field of international commercial arbitration. This uniform notion is based on the distinction between domestic and international public policy: the former is aimed at confronting the laws of a given country with the beliefs and moral standards considered necessary for the attainment of a civilised way of living in that particular country at a certain period of time¹¹²; the latter, although also based on national law, deals with international relations, that is to say relations characterised by elements of extraneity with the local jurisdiction which implies the application of a foreign law.¹¹³ It follows that, in light of the different purposes public policy has with respect to domestic and international relations, what is considered to pertain to public policy in domestic relations does not necessarily pertain to public policy in international relations. The number of matters considered to fall under public policy in international cases is smaller than that in domestic cases: international public policy results in a more limited set of rules, representing the very basic beliefs of a particular country. Only that very

¹⁰⁹ A. J. van den Berg, *op. cit.*, p. 360

¹¹⁰ J. Lew, *Applicable Law in International Commercial Arbitration*, Oceana Publishing, 1978, p. 403

¹¹¹ D. di Pietro and M. Platte, *op. cit.*, p. 180

¹¹² D. di Pietro and M. Platte, *op. cit.*, p. 181

¹¹³ *Ibidem*

core of the principles of a country whose application is believed to be absolutely necessary belong to the notion of international public policy. The 2002 Recommendations of the International Law Association on Public Policy as a Bar to Enforcement of International Arbitral Awards are a further attempt to define a common and global approach to public policy¹¹⁴. The fundamental notion underlying the Recommendations is that an international commercial arbitration award must be upheld save exceptional circumstances, and such exceptional circumstances may in particular be found to exist if recognition and enforcement of the award is contrary to the international public policy of any state¹¹⁵, which includes: 1) fundamental principles pertaining to justice or morality that the state wishes to protect even when it is not directly concerned; 2) rules designed to serve the essential political, social or economic interests of the state, these being known as *loi de police*; 3) the duty of the state to respect its obligations toward other states or international organisations¹¹⁶. Nonetheless, in order to ascertain whether a given principle forming part of its legal system must be considered sufficiently fundamental to justify refusal to recognise or enforce an award, a court should take into account the international nature of the case and its connection with the legal system of the forum, as well as the existence of a consensus within the international community as regards the principle under consideration¹¹⁷. With respect to *lois de police*, the Recommendations suggest that a court should only refuse recognition or enforcement when this would manifestly disrupt the essential political, social or economic interests protected by the rule¹¹⁸.

The distinction between domestic and international public policy is found in numerous judicial decisions reported under the Convention: in *Fritz Scherk v Alberto Culver Co*¹¹⁹, the US Supreme Court stated that an international contract involves considerations and policies significantly different from contracts only dealing with domestic matters and that this aspect should be taken into account, when ascertaining the compliance of such contract with the public policy of the country. Accordingly, it held that although disputes arising out of securities transactions cannot be submitted to arbitration if the contract is domestic, disputes arising out of such transactions are arbitrable if the contract is international. The necessity of a narrow approach to the notion of public policy has been

¹¹⁴B. Hanotiau and O. Caprasse, *Public Policy in International Commercial Arbitration*, in E. Gaillard and D. di Pietro (eds), *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice*, cit. p. 796. The International Law Association Recommendations on the Application of Public Policy as a Ground for Refusing Recognition or Enforcement of International Arbitral Awards were adopted by ILA at its 70th Conference held in New Delhi on 2-6 April 2002. The text of the Recommendations is available online at www.ila-hq.org/download.cfm/docid/032880D5-46CE-4CB0-912A0B91832E11AF

¹¹⁵Recommendation 1(a) and (b)

¹¹⁶Recommendation 1(d)

¹¹⁷Recommendation 2(b)

¹¹⁸Recommendation 3(b)

¹¹⁹YBCA, I, 1976, p. 203

confirmed by many US courts in subsequent decisions¹²⁰. A similar approach is found in many other jurisdictions, such as Germany¹²¹ and Switzerland¹²². This explains why the public policy ground, although often invoked, is rarely successful¹²³. If we look at the few cases in which a public policy claim effectively led to refusal of enforcement, we find that for their most part they were based on provisions other than art V(2)(b) (namely arbitability and lack of due process), so that the latter appears a provision of residual application¹²⁴. Among successful public policy defences based on art. V(2)(b), are worth mentioning the cases in which the subject matter of the dispute was found illegal. An example is represented by the case *Soleimany v Soleimany*¹²⁵, where the English Court of Appeal was called upon to decide on the enforcement of an award which had expressly stated the illegal nature of the business undertaken by the parties. The Court of Appeal denied enforcement by stating that its main concern was to <<preserve the integrity of its process and to see that it is not abused. The parties cannot override that concern by private agreement. They cannot by procuring an arbitration conceal that they are seeking to enforce an illegal contract. Public policy will not allow it>>.

¹²⁰ In the *Rakta* case (*Parsons & Whittemore Overseas Co v. Societe Generale de l'Industrie du Papier (RAKTA)*, 508 F.2d 969 2d Cir. 1974), the United States Court of Appeals for the Second Circuit expressly stated that <<the Convention's public policy defence should be construed narrowly. Enforcement of foreign arbitral awards may be denied on this basis only where enforcement would violate the forum state's most basic notions of morality and justice>>. In the same decision it also observed that <<in equating national policy with United States public policy, the appellant quite plainly misses the mark. To read the public policy defense as a parochial device protective of national policy interests would seriously undermine the Convention's utility. Rather, a circumscribed public policy doctrine was contemplated by the Convention's framers and every indication is that the United States, in acceding to the Convention, meant to subscribe to this supranational emphasis>>

¹²¹ In Germany courts have repeatedly held that in the case of a foreign award not every infringement of mandatory provisions of German law constitutes a violation of public policy; they accept a violation of public policy in extreme cases only. Cfr e.g. Oberlandesgericht of Hamburg, April 3 1975, YBCA, II, 1977, p. 241

¹²² Cfr *Lazarous Ltd v Chrome Resources S.A.*, September 17, 1976, YBCA, III, 1978, p. 311, in which the Court of Appeal of the Canton Geneva held that <<the extent of the exception of Swiss public order is more restrictive in respect of the recognition and enforcement of foreign awards than in respect of the application of foreign law by Swiss courts. Accordingly, this limitation means that an irregularity in the procedure does not necessarily entail the refusal of enforcement of the foreign arbitral award, even if such an irregularity would imply the setting aside of an award made in Switzerland. There must be a violation of fundamental principles of the Swiss legal order, hurting intolerably the feeling of justice... this exception of public order should not be twisted in order to avoid application of international conventions which are signed by Switzerland and which form part of Swiss law>>.

¹²³ In 1981 van den Berg estimated that out of some 140 decisions reported under the Convention, enforcement of an arbitration agreement and arbitral award was refused only in five decisions on account of public policy. Cfr also D. P. Stewart, *National Enforcement of Arbitral Awards under Treaties and Conventions*, cit, p. 189: <<public policy appears to have been the most frequently asserted defense, it has also been the least successful one, at least in U.S. Courts, where it has been given an appropriately narrow interpretation>>.

¹²⁴ A. J. Van den Berg, *op. cit*, p. 376

¹²⁵ *Soleimany v Soleimany*, Court of Appeal of England and Wales, 19 February 1998, All ER, 1999, 3, p. 847

The concept of arbitrability

Art. V(2)(a) provides that a court may refuse enforcement of an award if the dispute is not capable of settlement by arbitration under its own law. The capability of a dispute of being settled by arbitration is commonly referred to as arbitrability. It is also generally accepted that arbitrability forms part of the general concept of public policy and that therefore art. V(2)(a) can be considered superfluous¹²⁶. As part of the public policy of a given country, arbitrability reflects special national interests in referring the resolution of a given dispute to courts rather than to arbitral tribunals. Traditional examples of non-arbitrable subject matters are disputes related to anti-trust law, intellectual property, family law, labour law, bankruptcy law and criminal law. The various subject-matters differ, however, from country to country. Despite this divergence, also for the question of arbitrability courts generally rely on the distinction between domestic and international public policy: they often recognise that matters which might be not arbitrable in a domestic context because of national public policy may be capable of settlement by arbitration in an international context. The result of this tendency is that arbitral tribunals and courts are more often inclined to view an international matter as arbitrable than they would have been ten or fifteen years ago.¹²⁷ Accordingly, when it comes to international commercial arbitration, the range of matters which are non-arbitrable in the different countries is shrinking as the courts' pro-arbitration bias increases. This does not exempt a party from carefully checking the arbitrability of the dispute before seeking enforcement, since arbitrability is still one of the most frequently and most successfully invoked defences.

¹²⁶ The reason why the Convention envisages arbitrability as a separate ground for refusal is historical: as it was a distinct ground in the 1927 Geneva convention, the 1953 ICC Draft Convention, and the 1955 ECOSOC Draft Convention, it was decided without discussion to keep the question of non-arbitrable subject-matters as a separate defence also in the New York Convention

¹²⁷ A. Kirry, *Arbitrability: Current Trends in Europe*, Arb Int, 1996, 12, 4, p. 373. The most quoted example illustrating this tendency is the US case *Mitsubishi (Mitsubishi Motors Corporation v. Soler Chrysler-Plymouth Inc*, 473 U.S. 614, 105 S.Ct.3346, 87 L.ed.2d 444, 1985), which reversed a tradition of reserving anti-trust disputes to the exclusive jurisdiction of the courts. In deciding that anti-trust issues arising out of international contracts were arbitrable under the Federal Arbitration Act, the Supreme Court argued that <<concerns of international comity, respect for the capacities of foreign and transnational tribunals, and sensitivity to the need of the international commercial system for predictability in the resolution of disputes require that we enforce the parties' agreement, even assuming that a contrary result would be forthcoming in a domestic context>>. Yet, at the end of its decision, the Supreme Court added the following sibylline *caveat*, which has been termed the "second look" doctrine: <<The national courts of the United States will have the opportunity at the award-enforcement state (the case at issue regarded the enforcement of an arbitration agreement) to ensure that the legitimate interest in the enforcement of antitrust laws has been addressed>>.

Towards a new New York Convention?

In 1998, when the 40th anniversary of the New York Convention was celebrated, there was still wide agreement that no formal emendment of this treaty was needed, since any problem related to its interpretation and updating to current arbitration practice could be solved through less drastic means than a new convention. In 2008, at the ICCA Dublin Congress held to celebrate the Convention's 50th anniversary, two different schools of thought have emerged on the issue of the need for a modification of the New York Convention. The first school of thought, still prevailing, relies on the ability of bending the Convention's provisions by creative interpretation and on the spill-over effect of such creative interpretation through soft law instruments¹²⁸. In 2006, this school of thought has given rise to an informal modification of the New Convention by means of the “Recommendation regarding the interpretation of articles II(2) and VII(1) of the Convention”, which will be analysed in the following section of this chapter. The second school of thought claims that, given the ample number of modifications required to overcome the problems related to the New Convention, an entirely new treaty is needed. The most authoritative representative of this school of thought is van den Berg, who, at the ICCA Dublin Congress on 10 June 2008, has submitted his proposal for a new New York Convention (the so-called Dublin Convention). Articles 1 to 7 of this draft Convention deal with matters that are similar to those contained in article I to VII of the actual New York Convention and the object and purpose of the draft Convention mirror those of the New York Convention¹²⁹. Nonetheless, the Dublin Convention contains a considerable number of additional and revised provisions, which are aimed at modernising and filling the gaps of the New York Convention. For example, the Convention's scope of application is much more clearly defined: the title of the draft Convention points out that it also covers the enforcement of the arbitration agreement; besides, it no longer refers to the enforcement of “foreign” arbitral awards, but rather to the “international” enforcement of arbitral awards¹³⁰. This is because the Draft Convention's applicability is dependent on whether the agreement or award is international according to the criteria set forth in article 1(1), which is a condensed version of the definition set forth in article 1 of the UNCITRAL Model Law¹³¹. As a result, the notions of “foreign” and “non-

¹²⁸A. Uzelac, *Written Form of the Arbitration Agreement towards a Revision of the UNCITRAL Model Law*, Croat. Arb. Yearb., 2005, 12, p. 121 available online at alanuzelac.from.hr (July 2009)

¹²⁹A. J. Van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards – Explanatory Note- 26 May 2008*, pars 5-6, available online at arbitration-icca.org/articles.html (July 2009)

¹³⁰The title of the draft Convention is “Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards”

¹³¹Art 1 of the draft Convention reads: << Field of Application. 1. This Convention applies to the enforcement of an arbitration agreement if: (a) the parties to the arbitration agreement have, at the time of the conclusion of that

domestic” awards are deleted. Another important modification is the abolition of the written form requirement for the arbitration agreement, which will be dealt with in the following section. Equally important are the emendments to art V concerning the grounds for refusal of enforcement. Article 5 of the draft Convention envisages that the grounds for refusal of enforcement of an arbitral award are exhaustive and introduces the principle that enforcement shall be refused “in manifest cases only”¹³²; this formulation excludes the existence of a residual discretion upon the enforcing court to enforce the award, even if grounds for refusals under the Convention are fulfilled¹³³. Moreover, the new list of grounds for refusals often constitutes an opportune simplification and offers a solution to several issues which have emerged in practice. For instance, ground a) refers to an invalid arbitration agreement under the law of the country where the award was made¹³⁴ and therefore solves the problem of the law determining the incapacity of the parties and the invalidity of the arbitration agreement¹³⁵; ground b) modernises the language referring to due process, by mirroring the corresponding provision of the UNCITRAL Model Law¹³⁶; ground c) on excess of authority removes the unclear language of the current New York Convention which refers to a “difference”, “terms of submission”, “scope of the submission”¹³⁷; ground f) replaces the misleading term “ non-binding award” with the clearer expression “ award not subject to appeal on the merits before an arbitral appeal tribunal or a court in the country where the award was made” and deletes the current Convention’s reference to “suspended” awards in its art. v(1)(e) because its meaning is unclear¹³⁸; ground g) establishes the principle of the convergence between the grounds for setting aside in the

agreement, their place of business or residence in different states; or (b) the subject matter of the arbitration agreement relates to more than one state. 2. . This Convention applies also to the enforcement of an arbitral award based on an arbitration agreement referred to in paragraph 1>>.

¹³²Art. 5 Draft Convention reads: << 5 Grounds for Refusal of Enforcement.1. enforcement of an arbitral award shall not be refused on any ground other than the grounds expressly set forth in this article. 2. enforcement shall be refused on the grounds set forth in this article in manifest cases only.

¹³³A. J. Van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards – Explanatory Note- 26 May 2008*, pars. 72-73

¹³⁴Art. 5(a) draft Convention provides that enforcement of an arbitral award shall be refused if << there is no valid arbitration agreement under the law of the country where the award was made>>

¹³⁵A. J. Van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards – Explanatory Note- 26 May 2008*, par. 77

¹³⁶Art. 5(b) draft Convention provides that enforcement of an arbitral award shall be refused if <<the party against whom the award is invoked was not treated with equality or was not given a reasonable opportunity of presenting its case>>

¹³⁷Art. 5(c) draft Convention provides that enforcement of an arbitral award shall be refused if << the relief granted in the award is more than, or different from, the relief sought in the arbitration and such relief cannot be severed from the relief sought and granted>>

¹³⁸Art. 5(f) draft Convention provides that enforcement of an arbitral award shall be refused if <<the award is subject to appeal on the merits before an arbitral appeal tribunal or a court in the country where the award was made>>

country of origin and the grounds for refusal of enforcement under the Convention¹³⁹; ground h) narrows down the notion of “public policy” to that of “international public policy”¹⁴⁰.

As we will see in the following section, UNCITRAL experts have mostly drawn a sceptical note on the opportunity of carrying out a formal modification of the New York Convention through the drafting of an additional Protocol, let alone of an entirely new treaty. Nonetheless, if on the one hand persuading the judiciary to a more liberal interpretation through soft law instruments may be easier than embarking upon the drafting and ratification of a new New York Convention, on the other hand such work of persuasion may be more effective with a simple, user -friendly text than with a 50-year-old complex, and at times confusing, text¹⁴¹.

¹³⁹Art. 5(g) draft Convention provides that enforcement of an arbitral award shall be refused if <<the award has been set aside by the court in the country where the award was made on grounds equivalent to grounds (a) to (e) of this paragraph>>

¹⁴⁰Art. 5(h) draft Convention provides that enforcement of an arbitral award shall be refused if << enforcement of the award would violate international public policy as prevailing in the country where enforcement is sought>>.

¹⁴¹Q&A with Albert van den Berg, *Global Arbitration Review*, 2008, 3, 3, p. 21, available online at arbitration-icca.org/articles.html (July 2009).

SECTION II: THE REVISION OF THE WRITTEN FORM REQUIREMENT OF THE ARBITRATION AGREEMENT UNDER ART II(2) OF THE NEW YORK CONVENTION

The written form requirement under art. II of the Convention

The written form requirement imposed by art. II New York Convention has traditionally been considered to serve the “cautionary” purpose of making the parties aware of the fact that, by agreeing on arbitration, they oust the jurisdiction of the otherwise competent domestic courts¹. In concluding an arbitration agreement, the parties decide to relinquish the right to have their dispute solved judicially and, since the right of access to court is a fundamental right of every citizen in a civilized state, the written form requirement is an essential means of protection alerting the parties to the special significance of the arbitration agreement and urging them to proper consideration before consent to the agreement is given².

In the past 50 years, art. II has proven to be one of the most problematic provisions of the Convention and the only one which has been formally revised by UNCITRAL and made the subject of further regulation. The issue whether the arbitration agreement complies with the writing requirement under art. II of the Convention represents a potential threat to the arbitral process at every stage³. In particular, the issue is likely to arise where a party seeks to renege on his agreement to arbitrate and may therefore commence litigation on the grounds that, by reason of its form, the arbitration agreement is null and void. By the same token, a question as to the formal validity of an arbitration clause or agreement might impede the initial appointment of an arbitrator and even if a tribunal is constituted, the issue may be raised as a ground for contesting the tribunal's jurisdiction. At the conclusion of the arbitral process, the issue may be put forward as a ground for setting aside the award and at the stage of enforcement the issue may be raised pursuant to art. V(1)(a)⁴ as a ground for resisting recognition and enforcement of the award.

¹K. P. Berger, *Private Dispute Resolution in International Business*, Kluwer, 2006, p. 402.

²T. Landau and S. Moolan, *Article II and the Requirement of Form*, in E. Gaillard and D. di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice*, Cameron May Publisher, 2008, p. 189 and 219.

³T. Landau and S. Moolan, *Article II and the Requirement of Form*, cit., p. 201

Problematic aspects of art II of the Convention

art. II(2) defines what is meant by “agreement in writing” under the Convention. First, it clarifies that the writing requirement may be complied with either by a clause in the contract or a separate agreement to arbitrate (the so-called arbitration or submission agreement); then, it envisages two alternative requirements of written form: the agreement to arbitrate or the arbitration clause must be either signed by all parties, or contained in an exchange of documents which may consist in letters or telegrams. The formulation of these requirements raises four orders of interpretation problems. A first group is related to the literal interpretation of this provision: does the signature requirement apply only to the submission agreement or also to the contract containing the arbitration clause? Does the signature requirement also apply to the exchange of letters or telegrams?⁵ There have been conflicting decisions not only in the various countries, but also among different courts within the same country. For example, the US. Fifth Circuit Court of Appeals has stated that only the separate agreement must be signed, and not the contract containing the arbitration clause⁶; on the other hand, the U.S. Second and Third Circuits have disagreed with this interpretation, claiming that the signature requirement applies to both⁷. With respect to the exchange of letters and telegrams, the

⁴Art. V(1)(a) envisages as a ground for resisting recognition and enforcement of the award the invalidity of the agreement referred to in art II and lays down two criteria determining the law applicable to the arbitration agreement (choice of the parties and law where the award was made). Nonetheless, no court has doubted that matters regarding the form of the arbitration agreement are not to be determined under the law governing the arbitration agreement, but under the requirements of art. II(2). In other words, the expression “the agreement referred to in article II” in ground (a) of art. V(1) implies that the lack of the written form of the arbitration agreement as required by art. II(2) constitutes a ground for refusal of enforcement of an arbitral award. A. J. van den Berg, *The New York Convention of 1958: an Overview*, in E. Gaillard and D. di Pietro, *Enforcement of Arbitration Agreements and International Arbitral Awards: the New York Convention in Practice*, cit., p. 57

⁵M. L. Moses, *The Principles and Practice of International Commercial Arbitration*, Cambridge University Press, 2008, p. 20.

⁶*Sphere Drake Ins. PLC v. Marine Towing*, 16 F. 3d 666, 667-69, 1994. The court held that the definition of “agreement in writing” under art II(2) of the Convention included either : (1) an arbitral clause in a contract or (2) an arbitration agreement, (2a) signed by the parties or (2b) contained in an exchange of letters or telegrams. Thus, an arbitral clause in a contract was sufficient to comply with the Convention's written requirement, because an “agreement in writing” had not necessarily to be either signed by the parties or contained in an exchange of letters or telegrams, as long as the court was otherwise able to find an arbitral clause in a contract

⁷*Kahn Lucas Lancaster, Inc. v. Lark International Ltd*, 186 F. 3d 210, 217-18 (2d Cir. 1999). The court expressly rejected the view expressed by the Fifth Circuit Court in *Sphere Drake*. It held that the definition of “agreement in writing” in the Convention required that such an agreement, whether it be an arbitration agreement or an arbitral clause in a contract, be signed by the parties or contained in a series of letters or telegrams. It essentially relied on two arguments. The first was that the grammatical structure of the provision contained in art. II(2) was of the type “A or B, with C” and therefore the comma immediately preceeding the expression “signed by the parties or contained in an

Swiss Federal Tribunal has held that, if the parties expressed their intention to enter into an arbitration agreement by an exchange of documents, signatures were not necessary⁸. Similarly, the U.S. Third Circuit has held that the arbitral agreement may be unsigned if it is exchanged in a series of letters⁹. It is generally the rule today in most jurisdictions that both the contract containing the arbitration clause or the submission agreement must be signed, but there is no signature requirement for the exchange of documents¹⁰.

A second group of problems stem from the fact that the writing requirement under art II(2) seems to have been outgrown by advances in technology which have taken place since 1958. The emergence of electronic means of communication renders the reference to “letters” and “telegrams” completely obsolete: relying on a strict interpretation of art. II(2), an arbitration agreement concluded for instance by exchange of electronic mail would not be deemed to comply with the writing requirement envisaged by the Convention. Nonetheless, this particular aspect of art. II(2) does not appear to have given rise to many difficulties, since most courts have accepted that the reference to letters and telegrams must be interpreted in the light of developing technologies: hence, it has been held that telexes should be assimilated with telegrams and that both the terms “letters” and “telegrams” should include other forms of written communications regularly used to conduct commerce in the various signatory nations¹¹.

exchange of letters or telegrams” (C) suggested that this expression was meant to apply to both elements of the series “an arbitral clause in a contract (A) or an arbitration agreement (B)”. The second was that the plain language of the other working-language versions of the Convention compelled the conclusion that, in order to be enforceable under the Convention, both an arbitral clause in a contract and an arbitration agreement must be either signed or exchanged: in the French and Spanish- language versions, the word for “signed” appeared in the plural form, “*signés*” and “*firmados*” respectively. Of course, with respect to an arbitral clause in a contract, the clause itself does not have to be separately signed: it is sufficient for the parties to sign the contract as a whole.

⁸*Compagnie de Navigation et Transports S.A. v. MSC (Mediterranean Shipping Company) S.A.*, Swiss Federal Tribunal, 16 January 1995, YBCA, XXI, 1996

⁹*Standard Bent Glass Corp. v. Glassrobots OY*, 333 F. 3d 440, 449, 2003

¹⁰M.L. Moses, *op. cit.*, p. 21; A. Redfern and M. Hunter, *Law and Practice of International Commercial Arbitration*, Sweet and Maxwell, 1993, p. 135. As far as the signature requirement in case of exchange of letters is concerned, see e.g. Obergericht of Basle, 3 June 1971, YBCA, IV, 1979, p. 199 which stated that a written agreement exists not only where letters signed by the parties can be produced, but also when a written demonstration of both parties' agreement can be submitted: if the New York Convention had required a signature in the case of letters, then it would have said so expressly. Likewise, the Italian Corte di Cassazione in *Niserocchi v. Soc. Agnesi* (13 December 1971, YBCA, 1976, I, p. 190) : <<whenever the form of correspondence used does not permit personal signature of the original which is received by the other party and, it seems, even in cases where the agreement has taken place by exchange of letters, either one or both of which do not carry a personal signature, the requirement of the written form must be considered to have been met inasmuch as it may be ascertained in practice in some other way>>.

¹¹*Chloe Z. Fishing Co, Inc v. Odissey Re (London) Ltd*, 109 F. Supp. 2D 1236 (S.D. Cal. 2000). Similarly, the Court of Appeal of Geneva (*Carbomin S.A. (Switz.) v. Ekton Corp. (Pan.)*), 14 April 1983, YBCA, XII, 1987, p. 502) stated that art. II(2) envisages in a general way the transmission by telecommunication of messages which are reproduced in a lasting format. However, courts have occasionally relied on a narrow interpretation of art II(2) of the NYC: in a decision of the Hålogaland Court of Appeal (Norway) of 16 August 1999 (Stockholm Arb. Rep., 1992, 2, p. 121), it was held that an exchange of email messages does not satisfy the writing requirement of Article II(2) of the Convention, since it failed to meet the basic requirements of legal protection set up by the Convention itself.

The third order of problems arise because the writing requirement is out of step with commercial reality, since it fails to take into consideration a wide range of ways in which arbitration agreements are often concluded. Both requirements of signature and exchange seem to exclude any contract that has been drafted in a written text or offer, but has been accepted in some way other than in writing, for example, tacitly, orally, by performance, or by conduct. This is for example the view of the Italian Corte di Cassazione, Italy being the country with the largest amount of case law under the New York Convention, frequently concerning issues of form¹². Moreover, relying on the notion that there must be a mutual agreement to arbitrate, either by signature or by exchange of documents, courts have generally ruled out oral arbitration agreements, even if confirmed by the other party in writing¹³, or even if both parties subsequently appeared before the arbitrator¹⁴, tacit acceptance¹⁵ or performance of the contract¹⁶. By contrast, in some cases courts have recognised an arbitration agreement in the absence of written form, based on the conduct of the parties, either by reference to domestic contract law principles¹⁷, or by considering that the lack of written form was cured by participation in arbitration without objection¹⁸.

Particularly relevant is also the incorporation of the arbitration clause contained in general contract conditions by a reference made in the main contract. In this case, the most important issue is to establish which kind of reference is needed to satisfy the writing requirement under the Convention, i.e. whether a specific mention of the arbitration clause contained in the general contract conditions is needed, or a general reference to the standard terms without specifically mentioning the

¹²W.L. Craig, W.W. Park, J. Paulsson, *International Chamber of Commerce Arbitration*, Oceana, 2000, p. 58 in which it is observed that 146 Italian cases dealing with the New York Convention have been summarised in the first 22 volumes of the Yearbook of Commercial Arbitration from 1976 to 1997. For example, in *Marc Rich & Co. AG v. Società Italiana Impianti* (25 January 1991, YBCA, 1992, XVII, p. 554) the Court considered as not enforceable, in the absence of written acceptance, an arbitration clause contained in a fax which was sent to a party but was not answered in writing. In *Robobar Ltd v. Finncold SAS* (28 October 1993, YBCA, XX, 1995, p. 739), a purchase confirmation sent by a party to the other contained an arbitration clause. The Court regarded such arbitration clause as invalid on the grounds that art II NYC recognised as valid an arbitration clause contained in a document signed by the parties or in an exchange of letters or telegrams, and there was no doubt that none of these formalities had been met in the case at issue, since the clause was only contained in the purchase confirmation which the other party did not seem to have agreed to by letter or telegram.

¹³For example, in *Universal Peace Shipping Enterprise SA v. Montedipe Spa* (28 March 1991, YBCA, 1992, XVII, p. 562), the Italian Corte di Cassazione held that an oral contract for sale and a bill of lading which included an arbitration clause sent by one party but not signed did not satisfy the requirement of art. II(2) of the NYC.

¹⁴OLG Duesseldorf, 1971, YBCA, II, 1977, p. 237.

¹⁵OLG Rostock, 22 November 2001, (1 Sch 03/2000)

¹⁶*Robobar Limited (UK) v. Finncold sas (Italy)* 28 October 1993, YBCA, XX, 1995, p. 739.

¹⁷United States, Court of Appeals, Seventh Circuit, *Mary D. Slaney (US) v. International Amateur Athletic Federation (Monaco)*, 27 March 2001, YBCA, XXVI, 2001, p. 1091, where the court stated that non-signatories to an arbitration agreement might nevertheless be bound according to ordinary principles of contract and agency, including estoppel.

¹⁸Court of Appeal of Athens, *Greek Company v. FR German Company*, Decision No. 4458, 1984, YBCA, XIV, 1989, p. 638, where the lack of written form was cured by participation in arbitration without objection; to reach this conclusion, the court applied the domestic law governing the arbitration proceedings (without referring to article VII(1) of the New York Convention)

arbitration clause contained therein will suffice¹⁹. The relevant case law seems to have followed the test that the party against which the arbitration clause is invoked must be able to check the existence of such a clause in the standard terms²⁰. Accordingly, although it is not necessary that standard terms shall be physically attached to the main contract, a reference clause is generally needed in the latter, in which specific attention is called for the arbitration clause contained in the standard terms²¹ (e.g. “this contract is governed by the general conditions, including the arbitration clause contained therein”): in this way, the other party is made aware of the existence of an arbitration clause and therefore can be considered to be able to check it²². If however the parties have a long standing business relationship in which the same standard conditions are being used, the existence of the arbitration clause need not be mentioned in the main contract²³. Another exception is the case where the standard conditions are so well known in the trade sector concerned that any party participating therein can be deemed to be fully aware of these conditions²⁴.

The fourth order of problems regards the relationship between the strict writing requirement as laid down under the Convention and more lenient national rules on contract formation. If an arbitration agreement is valid under the pertinent national law, should it not be enforceable under the New York Convention? Since nowadays most arbitration statutes provide less stringent requirements for the written form of the arbitration agreement, it has been argued that a party may rely on these requirements for the validity of the arbitration agreement and at the same time still rely on the enforcement regime of the award under the Convention. This view is founded on an extensive interpretation of the most-favourable-right provision, contained in art. VII and literally referring only to arbitral awards, which would be applied also to the enforcement of the arbitration agreement. On this reading, the party seeking enforcement of the agreement may rely on domestic

¹⁹K.P. Berger, *Private Dispute Resolution in International Business*, cit., p. 411

²⁰A.J. van den Berg, *The New York Convention of 1958: an Overview*, cit, p. 49

²¹In *Bothell v. Hitachi Zosen Corp.* (19 May 2000, 97 F. Supp 2d 1048, W.D. Wash. 2000) an oral agreement for the manufacture of specialised equipment was concluded between the parties and subsequently confirmed in a letter. The contract was then performed through three purchase orders, each containing a reference to “General Terms and Conditions”, being a separate attachment containing in turn an arbitration clause. The court held that the arbitration clause was not unequivocally incorporated in any documents exchanged between the parties. Rather, these documents merely contained a vague reference (“General Terms and Conditions for Purchasing”), which, on its face, did not in any way implicate arbitration. In the court's view, <<in a series of documents where the words used to refer to a proposed arbitration agreement are so vague as to be meaningless and no further explanation is provided, either by attachment, discussion or otherwise, the totality of the documents exchanged between the parties does not constitute a valid “arbitration agreement” under the Convention>>.

²²A.J. van den Berg, *The New York Convention of 1958: An Overview*, cit, p. 49-50

²³*Bomar Oil N.V. v. ETAP*, 11 October 1989, Rev. Arb. 1990, 1, p. 134; YBCA, 1990, XV, p. 448. *Contra James Allend (Ireland) Ltd. v. Marea Producten B.V* (17 February 1984, YBCA, 1985, X, p. 585), in which the Court of Appeal in the Hague held that the regular prior use of particular general conditions containing an arbitration clause could not give rise to an enforceable arbitration agreement, where such general terms had not been specifically referred to.

²⁴Cp *Chloe Z. Fishing Co., Inc v. Odyssey Re (London) Ltd*, 29 April 2000, 109 F. Supp. 2D 1236 (S.D. Cal. 2000): <<London arbitration clauses are ubiquitous in the London marine insurance market, and a competent and diligent London broker would be familiar with all important terms of the insurance contract, obviously including arbitration clauses>>.

law for the formal validity of the arbitration agreement, excluding thereby art. II (2) of the Convention, but for other aspects of the enforcement still rely on the remaining provisions of the Convention. Until recently, the most common opinion was that the written form requirement under the Convention constituted a “maximum-minimum” rule, not susceptible of derogation by national law²⁵ and therefore prevailing over any provision of municipal law regarding the form of the arbitration agreement in those cases where the Convention is applicable.²⁶ Accordingly, either the Convention or the other basis for enforcement (national law or international treaty) must be relied on *in toto*. Relying on a combination of the two bases would run against the systematic character of the Convention, whose provisions constitute a whole, and consequently cannot be applied in bits and pieces²⁷. Nonetheless, especially after the adoption of the Model Law on International Commercial Arbitration in many national jurisdictions, an increasing number of courts have considered the written form requirement under the Convention as a maximum rule, which may be derogated by less stringent municipal law. In so doing, they have relied on an extensive interpretation of the more-favourable-right provision under art. VII: for instance, in 1995 the Court of First Instance of Rotterdam affirmed that art. II of the New York Convention did not preclude the application of relevant Dutch Law, because the more-favourable-law provision in article VII of the Convention could be applied by analogy²⁸; likewise, in 1992 the Court of Appeal of Cologne stated that art. II(2) of the Convention did not provide for a uniform rule, as it can be deduced from article VII(1)²⁹. On the other hand, other courts have interpreted art. II (2) of the Convention in light of the Model Law, which, even before the 2006 reform, provided in art. 7(2) for less demanding requirements³⁰. An example of this new trend is constituted by a decision of the Swiss Federal

²⁵ Cfr e.g. Oberster Gerichtshof, November 17, 1971, YBCA, II, 1976, p. 183, in which the Supreme Court of Austria expressly stated: <<the requirement of the written form of the arbitration agreement is exclusively governed by the New York Convention>>; likewise the Italian Corte di Cassazione in *Getreide Import Gesellschaft MbH (FRG) v. Fratelli Casillo (Italy)* (7 October 1980, YBCA, VII, 1982, p. 342), according to which art. II NYC constitutes a *lex specialis* rendering inapplicable the general Italian rules of form concerning arbitration agreements.

²⁶ A. J. Van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, Kluwer Law, 1981, p. 173

²⁷ *Contra* M. Rubino-Sammartano, *op. cit.*, pp. 944-945: <<it does not seem to be sure that, in the absence of an express provision, a party may not apply for recognition based on the Convention, but base some specific aspect of its application on domestic law or another convention>>

²⁸ Court of First Instance, Rotterdam, 28 September 1995, *Petrasol BV (Netherlands), v. Stolt Spur Inc. (Liberia)*, YBCA, XXII, 1997, pp. 762-765

²⁹ Court of Appeal of Cologne, Danish buyer vs. German seller, 16 December 1992, YBCA, XXI, 1996, p. 535

³⁰ Whereas the Convention considers as an agreement in writing only an arbitral clause or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams, the original version of art. 7(2) of the Model Law provided a broader definition of “agreement in writing”, which took into account the modifications occurred in international practice. First of all, art. 7(2) of the Model Law broadened the range of means by which an agreement in writing could validly be concluded: not only an arbitral clause or an arbitration agreement signed by the parties or contained in an exchange of letters or telegrams, but also resulting from other means of telecommunication that provide a record of the agreement. On this reading, the Model Law encompassed in the definition of agreement in writing modern means of communication, such as telefax or e-mail, which had become indispensable tools of everyday work and did not exist at the time the Convention was drafted. Secondly, art. 7(2) of the Model Law provided an answer to

Tribunal, which held that art. II (2) of the Convention has to be interpreted with reference to the Model Law, since the latter is intended to adapt the rules of the former to the present needs of arbitration³¹.

In conclusion, as observed by the UNCITRAL Working Group on Arbitration in March 2000, art. II(2) of the Convention, if interpreted narrowly, can lead to results which are not in line with international practice. Although national courts have increasingly adopted a liberal interpretation of this provision in accordance with international practice and the expectations of parties in international trade, there are still divergences as to its proper interpretation. This lack of uniformity is a problem in international trade, which reduces the predictability and certainty of international contractual commitments³².

The “soft” reform of art. II of the Convention

The amount of problematic aspects related to art II prompted UNCITRAL in 1999 to give to the reform of the written form of the arbitration agreement priority among the thirteen topics initially identified for future work in the area of international commercial arbitration³³. Various views were expressed as to the means through which modernization of the New York Convention could be sought. A traditional amendment of the Convention provisions, which had so far been adopted by more than 140 countries, would have been very difficult to achieve, if not impossible. The idea of drafting a protocol amending the terms of article II of the New York Convention was actually discussed, but it was eventually discarded because it was feared that it would exacerbate the

another crucial interpretation problem related to the concept of agreement in writing under the Convention, namely whether the agreement may be proved by other means than those provided in its definition (document signed by the parties or exchange of letters or telegrams). Whereas the most common interpretation was that the written form requirement was a requirement *ad substantiam* and therefore did not allow proof by other means of an arbitration agreement concluded in a form different from that envisaged by art. II (2), the Model Law adopted a less strict view. It provided that an agreement in writing is considered also an exchange of statements of claim and defence, in which the existence of an agreement is alleged by one party and not denied by another. It also provided that the reference in a contract to a document containing an arbitration clause constituted an arbitration agreement, provided that the contract is in writing and the reference is such as to make that clause part of the contract.

³¹ *Compagnie de Navigation et Transports S.A. v. MSC S.A.*, Swiss Federal Tribunal, 16 January 1995, YBCA, XXI, 1996, p. 697. Similarly, Hong Kong, High Court, *Jiangxi Provincial Metal and Minerals Import and Export Corp v. Sulanser Company Ltd*, 6 April 1995, YBCA, XXI, 1996, p. 546: the court held that the definition of writing in article II(2) was not exclusive and did not bar the application of article 7(2) of the UNCITRAL Model Law.

³² UN Doc A/CN.9/468, par. 88

³³ Report of the United Nations Commission on International Trade Law on its thirty-second session, 17 May- 4 June 1999, UN Doc/A/54/17, par. 350

existing lack of uniformity in the interpretation of the Convention. A formal modification of the provisions on the writing requirement could lead to suggestions for changes to other provisions, which should not be reopened³⁴; moreover, adoption of a protocol by a number of countries was likely to take a significant number of years, during which uncertainty as two different potentially applicable regimes would increase³⁵. It was also suggested that a formal amendment was unnecessary, since the existing text of art. II was already subject to liberal interpretation without any amendment, as evidenced by existing practice across many countries: any reform of the existing text might therefore undermine these liberal interpretations³⁶. Finally, it was observed that the Convention had survived since 1958 without any amendment and had become one of the most successful commercial treaties: given its evident success, shown by the unparalleled number of ratifications, the New York Convention could be rightly regarded as the foundation of international commercial arbitration, and that fact by itself demanded that utmost caution be used in considering any changes to its text³⁷. What was needed was a declaratory instrument recommending a uniform interpretation of art. II(2) of the New York Convention, in view of the fact that in some states a liberal interpretation of art. II(2) was accepted, whereas in other states a more narrow interpretation was still prevalent. The purpose of the declaration was to extend to all states this liberal interpretation³⁸. Another view was that, while no attempt should be made to revise the New York Convention directly, the desired result with respect to art. II (2) might be achieved indirectly through model legislation. This could bring national arbitration laws more in line with international practice; in turn, national laws might supersede the outdated provisions of article II (2), by relying on the more-favourable- law provision of art. VII of the Convention. Such a solution could be pursued only if art. II (2) were no longer to be interpreted as a uniform rule establishing the minimum requirement of writing, but would instead be understood as establishing the maximum requirement of form, which could be derogated by a less stringent national law. It was pointed out that the worldwide acceptance of such an interpretation was currently doubtful and could only become established as the result of a lengthy harmonization process based on case law. However, it was suggested that UNICITRAL could usefully contribute to speed up that process, by elaborating

³⁴The protocol would have been adopted by a sovereign diplomatic conference, which would be empowered to decide on any amendment of the Convention and would not be bound by the narrow scope of amendments currently under consideration by the Working Group (UN Doc A/CN.9/508, par. 46).

³⁵A/CN.9/468 par. 92. The drafting, signature and ratification of the protocol would have entailed the existence, at least for a certain period of time, of two groups of states parties to the New York Convention, namely those that adhered to the Convention in its original form only and those who, in addition, had adhered to the amending protocol (UN Doc A/CN.9/508, par. 44)

³⁶T. Landau and S. Moolan, *Article II and the Requirement of Form*, cit., p. 232

³⁷UN Doc A/CN.9/508, par. 46

³⁸UN Doc/A/CN.9/497, par. 43

an interpretative declaration on art. II (2) of the Convention³⁹. Accordingly, it was decided to embark upon the elaboration of two related measures of a soft law character: 1) a declaration, resolution or statement addressing the interpretation of the New York Convention, that would reflect a broad understanding of the form requirement and would permit the application of more lenient national law; 2) the reform of the provisions on the form of the arbitration agreement, contained in art. 7 of the UNCITRAL Model Law on International Commercial Arbitration, in order to bring national laws more in line with international practice and thus render arbitration agreements more easily enforceable in Model Law countries where the courts were willing to follow the interpretative declaration on art II (2) of the Convention.

The idea underlying this “soft” reform is a shift in the purpose of the written form requirement. As stated above, the written form imposed upon the arbitration agreement had traditionally absolved a “cautionary” function, whereby it served to prove certainty of the will of arbitrate, thus alerting the parties that they were giving up litigation in favour of arbitration. By contrast, UNCITRAL’s “soft” reform has intended to achieve a radical change of perspective, by structuring the written form as means to prove the terms of the arbitration agreement, so as to secure the certainty of the rules designed to govern the conduct of the arbitration proceedings⁴⁰, avoid breakdowns during the arbitral process itself and minimise disputes before courts in relation to arbitration and the challenges to the award at the stage of recognition and enforcement⁴¹. The reason for this shift was due to the fact that arbitration was now widely accepted for resolution of international commercial disputes and consequently could no longer be regarded as an exception requiring careful consideration by the parties before choosing something other than litigation before courts. As arbitration was now the preferred or the usual method for international commercial dispute resolution, the warning function of the written form was no longer as important as before⁴². This shift of purpose was clearly stated by the Working Group in charge of reforming art. 7 of the UNCITRAL Model Law at its forty-fourth session on 23-27 January 2006: it was discussed whether the purpose of the writing requirement was to provide a record of the parties’ consent to arbitrate or of the content of the arbitration agreement. The Working Group was generally of the view that what was to be recorded was the content of the arbitration agreement, as opposed to the meeting of the parties’ minds or any other information regarding the formation of the agreement: the question whether the parties actually reached an agreement to arbitrate was an issue to be left to national legislation⁴³.

³⁹UN Doc A/54/17, par. 348

⁴⁰Note by the Secretariat, UN Doc A/CN.9/609, 4 May 2006, par. 6

⁴¹T. Landau and S. Moolan, *Article II and the Requirement of Form*, cit., p. 221

⁴²A/CN.9/468 par. 88-89

⁴³Note by the Secretariat, UN Doc. A/CN.9/606, 13 April 2006, pars. 3-4.

The UNCITRAL Recommendation on the Interpretation of art. II(2) and art. VII(1) of the Convention and the reform of art. 7 of the UNCITRAL Model Law

On 7 July 2006, at its thirty-ninth session, the UNCITRAL Commission adopted the “Recommendation regarding the interpretation of Article II(2) and Article VII(1) of the Convention”. At the same session, revised provisions on the form of the arbitration agreement contained in art. 7 of the UNCITRAL Model Law on International Commercial Arbitration were also approved.

At the outset there was uncertainty as to which form the interpretative instrument should take, i.e. whether a resolution, a declaration, a recommendation, or a simple statement. Eventually, it was decided that the most appropriate form for such a document was that of a recommendation, instead of a declaration, which could be misinterpreted as to its nature: the Commission agreed that the purpose of the document, in line with the Commission’s mandate⁴⁴, was to propose a harmonizing interpretation of certain provisions of the New York Convention and not to issue binding declarations regarding the interpretation of that treaty⁴⁵. Although the recommendation was not considered to be legally binding, the fact that it was drafted by UNCITRAL, the core legal body in the United Nations system in the field of international trade law, gave it a particular persuasive force⁴⁶; furthermore, in order to increase the persuasive value of the instrument, it was suggested that the interpretative declaration should be endorsed by the General Assembly of the United Nations⁴⁷. However, the Recommendation was not expressly approved by the General Assembly: in its Resolution of 18 December 2006 the General Assembly only limited itself to <<*express its appreciation* (emphasis added) to the United Nations Commission on International Trade Law for formulating and adopting the recommendation regarding the interpretation of article II, paragraph 2, and article VII, paragraph 1, of the Convention on the Recognition and Enforcement of Foreign Arbitral Awards>>⁴⁸. Non-approval of the Recommendation by the UN General Assembly shall be

⁴⁴The General Assembly Resolution 2205 (XXI) of 17 December 1966, which established the United Nations Commission on International Trade Law, envisaged within the mandate of the Commission, inter alia, the task of promoting ways and means of ensuring a uniform interpretation and application of international conventions and uniform laws in the field of the law of international trade.

⁴⁵UN Doc, A/61/17, par. 179

⁴⁶A/CN.9/468 par. 93

⁴⁷A/CN.9/592, par. 84

⁴⁸A/RES/61/33

read as a strong indication of the non-binding character of this interpretative instrument, avoiding any doubt that it may constitute a “subsequent agreement” or “subsequent practice” in the sense of art. 31.3 of the Vienna Convention on the Law of Treaties⁴⁹.

The Recommendation consists of two limbs: the first regards art. II(2), the second art. VII(1) of the Convention. In the first limb it is recommended that art. II(2) should be applied recognising that the circumstances described therein are not exhaustive. Consequently, if the definition of writing contained in this provision is not exhaustive, then the provision does not set a minimum standard, but instead allows for other, more expansive forms of “writing”⁵⁰. In other words, the Recommendation is seeking to promote the interpretation of art. II(2), which is increasingly gaining ground in international practice, whereby the writing requirement under the Convention is not mandatory, but is susceptible of being derogated by more lenient national laws. The second limb recommends that art. VII(1) of the Convention, which by its own terms only applies to arbitration awards, should be interpreted to apply to arbitration agreements as well. As it stands, the second limb of the Recommendation only authorises the application of a more favourable national law on the enforcement of the arbitration agreement *to the exclusion* of the New York Convention regime. This was already a well-established rule: the omission of an express mention of the arbitration agreement in art. VII(1) was regarded as unintentional, since the provisions concerning the arbitration agreement were inserted in the Convention at a very late stage of drafting; accordingly, it would seem contrary to the pro-enforcement bias of the Convention that the most-favourable-right provision would not apply also to the enforcement of the arbitration agreement⁵¹.

Nonetheless, by reading the second limb of the Recommendation in connection with the first, a sort of *dépeçage* of the Convention seems to be allowed, in the sense that the New York Convention’s provisions might be combined with more liberal provisions of domestic laws regarding the written form of the arbitration agreement. In other words, the Recommendation seems to authorise an extensive interpretation of art. VII, whereby the party seeking enforcement of the agreement may rely on domestic law requirements for its formal validity, but still rely on the remaining provisions of the Convention for other aspects of the enforcement procedure⁵².

The Commission has repeatedly emphasised the opportunity of building a “friendly bridge” between the Recommendation and the revised version of art. 7 of the Model Law: on the one hand, the former shall allow an interpretation of the written form requirement of the Convention in light of less stringent national law, on the other hand the latter shall encourage national legislators to adopt

⁴⁹See *infra* pp.431 ff.

⁵⁰T. Landau and S. Moolan, *Article II and the Requirement of Form*, cit., p. 244.

⁵¹A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation*, cit, pp. 86-87

⁵²In this sense, T. Landau and S. Moolan, *Article II and the Requirement of Form*, cit., p. 253

updated provisions on the written form requirement. The overall effect of this interaction would be that an arbitration agreement would be more easily enforced under the New York Convention regime. As stated above⁵³, the new version of art. 7 of the Model Law envisages two alternative options which a country may adopt. Option I is very close to the previous version of art. 7 and only adds small improvements, taking into account most recent contractual practice. In particular, in par. 3 it clarifies that the written requirement is satisfied if the content of the agreement is recorded in any form, whether or not the agreement has been concluded orally, by conduct, or by other means. More importantly, par. 4 provides that the writing requirement is met by an electronic communication, so long as the information can be used for subsequent reference; furthermore, the term “electronic communication” is defined in the same way as in the United Nations Convention on the Use of Electronic Communications in International Contracts⁵⁴ and the definition of “data message” is also identical to that of the UNCITRAL Model Law on Electronic Commerce⁵⁵. By making the definition of “writing” in the amended art. 7 consistent with these two instruments, UNCITRAL is attempting to create an internationally accepted definition of written form extended to the modern practice of electronic commerce⁵⁶. By contrast, Option II completely does away with the written form requirement; consequently, if a country has adopted the “no writing” requirement of Option II in its national arbitration law, an enforcing court in that country should be able to enforce an oral arbitration agreement under the New York Convention, assuming that the court applies the “more- favourable- right” provision of art. VII(1) to arbitration agreements⁵⁷.

The close connection between the Recommendation and art. 7 of the Model Law has led some commentators to conclude that the latter may be used as a source of interpretation of art. II of the New York Convention. UNCITRAL's work on the writing requirement of the Convention and of the Model Law was carried out conjunctively and art. 7 of the Model Law and the Recommendation were adopted simultaneously at the same session of the UNCITRAL Commission: this would indicate that the two instruments concerned broadly similar issues and were designed to achieve

⁵³ See *supra* pp. 219 ff.

⁵⁴The United Nations Convention on the Use of Electronic Communications in International Contracts, signed in 2005, has not yet entered into force in any country. The text of the Convention is available at www.uncitral.org

⁵⁵The text of the 1996 UNCITRAL Model Law on Electronic Commerce is available at www.uncitral.org

⁵⁶M. L. Moses, *op cit*, p. 26. This trend is also confirmed by the decision to include a reference to the New York Convention in art. 20 of the United Nations Convention on the Use of Electronic Communications in International Contracts. Art. 20 states that the provisions of the Convention apply to the use of electronic communications in connection with the formation or performance of a contract covered by a number of other Conventions, in which the New York Convention is included. The reference to the New York Convention under article 20 has been considered as means to provide a uniform definition of “writing”, which is more consistent with current practices in international commercial arbitration, and would therefore contribute to uniformity in the interpretation of article II (2) of the New York Convention. (UN Doc A/CN.9/WG.II/WP.132, par. 12).

⁵⁷M. L. Moses, *op. cit.*, p. 25

homogeneity and consistency in their results⁵⁸. Although this approach has already been adopted by some courts⁵⁹, it must be noted that during the *travaux préparatoires* of the Recommendation this issue was expressly dealt with and concerns were put forward that promoting an interpretation of article II(2) of the New York Convention in line with the revised draft article 7 of the Model Law would be regarded in a significant number of countries as an innovative or revolutionary interpretation of the form requirement under article II(2) of the New York Convention, which might be regarded as an unwelcomed development⁶⁰.

The reform of the written requirement under the Convention through soft law instruments has not met unanimous consensus within the arbitration community. It has been argued that the New York Convention's shortcomings cannot be adequately and comprehensively remedied by a recommendation providing interpretation guidelines which are too complicated for courts and difficult to reconcile to the letter of art II.(2) of the Convention. What is needed is a formal revision of the Convention, which, after more than fifty years, is starting to show its age⁶¹. Accordingly, as we have seen in the previous session, on 10 June 2008 at the ICCA Congress in Dublin, prof. van den Berg has submitted his draft of a completely revised text of the New York Convention (the so-called "Dublin Convention"). As far as the issue of the writing requirement is concerned, the Dublin Convention adopts a very drastic solution: the new version of art. II completely abolishes not only the requirement of the written form of the arbitration agreement, but also any definition whatsoever of arbitration agreement; it limits itself to provide a specific regulation of the enforcement procedure of the arbitration agreement. As stated in the Explanatory Note, the writing requirement of the New York Convention poses one of the major problems in practice, as it is more stringent than what is imposed by virtually all modern arbitration laws. Accordingly, the draft Convention follows the trend as evidenced by Option II of the new art. 7 of the Model Law, by offering the possibility of no longer imposing an internationally required written form for the arbitration agreement⁶².

⁵⁸T. Landau and S. Moolan, *Article II and the Requirement of Form*, cit., pp. 253-254

⁵⁹ See e.g. *Compagnie de Navigation et Transports S.A. v. MSC S.A.*, Swiss Federal Tribunal, 16 January 1995, YBCA, XXI, 1996

⁶⁰UN Doc A/CN.9/WG.II/WP.118, par. 29

⁶¹ A. J. Van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards – Explanatory Note- 26 May 2008*, par. 3 available at www.arbitration-icca.org

⁶² A. J. Van den Berg, *Hypothetical Draft Convention on the International Enforcement of Arbitration Agreements and Awards – Explanatory Note- 26 May 2008*, par. 34

The legal nature of the Recommendation

During the *travaux*, the UNCITRAL Secretariat submitted a paper in which the public international law status of the future Recommendation was discussed. The Secretariat argued that the interpretative instrument found its source in art. 31.3(b) of the Vienna Convention on the Law of Treaties, according to which, in interpreting a treaty, account should be taken of any subsequent practice in the application of the treaty which establishes the agreement of the parties regarding its interpretation. According to the Secretariat, the interpretative instrument responded to the need for clarity in the interpretation of article II(2) of the New York Convention, arising from changes in communication technologies and the increased use of commercial arbitration in international trade⁶³. Subsequent practice is a very effective instrument which parties sometimes use in order to implicitly modify the terms of a treaty, without going through the formal emendment procedure: there is in fact a close link between the concept that subsequent practice is an element to be taken into account in the interpretation of a treaty and the concept that a treaty may be modified by subsequent practice of the parties⁶⁴. Nonetheless, commentators make clear that art. 31.3(b) does not cover subsequent practice in general, but only concordant subsequent practice common to all the parties⁶⁵. We have seen that, at least for the time being, the interpretation of the written requirement under the New York Convention is not concordant at all: as a result, rather than as an expression of “subsequent practice”, the Recommendation may be considered as a soft law instrument deemed to foster the emergence of a subsequent practice in the sense of art. 31.3(b) of the Vienna Convention. Only if national courts follow the Recommendation and interpret art. II and VII of the New York Convention accordingly, will a significant body of case law be formed constituting subsequent practice in the sense of art. 31.3(b) of the Convention.

It has also been argued that the Recommendation may be considered as a “subsequent agreement” in the sense of art. 31.3(a) of the Vienna Convention⁶⁶: a subsequent agreement need not be a formal agreement or a subsequent treaty; it can take various forms, including a decision adopted by a meeting of the parties, or an interpretative declaration, provided that the purpose is clear⁶⁷.

Yet, the notion of subsequent agreement implies that each State party expresses its individual consent to the new agreement⁶⁸: an interpretation agreed between only some of the parties to a

⁶³UN Doc A/CN.9/WG.II/WP.110, par. 30

⁶⁴I. Sinclair, *The Vienna Convention on the Law of Treaties*, Manchester University Press, 1984, p. 138

⁶⁵*Ibidem*; A. Aust, *Modern Treaty Law and Practice*, Cambridge University Press, 2000, p. 194.

⁶⁶T. Landau and S. Moolan, *Article II and the Requirement of Form*, cit., p. 239

⁶⁷A. Aust, *op. cit.*, pp. 191-192; R. Jennings and A. Watts (eds), *Oppenheim's International Law*, Longman, 1996, p. 1268

⁶⁸UN Doc A/CN.9/WG.II/WP.110, par. 31

multilateral treaty may fall within the scope of art. 31.3(a) only to the extent that it is consistent with the interests and intentions of the other parties⁶⁹. As we have seen, the Recommendation was approved only by the UNCITRAL Commission, which is an inter-governmental body with limited membership, and not also by the UN General Assembly, in which all the States parties to the New York Convention are represented. Besides, the *travaux* make clear that in no way shall the Recommendation be intended as a binding text providing an authentic interpretation and therefore constituting an implicit emendment of the New York Convention; on the contrary, the Recommendation is meant to have only presuasive force and propose a harmonising interpretation of certain provisions of the New York Convention, without interfering with the competence of the state parties to issue binding declarations regarding the interpretation of that treaty⁷⁰.

In conclusion, according to a merely legal analysis, the Recommendation has no legal value, since it does not fit into any of the traditional public international law categories. However, International Relations theory – and in particular models of norm diffusion and the concept of legalization outlined in the introductory part of this work⁷¹ - can help to assess the role this soft law instrument can play in the modernisation and harmonisation of the law of international arbitration. On this reading, the Recommendation can be viewed as a catalyst allowing a liberal interpretation of art. II of the New York Convention to climb up a further rung of the legalization ladder. Such liberal interpretation, which is gaining ground among national courts, is still inconsistent and uncertain among them. The Recommendation is the product of an epistemic community (UNCITRAL), which is attempting to challenge the existing standard of interpretation of a given norm (the writing requirement of the arbitration agreement under art. II Convention) and persuade the rest of the international community (in particular, the various national courts) to replace the old standard with a new one, more in line with current contractual practice. Given the authority and the worldwide recognition of its issuing body, it is very likely that the Recommendation will trigger a process of “norm cascade”, whereby a significant “critical mass” of national courts will be persuaded to follow the more liberal interpretation of the writing requirement suggested therein. Only when this threshold is reached, will the times be ripe for a formal modification of art. II of the New York Convention, which will take stock of the successful work of persuasion carried out by the Recommendation.

⁶⁹R. Jennings and A. Watts (eds), *Oppenheim's International Law*, cit., p. 1268

⁷⁰UN Doc A/61/17, par. 179

⁷¹ See *supra* pp. 69 ff.

CHAPTER SEVEN: CONCLUDING REMARKS

The emergence of transnational law

This work has aimed at analysing the process of harmonisation of the law of international commercial arbitration with particular reference to the drafting and diffusion of its uniform rules

It has attempted to show that traditional legal thinking identifying the notion of law exclusively as an expression of state sovereignty cannot adequately account for recent developments in the field of the law of international commercial arbitration.

As new actors are emerging in international relations, one cannot give a complete account of law in the modern world without paying any attention to non-state forms of regulation (which Teubner, emphatically, calls “global law without a state”), challenging state centralism, that is the idea that the state has a monopoly of lawful power within its own territory. Scholars studying law at the world level have so far considered nation states as the only relevant actors on the international scene and state law as the sole product of official state entities¹. Accordingly, they have focused on only two types of normative systems: those enacted by nation states (national law) and those enacted among nation states (international law). Law and globalization scholars argue that the conception of law founded on this dichotomy is inadequate to understand new regulatory phenomena occurring on a global scale.

The most important effect globalisation has exerted on the law is the marked decline of national sovereignty and the concomitant proliferation of international regimes, institutions, and non-state actors². As a result, the regulation of social activities, especially in the economic field and at the global level, is increasingly becoming the product of the interaction of states, international organizations, networks, non-governmental organisations and other non-state actors, rather than the exclusive expression of state sovereignty³. This has radically restructured the context in which law is produced: the divide between national, international and non-national law wears thinner and thinner, since the whole international legal order is open to forms of interpenetration between international and domestic, state and non-state law.

¹P. Schiff Berman, *From International Law to Law and Globalization*, Columbia Journal of Transnational law, 2005, 43, p. 485.

²H. Koh, *Review Essay: Why do Nations Obey Law?* Yale Law J., 1997, 106, p. 2604

³H. Schepel, *The Constitution of Private Governance*, Oxford University Press, 2005, pp. 19-20.

The most important reason fostering the emergence of these hybrid regimes is the mismatch between the global reach of economic activities and the scarce development of international law. Economic activities that previously took place between national markets, that is between distinct economic and political units, are now carried out independently of national boundaries. The growing interconnectedness among world markets, reducing obstacles to the exchange of goods, capital, and services across national boundaries, has fostered the emergence of an increasing range of transnational transactions, transcending national boundaries and covering a great part of the world. On the other hand, legislation on a world scale is a difficult process: in the absence of an overarching global authority, there are few signs of a development of legal institutions and regulation at the global level; rather, there is a vacuum of authority, a regulatory anarchy in which legislation moves away from its privileged place at the top of the norm hierarchy and is placed on a equal footing with other types of social law-making⁴. Accordingly, at the global level it makes no longer sense to define law as a chain of hierarchically ordered acts, because there is no overarching authority which can legitimate such chain. The traditional view of law as an exclusive product of the state is inadequate to understand self-regulation phenomena occurring at the global level, a context in which the state has partly lost its law-making monopoly. Transnational transactions are increasingly *de facto* regulated by a new form of law (the so-called “transnational law”), which cannot be encompassed in any of the traditional categories of national and international law. On this reading, transnational law may be defined as a body of rules regulating actions or events transcending national frontiers, whose sources include both public and private international law (international conventions, international customary law, conflict of laws rules) and other rules which do not wholly fit into such standard categories (standard contract terms, rules drafted by formulating agencies, *lex mercatoria*)⁵

Towards a post-westphalian order

The development of transnational law is premised on a particular conception of the role of the state in international relations which emerged in the Nineties in the wake of the diffusion of globalisation in every field of human activity.

⁴ G. Teubner, *Breaking Frames: Economic Globalization and the Emergence of Lex Mercatoria*, European Journal of Social Theory, 2002, 5, p. 205

⁵Cp. P. C. Jessup, *Transnational Law*, New Haven: Yale University Press, 1950, p. 2

The vast literature on anthropology, sociology, geography, and cultural studies concerning globalization has challenged the idea of the nation state as the only relevant form of social aggregation and revealed new ways in which norms are articulated and disseminated among multiple, often overlapping, communities⁶. In particular, the debate on the state and globalisation engaged in by International Relations theorists has pointed out the emergence of a post-westphalian order, no longer centered on states as the sole actors in the international scene. The so-called westphalian order is the international order that was established in Europe pursuant to the Peace of Westphalia in 1648, which brought to an end the Thirty Years War. This peace settlement is commonly regarded to have laid down the foundation of the modern international order: the international system of sovereign states. The westphalian order is based on four main principles⁷. The first is territoriality, according to which states have fixed territorial boundaries defining the limits to their jurisdiction and scope of their political authority. On this reading, territoriality is a crucial principle of modern political organisation: humankind is divided into political units defined in terms of fixed and exclusive territorial realms.⁸ The second principle is internal sovereignty, whereby states, within their territory, can claim effective supremacy, since they represent the ultimate and undisputed source of legal and political authority. Accordingly, in the westphalian order mankind is organised into a limited number of sovereign territorial states, which recognise no higher legal or political authority than themselves. The third is autonomy or external sovereignty, whereby states are entitled to conduct their internal and external affairs in a manner which only they are competent to decide, free from external intervention or control.⁹ Finally, the fourth principle is legality, which provides that there is no legal authority above and beyond the state, able to impose legal duties upon it or its citizens. Relations among sovereign states may be subject to international law, but only to the extent that each state agrees to being so bound.

The vast majority of International Relations scholars maintain that globalisation - conceived essentially as the growing interconnectedness of social activities across the globe, occurring as more and more people, goods, capitals, technology flow swiftly and smoothly across borders - fundamentally compromises the principles upon which the westphalian order was constructed. In particular, this growing interconnectedness poses three main constraints on state sovereignty. The

⁶ P. Schiff Berman, *From International Law*, cit., p. 511

⁷ A. McGrew, *Globalization and Territorial Democracy: an Introduction*, in ID (Ed), *The Transformation of Democracy? Globalization and Territorial Democracy*, ch 1, Cambridge University Press, 1997, p. 3

⁸ *Ibidem*

⁹ Internal and external sovereignty are two diametrically opposed concepts. The former is the state power to impose an order that allows individuals to peacefully coexist within the state territory, the latter means independence of any other outside authority. Accordingly, internal sovereignty is based on the concept of supreme authority; on the contrary, external sovereignty presupposes the lack of supreme authority and therefore the independence of states in the international system. On this point see W. Reinicke, *Globalization and Public Policy: An Analytical Framework*, in ID, *Global Public Policy: Governing without Government?*, Brookings Institution Press, 1998, p. 56-58

first is mutual vulnerability among states: events originating in one state or part of the world can have an immediate and direct effect on individuals and communities residing in distant part of the globe. Accordingly, globalisation erodes the boundaries between what is foreign and what is domestic, what is national and what is international. For example, pollution generated in UK contributes to acid rain, which spoils forests in Norway or Sweden: it is therefore at the same time a domestic and international matter. The second is the emergence of forms of social activities which are transnational in character, i.e. transcend national borders, the most important of which is the organisation of global industrial production carried out by multinational corporations. Economic, social and political activities are increasingly "stretched" across the globe: they are no longer primarily or solely organised according to a territorial principle.¹⁰ The third is the emergence of global problems and threats (proliferation of weapons of mass destruction, global warming and pollution, terrorism), which in no way can be solved by a single government alone, but only through multilateral or international cooperation. New global problems, especially environmental and population threats have become too broad and too menacing to be handled by nation-States alone¹¹. The proliferation of multilateral institutions and international regimes designed to manage these new common problems compromises further the state's autonomous capacities. Governments and societies across the globe need to adjust to a world in which there is no longer a clear distinction between international and domestic.¹²

The result of these constraints is that national governments have lost control over an increasing range of activities occurring within their territory; on the other hand a new set of arrangements is emerging in which states, institutions and non-state actors interact in order to regulate new global issues. National governments are no longer able to control an increasing range of activities occurring within their territories (free flows of capitals, information, goods, technology). This wide range of transnational activities fosters the emergence of global and transnational networks linking people and organisations in different parts of the world (e.g. multi-national corporations, transnational groups). As a consequence of these new emerging forms of economic and political

¹⁰ D. Held and A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations: Politics, Economics and Culture*, Polity Press, 1999, p. 28

¹¹ M. Mann, *Has Globalization Ended the Rise and Rise of the Nation-State?*, *Review of International Political Economy*, 1997, 4-3, p. 472.

¹² D. Held and A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations: Politics, Economics and Culture*, cit., p. 7

organisation at a global level restricting the scope for the exercise of state sovereignty, the world order is a post-westphalian order, in the sense that it is no longer state-centric. The world order is no longer composed only by independent States exerting their sovereignty within their fixed territory; states are forced to share their sovereignty with other actors in the international system in order to regulate phenomena lacking a defined territorial scope.

From a community of predominantly western states, the global arena now encompasses more than four times the number of states that existed at the beginning of the 20th century. In addition, other actors have emerged: intergovernmental organisations, non-governmental organisations, professional associations, transnational corporations, and mixed entities made up of members of different communities. They all contribute to the making of international norms and are increasingly bound by them¹³.

Yet, this does not mean the demise of the state as an effective political organisation: globalisation leads to a re-construction of the power, functions and authority of national governments. Territorial boundaries have become increasingly problematic: although states formally retain the ultimate legal claim to supremacy over what occurs within their territory, their effective control must come to terms with the expanding jurisdiction of complex global systems, global infrastructures of communication and transport, institutions of global governance, which support new forms of economic and social organisation, transcending national boundaries. What is at stake is not the legal concept of state sovereignty, since formally states remain sovereignty entities: globalisation challenges operational or de facto sovereignty, that is to say the ability of states to practice this concept in the daily affairs of politics¹⁴. In this context, the notion of the nation-state as a self-governing, autonomous unit appears to be more a normative claim than a descriptive statement.¹⁵ The forms and functions of the state need to adapt to this changing global order: rather than bringing about the end of the state, globalisation has encouraged a range of adjustment strategies to manage the growing arrays of cross-border issues. In this new context, the power of national governments is not necessarily diminished, but is being reconstituted and restructured in response to the growing complexity of processes of governance. Accordingly, the relationship between state and globalisation shall not be conceived as a "zero-sum game", whereby either globalisation is

¹³D. Shelton, *Law, Non-Law and the Problem of Soft-Law*, in D. Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System*, Oxford University Press, 2000, p. 6

¹⁴W. Reinicke, *Globalization and Public Policy*, cit., p. 56

¹⁵ D. Held and A. McGrew, D. Goldblatt and J. Perraton, *Global Transformations: Politics, Economics and Culture*, cit., p. 8

considered weak and consequently states have all the power, or globalisation is considered strong and states are considered to be losing power; rather, the relationship between states and global networks may be better described as a “positive-sum” game, in which the interaction among local, domestic, international and global actors can lead to potential gains for all the parties involved. In particular, states may increase their power by exerting both constitutive and adaptive strategies: constitutive, because they are able to circumvent or even shape global, domestic, local constraints; adaptive, because sometimes they adapt their structures to pressures stemming from the same levels. For example, states can often decide to bind themselves to international agreements in order to overcome opposition from powerful domestic groups (as in the case of WTO membership, which enabled states to overcome domestic demands for protectionism by industrial groups). Far from eroding state sovereignty, international institutions are in this way used as “scapegoats” in order to pursue a precise domestic strategy. By the same token, European states have jointly agreed to implement measures preventing regulatory tax competition among them, in order to hamper global constraints stemming from MNCs, which tend to allocate their production on the basis of better fiscal conditions. Also, states can sometimes act on the national level, in order to mitigate the negative effects of globalisation: they can decide to increase labour costs in order to discourage systems of production based on low wages, or decide to limit tax benefits only to highly-technological firms. On the other hand, states are not totally free from domestic and global constraints. In many cases states create the domestic political-economic environment (developed industrial infrastructures, low tax regimes, disciplined and cheap labour force) hospitable to MNCs. In pursuing this constitutive and adaptive strategies, states help to promote the interaction among the regional, national, global levels, thus enabling the development of an increasingly integrated global architecture.

The main tenets of legal pluralism

The most important theory challenging state centralism is legal pluralism. Originally conceived as a term denoting the coexistence of different systems of norms in former colonial countries, legal pluralism has developed into a theory challenging the idea that the state has a monopoly of lawful power within its own territory. Legal pluralists maintain that legal centralism is a fiction, a myth, a product of ideology. They also argue that legal centralism constitutes the main hindrance to an

accurate, empirical observation of the legal phenomenon. The legal reality of the modern state - they contend – is not at all the tidy, consistent, organized ideal so nicely captured in the common identification of the law with state law. Rather, empirical observation reveals that the legal field constitutes an unsystematic set of inconsistent and overlapping parts.¹⁶

In contrast with the idea of legal centralism, they suggest that all societies have a diversity of legal orders, of which official state law is only one, and not necessarily the most powerful. On this reading, globalisation creates a multitude of decentered law-making processes in various sectors of civil society, in relative insulation from nation-states¹⁷. Technical standardization, professional rule production, intra-organisational regulation in multinational enterprises, *lex mercatoria* are all forms of private rule-making on a global scale, which have come into existence not by formal recognition of nation-states, but by acts of self-validation¹⁸.

This last version of legal pluralism challenges the traditional, positivist conception of law. According to the traditional doctrine of legal sources, all forms of legal pluralism are no more than social rules, customs, usages, contractual obligations, intra-organisational agreements, but in no way can they be considered as law. This is because positivism bases the distinction between law and non-law on a hierarchy of legal rules where the higher rules legitimate the lower ones. Normative phenomena outside this hierarchy are not considered law, but merely facts. At the top of this hierarchy lies the constitution of the nation-state, which is the highest product of the democratic legislative process and therefore the ultimate source of legitimation of legal validity. On this reading, contractual rule-making, as well as intra-organisational rule production, is either seen as non-law or as delegated law-making, which requires recognition by the national legal system.

Legal pluralism supporters suggest that globalisation is breaking this hierarchy. In their view, political law-making has lost its leading role in the globalisation process¹⁹: sovereign states are not able to agree on certain legal principles which may guarantee the development of a just legal order for mankind. The political process has reached only a proto-globality in international relations²⁰. On the other hand, legal pluralism supporters maintain that various sectors of civil society are developing a global law of their own, partly independently of nation states, the latter appearing too weak on a global scale. The difference between a highly globalised society and a weakly globalised politics is pressing for the emergence of a global law that is not a product of the nation state's legislative process and is not dependent upon any political constitution and politically ordered

¹⁶J. Griffiths, *What is Legal Pluralism?*, Journal of Legal Pluralism, 1986, 1, p. 4

¹⁷A. Giddens, *The Consequences of Modernity*, Stanford University Press, 1990, p. 70

¹⁸G. Teubner, *Foreword: Legal Regimes of Global Non-state Actors*, in ID (Ed), *Global Law Without a State*, Dartmouth, 1997, p. xiii

¹⁹G. Teubner, *Global Bukowina: Legal Pluralism in the World Society*, in ID (ed), *Global Law Without a State*, cit. p. 5

²⁰G. Teubner, *Legal Pluralism in the World Society*, cit. p. 6

hierarchy of norms: in Teubner's terms, a global law without a state.²¹ This makes it necessary to rethink the traditional doctrine of the sources of law. Globalisation breaks the hierarchy within this order, moves the national law-making process away from its privileged position and puts it on an equal footing with other types of social law-making.

But the coexistence of a plurality of legal orders affecting the exercise of national sovereignty does not mean the demise of the state at the global level. On the contrary, the situation of normative pluralism is an indication that none of them alone is capable of being applied to the exclusion of the others. These normative orders are incomplete: legal certainty emerges from their interaction with state law. The transnational law-making process is characterised by a high degree of hybridism: interaction between state law and other legal orders gives rise to forms of hybrid regulation, characterised by an overlapping of hard and soft, state and non-state law. On this reading, international commercial arbitration can be better theorized as a hybrid regime, dualistic in nature, combining both a state-centric system, organized around the New York Convention on Recognition and Enforcement of Foreign Arbitral awards and other bilateral, regional and multilateral treaties, and a multi-centric system made up of a complex network of private contracts, non-national norms elaborated by formulating agencies and international arbitral institutions²².

The concept of legalization

The concept of legalization, elaborated by rational theorists of International Relations, is a very useful tool accounting for the emergence of these hybrid regimes in the globalisation era. Legalization is a concept coined by a number of political scientists in order to provide an alternative to the positivist view of law, which identifies law only with norms bestowed with enforcement by a coercive power²³. Legalization comprises a set of characteristics which a given set of norms may or may not possess, namely obligation (the addressees are legally bound by the rule, in the sense that their behaviour is subject to scrutiny under the procedures and discourse of law: challenges to such a legal obligation can occur only through legal procedures and legal reasoning; a state cannot depart

²¹G. Teubner, *Foreword: Legal Regimes of Global Non-state Actors*, cit. p. xiv

²² K. Lynch, *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*, Kluwer, 2003, p. 404

²³ K. W. Abbott, R.O. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, *The Concept of Legalization*, IO, 2000, 54, 3, p. 402. See also P. F. Diehl, c. Ku, D. Zamora, *The Dynamics of International Law: The Interaction of Normative and Operating Systems*, IO, 2003, 57,1, p. 49 <<There has also been an expansion in the forms of law. This had led to thinking about law as a continuum ranging from the traditional international legal forms to soft law instruments (...)The concept of a continuum is useful because these modes are likely not to operate in isolation, but rather to interact with and build on each other>>.

from such rules on the ground that they do not comply with its own interests: it must give reasons stemming from the interpretation of the norm justifying possible exceptions); precision (the rule specifies clearly and unambiguously the behaviour it requires, authorises or interdicts); delegation (third parties are granted authority to implement, interpret and apply the rules, as well as to solve disputes)²⁴. Each characteristic is conceived as a continuum, ranging from a minimum to a maximum, so that for each norm or set of norms it is possible to identify a higher or lower degree of obligation, precision and delegation²⁵.

The legalization paradigm shows how blurry the boundaries between hard and soft law are. Examples of full legalization, where all the three dimensions are present at the highest level, are rare: more common are those arrangements in which at least one dimension is relaxed. For example, treaties with imprecise or indeterminate provisions have been termed “legal soft law” in that they merge legal form with soft obligations; the International Court of Justice has recognised that legally binding obligations among states may be created through oral agreements, unilateral statements, minutes of a meeting, exchange of letters²⁶; reservations and interpretative declarations are instruments on which states may rely in order to deny or limit legal obligations stemming from hard law commitments; treaties frequently envisage private dispute resolution processes (negotiation, mediation, conciliation, arbitration) instead of adjudicatory mechanisms. Accordingly, the widespread inclusion of soft law commitments in hard law instruments shows that it is not always clear where law ends and non-law begins, or, in other terms, where soft law should be placed²⁷. By contrast, some soft law instruments may have a specific normative content that is “harder” than the soft commitments in treaties; moreover, they frequently envisage supervisory and implementation mechanisms traditionally found in hard law texts²⁸. The distinction between hard and soft law is becoming ever more difficult to draw, mainly because it is rare to find soft law standing in isolation; rather, it is most frequently used either as a precursor or as a supplement to a hard law instrument²⁹. Soft law can be used to fill gaps in hard law instruments or supplement hard law with new norms³⁰. In other instances, a given set of rules is first formulated in a non-binding form with

²⁴K. W. Abbott, R.O. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, *op. cit.*, p. 401

²⁵K. W. Abbott, R.O. Keohane, A. Moravcsik, A-M. Slaughter, D. Snidal, *op. cit.*, p. 404

²⁶*Cp* Qatar v. Bahrain, 1994, ICJ Rep. 6, in which the International Court of Justice upheld the binding character of the signed minutes of a meeting

²⁷D. Shelton, *Law, Non-Law and the Problem of Soft-Law*, cit., p. 8

²⁸ This is the case for instance of Agenda 21, adopted at the 1992 Rio Conference on Environment and Development, which, although laying down non-binding rules, envisaged an ad hoc body (the Commission on Sustainable Development) to supervise implementation.

²⁹D. Shelton, *Law, Non-Law and the Problem of Soft-Law*, cit., p. 10.

³⁰ International environmental law-making provides numerous examples of conventions generating “secondary” or “delegated” soft law, i.e. the statements and practices which develop under a treaty to supplement or correct its text: a framework convention is combined with a series of accompanying non-binding instruments (such as conference resolutions, administrative agreements, memoranda of understanding) specifying the details of the convention's provisions or providing guidance to their interpretation and application. See e.g. The 1992 Montreal Protocol to the

the possibility, or even aspiration, of hardening the provisions of an existing treaty, developing into a subsequent treaty, or becoming a catalyst for the establishment of customary international law³¹.

Application of the legalization paradigm to the law of international commercial arbitration

The application of the legalization paradigm to the main sources of international commercial arbitration (the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the UNCITRAL Model Law on International Commercial Arbitration and the UNIDROIT Principles of International Commercial Contracts) shows that also within the field of the law of international commercial arbitration the distinction between hard and soft law is blurry. The New York Convention, which from a legal standpoint is to be considered a hard law instrument, does not reach the full level of legalization: its provisions are legally binding, but they often lack precision, since key concepts such as “arbitration agreement” and “award” are not defined; on the other hand, it provides a full level of delegation, since its interpretation and application is left to state courts. By contrast, the UNCITRAL Model Law and the UNIDROIT Principles – both soft law instruments from a legal standpoint – are not legally binding, but on the other hand they have a level of precision (or imprecision) comparable to the New York Convention (they are a systematic set of rules, in which many key concepts such as “good faith” or “commercial arbitration” are not

Vienna Convention for the Protection of the Ozone Layer (YBIEL, 1992, 2, p. 819) which provides a framework for non-compliance procedure the details of which have been specified by the internal practices and decisions of the Implementation Committee envisaged by the Protocol itself.

³¹C. Chinkin, *Normative Development in the International Legal System*, in D. Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System*, cit., p. 30 and 32. For example, the 1996 International Covenant on Economic, Social and Cultural Rights (IESCR) contained very weak obligations, had no monitoring committee and no compliance mechanism; however, a number of external factors, such as greater political and scholarly attention to economic and social rights, NGO activity, practice of similar bodies, notably the Human Rights Committee, led to the establishment in 1986 by ECOSOC of the Committee on Economic, Social and Cultural Rights to which states were required to report. In turn, the Committee has strengthened the provisions of the Covenant through its General Comments, which have inter alia suggested steps to take against states failing to comply with their reporting obligations: accordingly, the combined impact of these measures has been to raise the level of obligation under the Covenant far beyond that originally envisaged. Likewise, the use in international trade of pesticides and chemicals was for years regulated through non-binding instruments developed by the FAO and the United Nations Environment Programme, but in September 1998 ninety-five states adopted a treaty with binding obligations to regulate this trade: the Convention on the Prior Informed Consent Procedure for Certain Hazardous Chemicals and pesticides in International Trade (ILM 1999, 38, 1). Moreover, in recent years non-binding instruments have sometimes provided the necessary statement of legal obligation (*opinio juris*) to evidence the emergent custom and have helped to establish the content of the norm: as stated by the International Court of Justice, although non-binding instruments do not become binding merely through repetition, a series of resolutions may show the gradual evolution of the *opinio juris* required for the establishment of a new rule (ICJ Advisory Opinion on the Legality of the Threat or Use of Nuclear Weapons, ILM, 1996, 35, par. 71).

precisely defined) and a lower (albeit still significant) level of delegation, because their interpretation and application is largely left to arbitral tribunals, which enjoy a certain degree of autonomy from state courts..

The particular features of the UNCITRAL Model Law and the UNIDROIT Principles (non- legally binding nature, moderate precision and delegation) allow to combine some of the advantages of hard law with those of soft law. Their non-binding character and moderate level of precision has allowed the drafters to reach a consensus in a relatively short period of time on a systematic set of norms, covering a large part of the arbitral process and the subject-matter of international commercial contracts respectively; this has also permitted the adoption of “best solutions”, not necessarily reflecting the rules common to all the legal systems of the world. The moderate level of delegation has allowed to overcome the disadvantages related to the lack of precision, by fostering a process of mutual learning among law-makers, courts and arbitrators, aimed at filling the gaps within the rules of these harmonisation tools and testing the impact of the “best solutions” in practice. It is thus not surprising that the drafting of the UNIDROIT Principles has been defined as an “ongoing process”: after the second edition published in 2004, a third one is under preparation and is expected in 2010. Finally, the moderate level of delegation implies that state courts may intervene when arbitral decisions appear to breach imperative rules of public policy by setting aside or refusing enforcement of arbitral awards.

As the analysis of the diffusion of the main sources of international commercial arbitration has shown, the international commercial arbitration regime is characterised by a strong hybridation between hard and soft law instruments. After 50 years, two provisions of the New York Convention have been *de facto* modified by a soft law instrument, the “Recommendation regarding the interpretation of Article II(2) and Article VII(1) of the Convention”, in order to update them to current arbitration practice. Nonetheless, the diffusion of the liberal interpretation suggested by the Recommendation will depend on the successful interaction between the Convention, the Model Law and the various national arbitration laws: on the one hand, the Recommendation shall allow an interpretation of the written form requirement envisaged by the Convention in accordance with less stringent national law; on the other hand, the reform of art. 7 of the Model Law shall encourage national legislators to adopt updated provisions on the written form requirement of the arbitration agreement in their national arbitration laws. Likewise, the wide number of national arbitration legislations largely based on the Model Law on International Commercial Arbitration has given rise to hybrid forms of laws, which have been formally adopted through national law-making procedures, but whose content has been almost entirely determined by a non-national source. The application of the UNIDROIT Principles as means to interpret and supplement national and

international legislation (which has so far proved to be the most successful use of the Principles) has fostered a creative interpretation of unclear or outdated provisions more in line with international practice: in particular, they have been an important instrument for the promotion of the acceptance of the principle of good faith in common law jurisdictions.

Finally, it should be noted that, although the distinction between hard and soft law is becoming increasingly blurry, it is still important to identify which norms in the international system are meant to be binding and which are not. After all, much of the work of lawyers and judges still consist in administering the law/non-law boundary by deciding on which side of it various alleged norms and conduct fall³². Moreover, the aim of most global governance is to achieve enforceable hard obligations: a fully legalised treaty bestowed with coercive sanctions is still the best means to ensure cooperation among states and non-state actors generally strive to get non-binding principles transformed into hard law so as to be able to enforce the norms they champion³³.

The diffusion of norms in the international system

The debate on globalisation of the law is almost exclusively focused on the identification of a new concept of law which may overcome the old positivist definition and encompass new forms of rule-making not stemming from state authority. This agenda risks to lose sight of the most important implications of the phenomenon of law beyond the state: what is lacking in this debate is a theory explaining how norms emerge and spread in the international system, as well as the mutual interactions between state and non-state law. International Relations theory can bring an important contribution to this discussion. In order to account for the origin and diffusion of norms in the international system, constructivists have theorised a norm “life cycle”, which comprises three stages: norm emergence, norm cascade and internalization³⁴. In the first stage new norms emerge as a result of a persuasion effort carried out by “norm entrepreneurs” (also known as “epistemic communities” or “meaning managers”), that is groups of professionals with recognised expertise and competence in a particular domain, whose members agree on a well-defined regulatory approach to a given issue. Epistemic communities are essential to the diffusion of new norms in the international system: they challenge existing rules laying down standards of appropriate behaviour

³²R.B. Bilder, *Beyond Compliance: Helping Nations Cooperate*, in D. Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System*, cit. , p. 71

³³M.E. O'Connell, *The Role of Soft Law in a Global Order*, in D. Shelton (ed), *Commitment and Compliance: the Role of Non-Binding Norms in the International Legal System*, cit., p. 111.

³⁴J.G. March and P. Olsen, *The Institutional Dynamics of International Political Orders*, IO, 1998, 52, 4, p. 895.

and try to persuade the rest of the community to replace the old standards with the new ones. If these norm entrepreneurs are successful and thus a “critical mass” of states and other actors of the international system are persuaded to adopt the new norms, the second stage consists in the norm cascade, whereby the “norm leaders” (i.e. the avant-garde of actors which have adopted the new norms) try in turn to persuade others to become norm followers. At the far end of the norm-cascade stage, norms may become so widely accepted that they are internalized by actors and achieve a “taken-for granted” quality, that makes compliance with the norm almost automatic.

This theoretical framework opens up new insights into the analysis of the harmonisation of the law of international commercial arbitration. This harmonisation process can be seen as a process of diffusion of uniform norms in the field of international commercial arbitration, following the constructivist “norm life cycle” in at least two of its three stages, namely norm emergence and norm cascade. Formulating agencies, like UNCITRAL and UNIDROIT, can be considered as epistemic communities or norm entrepreneurs, challenging the existing logic of appropriateness with which the arbitral process was conducted in the various states, characterised by a mistrust vis à vis this method of dispute resolution, in favour of the more traditional litigation in national courts, and trying to foster the emergence of a common culture of arbitration, i.e. the gradual convergence in norms procedures and expectations of participants in the arbitral process.³⁵ Despite their formal status as intergovernmental UN agencies, UNCITRAL's and UNIDROIT's membership resembles more an epistemic community than an intergovernmental conference of state representatives. UNCITRAL and UNIDROIT sessions represent a <<wholesome mix of academic specialists in commercial and comparative law, practising lawyers, and members of government ministries with years of experience in international lawmaking>>³⁶. Although their formal membership is limited to states, their working sessions are open to participation as observers to international organizations, both governmental and non-governmental: they are allowed to join all sessions to the same extent as members, with the sole exception that they have no right to vote³⁷. This exception is however of

³⁵A.J. Van den Berg, *International Dispute Resolution: Towards an International Arbitration Culture*, Kluwer, 1998, p. 31-34

³⁶J. Honnold, *Uniform Law for International sales Under the 1980 United Nations Convention*, Kluwer, 1999, p. 51

³⁷The reports of UNCITRAL and UNIDROIT's last working sessions show a steep increase in the participation of non-state actors as observers. At the 12th UNCITRAL Session in 1979 only four non-governmental organisations attended (Baltic and International Maritime Conference, International Bar Association, International Chamber of Commerce), whereas at the latest 41st Session in 2008 their number was 28 (inter alia Institute of International Banking Law and Practice, Instituto Iberoamericano de Derecho Marítimo, International Association of Ports and Harbors, International Bar Association, International Chamber of Shipping, International Council for Commercial Arbitration, International Federation of Freight Forwarders Associations). Similarly, during the drafting sessions of the UNIDROIT Principles 2004, only 4 non-governmental organisations were invited as observers (UNCITRAL, ICC, ASA, the Milan Chamber of National and International Arbitration); in 2006, at the first session for the preparation of a new edition of the UNIDROIT Principles, the circle of invited observers has considerably enlarged (the Cairo Regional Center for International Commercial Arbitration, the International Bar Association, the Swiss Arbitration Association, the New York City Bar, the German Arbitration Institution, the Milan Chamber of National and International Arbitration, the

little significance, since these formulating agencies typically reach their decisions by consensus, rather than by voting: during working sessions, all efforts are made in order to take into account all concerns raised and to reach a final text which is acceptable to all.³⁸ Constructivists observe that an emergent norm, in order to move towards the second stage of norm cascade, needs to be institutionalised in specific sets of international rules, so as to clarify what the norm exactly is and what constitutes a violation thereof. This is what is currently happening in the field of the harmonisation of international commercial arbitration: over the past twenty years, there has been an evident move toward the codification or restatement of general principles of law or commonly accepted practices (e.g. the UNCITRAL Model Laws on International Commercial Arbitration and Conciliation, the UNCITRAL Arbitration Rules, the rules of procedures of the various international arbitral institutions, such as the International Chamber of Commerce and the London Court of International Arbitration) and the vague notion of *lex mercatoria* is being progressively replaced by written codifications, such as the UNIDROIT Principles of International Commercial Contracts, the Principles of European Contract Law and the CENTRAL database. Once a “critical mass” of states have been persuaded to adopt the new norms, constructivists say that these have reached a threshold or tipping point, since from this moment on they start to bring about a change in the prevalent beliefs and values within the international system.

Two of the main harmonisation tools in the field of international arbitration seem to have reached this threshold: the first is the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, which has been adopted by most states in the world and therefore seems to have achieved even the final stage of internalization; the second is the UNCITRAL Model Law on International Commercial Arbitration, which has reached or is reaching the tipping point, since nearly 50 states around the world have so far enacted legislation based on this instrument and among them feature many of the world's main trading nations, such as some Canadian and US states, Germany, Hong Kong, and the United Kingdom. In the norm-cascade phase, constructivists envisage three major motivations pulling other states to respond to the pressure stemming from “State leaders” and ultimately adhere to the new rules: legitimation, that is the concern with international approval (in the sense that not complying with internationally accepted standards may undermine their reputation and credibility)³⁹; conformity, whereby states comply with norms to demonstrate that they have adapted to the social environment to which they belong; esteem,

United Nations Commission on International Trade Law (UNCITRAL), the Study Group for a European Civil Code, the ICC International Court of Arbitration, the London Court of International Arbitration, to mention only a few).

³⁸ The UNCITRAL Guide, United Nations Publication, 2006, p. 3, available on the website [uncitral.org](http://www.uncitral.org/pdf/english/texts/general/V0650941.pdf) at <http://www.uncitral.org/pdf/english/texts/general/V0650941.pdf>

³⁹ J.G. March and P. Olsen, *The Institutional Dynamics of International Political Orders.*, cit, p. 903

whereby state leaders conform to norms in order to avoid disapproval stemming from violation of internationally accepted standards and thus enhance national consensus (and, as a result their prestige)⁴⁰. These motivations appear too general and do not take into account the peculiarities of the international trade context. More convincing seems the explanation that states decide to conform their national laws to international trade standards because they want to convey a “signalling effect” to the international business community: they want to make their national laws dealing with international trade matters immediately familiar and recognisable to the foreign practitioner, so as to attract as many foreign investments and arbitrations as possible within their territory. In the specific context of international commercial arbitration, this signalling effect can also be interpreted with reference to the nationals of the state concerned. As arbitration is largely founded on party autonomy, parties are free to choose the place of arbitration and therefore the procedural law governing their dispute. If a given country has an outdated arbitration law, it will rarely be selected as a place of arbitration; consequently, even its nationals will tend to go abroad to solve their disputes and thus will have to deal with a foreign arbitration law with which they may not be familiar.

As mentioned above, the diffusion of the Model Law has been particularly successful, whereas the UNIDROIT Principles have so far been considerably less applied in arbitration as *lex contractus* or as restatement of *lex mercatoria* and general principles of contract law. Accordingly, from a legal process standpoint, the model law has proved to be a more effective vehicle of norm diffusion than a restatement. Whereas the latter is primarily addressed to contracting parties, judges and arbitrators throughout the world, with the consequent difficulties in ensuring its diffusion among such a huge and indefinite multitude of actors, the model law is addressed to national law-makers, which are much more identifiable and limited in number. Indeed, the Principles seem to have worked better as a model law, rather than as a restatement, since their impact on national and international legislations has been comparatively stronger. This may lead to a re-thinking in the purposes this instrument may serve. It might perhaps be worth considering the opportunity of adopting the UNIDROIT Principles in the form of a model law, so as to exert persuasion directly on those officials who, within their respective national governments, are in charge of adopting legislation in the field of international commercial law, with a view to convincing them of the need for reforming outdated national contract laws in accordance to international standards.

The impact of the UNCITRAL Model Law and the UNIDROIT Principles on national legislations is also fostering the emergence of a particular legislative technique, which is becoming the standard

⁴⁰J.G. March and P. Olsen, *The Institutional Dynamics of International Political Orders*, cit, p. 904

for national or international codification of private law⁴¹. This drafting approach is characterised by two main features: an extensive comparative law research underlying the elaboration of each provision, which takes into account a large number of foreign sources of both national and non-national origin; the involvement in the drafting process of a wide range of outside experts and stakeholders not belonging to the state or formulating agency's bureaucracy, in order to strengthen the legitimacy of the harmonisation tool and facilitate its reception in practice⁴². In turn, the diffusion of such national and international instruments, reflecting widely accepted rules, ends up constraining the choice of legislatures embarking on new law-making projects, since they need to provide reasonable grounds every time they decide to adopt rules departing from internationally accepted standards⁴³. This is particularly evident in the diffusion of UNCITRAL Model Law, which has “trapped” into the logic of arguing even those states which have decided not to adapt their legislation to this harmonisation instrument. This is the case for example of Great Britain, which decided not to enact the Model Law essentially on grounds of self-interest, i.e. for fear that departure from its traditional legislation would have undermined its ability to attract arbitral disputes into its territory. Yet, the large success of the Model law forced Great Britain to justify on rational grounds the validity of its self-interest, by publishing in 1989 a detailed report – the Mustill Report – in which the Model Law was thoroughly analysed and reasons were given why English arbitration law should not conform to this harmonisation tool.

Legitimacy of international commercial arbitration

Interdisciplinary approaches to international commercial arbitration have been mainly adopted with a view to addressing the issue of its autonomous character with respect to state sovereignty. Very few attempts have been made to assess its legitimacy and no detailed analysis has been conducted so far of how legitimacy in this field may be justified under the various theories envisaged by law and social sciences literature. Although this task falls outside the main purpose of this work, some broad considerations are worth making. As outlined in the introductory part of this dissertation, in

⁴¹B. Volders, *The UNIDROIT Principles of International Commercial Contracts and Dutch Law*, in E. C. Cashin Ritaine and E. Lein (eds), *The UNIDROIT Principles 2004: Their Impact on Contractual Practice, Jurisprudence and Codification- Reports of the IDSC Colloquium 8/9 June 2006*, Schulthess, 2007, p. 142; D. Tallon, *The New Dutch Civil Code in a Comparative Perspective – a French View- Point*, ERPL, 1993, p. 190. A similar procedure has for example been adopted in 2001 by the EU Commission, with a view to identifying a new strategy of harmonisation in the field of European contract law.

⁴²B. Volders, *The UNIDROIT Principles of International Commercial Contracts and Dutch Law*, cit., pp. 139-141

⁴³B. Volders, *The UNIDROIT Principles of International Commercial Contracts and Dutch Law*, cit., pp. 142-143

the literature there are two main different approaches to the notion of legitimacy: a normative and a descriptive approach. The first is used in order to identify the characteristics which make a given institution or regime responsible to the people subject to it⁴⁴: in this context scholars often prefer to use the term “accountability”, rather than legitimacy. The second approach attempts to explain why or when people obey or accept a given regime or institution. This reading of legitimacy investigates the specific empirical motives for obedience: it does not attempt to evaluate political regimes, but rather to provide reasons for a particular social action, namely obedience to a regime or institution.

From a normative standpoint, the issue of the legitimacy of international commercial arbitration depends on how the issue of its autonomous character is addressed. Supporters of the globalist approach to arbitration, who consider arbitration as an increasingly autonomous legal order increasingly detached from State sovereignty, may either emphasise its dangerous lack of legitimacy, or rely on autopoiesis in order to emphasise the self-legitimation of this regime. As seen above⁴⁵, according to Cutler the tremendous growth of international commercial arbitration is being encouraged by states, which are involved in a regulatory competition to provide a hospitable legal framework for arbitration proceedings and accordingly limit the powers of their national courts to review arbitral awards⁴⁶. By so doing, states are increasingly assuming the role of enforcers or stabilizers of rules and practices established by private authorities⁴⁷ and consequently weakening mechanisms that work toward participation and democratic accountability⁴⁸. By contrast, Banakar considers arbitration a self-reflexive system, in the sense that it regulates self-regulation⁴⁹: it establishes procedural rules to foster the development of a self-regulated area of the market (i.e.

⁴⁴More precisely, Keohane (Kehoane, *The Concept of Accountability in World Politics and the Use of Force*, Michigan Journal of International Law, 2003, 24, p. 1124) defines accountability as a relational term, denoting a relation between a power wielder and the accountability holders to which the former is held accountable. As far as the content of the definition of accountability is concerned, Kehoane identifies two essential elements: information and sanctions. For a relationship to be one of accountability, there must be some provision for interrogation and provision for information, and some means by which the accountability-holder can impose costly sanctions on the power-wielder. To be accountable means to be compelled to answer or give explanations for one's action or inaction and, depending on the explanation, to be exposed to potential sanctions, both positive and negative.

⁴⁵ See *supra* pp. 186 ff.

⁴⁶ A.C. Cutler, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*, Cambridge University Press, 2003, p. 225 and 26-27.

⁴⁷ A.C. Cutler, *Private Power and Global Authority*, cit, p. 237-239

⁴⁸ A.C. Cutler, *Private Power and Global Authority*, cit, p. 235

⁴⁹See *supra* p. 200. Teubner introduces the concept of reflexive system as a consequence of the operative closure of the various social systems. Autopoiesis implies that social systems are operatively closed, that is they function according to their own internal logic and do not allow external interference in their internal normative operations. Accordingly, no single social system can, by way of controlling the normative operations of the others, control the whole of the society. It follows that society assumes a polycentric structure: it is impossible to steer it from a single control centre and the only alternative is to rely on the self-regulation of social systems. On this reading, reflexive systems are those systems which establish norms of procedures, organization, membership and competence of the other social systems: they regulate self-regulation, they further the development of reflexive structures within the other social sub-systems. Cfr G. Teubner, *Substantive and Reflexive Elements in Modern Law*, *Law & Society Review*, 1983, 17, p. 239-285; R. Banakar, *Reflexive Legitimacy in International Arbitration*, in V. Gessner and A.C. Budak, *Emerging Legal Certainty: Empirical Studies on the Globalization of Law*, Ashgate, 1998, p. 360-361.

international commercial transactions)⁵⁰, it sets up a favorable environment in which the business community can strengthen its own self-regulation⁵¹. On the other hand, scholars seeing arbitration as a hybrid regime composed of national, international and non-national sources may argue that in this field there are enough links with state sovereignty to make it accountable to its addressees. Governance of international commercial arbitration occurs through the interaction between states and a restricted number of intergovernmental organisations (such as UNCITRAL and UNIDROIT) and non-state actors (such as the various arbitral institutions). Accountability is ensured through the instrument of delegation: the increasing use of soft law and the wide scope of party autonomy in arbitration are indicators that states are delegating to international organisations and non-state actors the task of determining the most appropriate standards for the conduct of arbitration, but at the same time they retain the power of supervising the arbitration process. State law is still a fundamental source of international commercial arbitration, although the content of many national arbitration laws is increasingly determined by model laws elaborated by transnational epistemic communities. Moreover, the increasing role of party autonomy in the arbitration process has spurred arbitral institutions as well as specialized formulating agencies to create a large amount of private informal norms of dispute resolution; yet, in the absence of a supra-national arbitration tribunal, national courts and laws continue to play an important supportive and supervisory function at various moments in the arbitration process: for example, in the recognition and enforcement of arbitration agreements, in the determination of which disputes can be submitted to arbitration, and in the recognition and enforcement of arbitration awards. The legitimacy problem of this form of governance lies in the restricted number of actors taking part to the decision-making process. Nonetheless, as already noted above, in recent years there has been a steep increase in the participation of non-state actors as observers to the working sessions of the main formulating agencies in the field, i.e. UNCITRAL and UNIDROIT. The fact that these observers are not members and therefore have no right to vote is of little significance, since these formulating agencies typically reach their decisions by consensus, rather than by voting: during working sessions, all efforts are made in order to take into account all concerns raised and to reach a final text which is acceptable to all. The involvement of a wide range of outside experts and stakeholders not belonging to the state or formulating agency's bureaucracy in the drafting process of UNCITRAL and UNIDROIT is therefore an attempt to strengthen the legitimacy of their harmonisation tools and facilitate their reception in practice.

⁵⁰ R. Banakar, *Reflexive Legitimacy in International Arbitration*, cit, p. 361

⁵¹ R. Banakar, *Reflexive Legitimacy in International Arbitration*, cit, p. 393

The particular decision-making process followed by UNCITRAL and UNIDROIT is also the main indicator of the legitimacy of international commercial arbitration from a descriptive perspective.

One of the most important descriptive approaches to the legitimacy of global governance is founded on Habermas' notion of communicative action. Communicative action implies that, when individuals are discussing a given issue, their views are not fixed, but are subject to discursive challenges, i.e. actors are open to being persuaded to change them in view of better arguments founded on reasonable grounds. This is because in communicative action the goal is not to maximize fixed preferences or to make one's own view prevail, but rather the achievement of a common understanding or reasoned consensus. Building on Habermas, it is argued that in the absence of democratic forms of participation and control, governance beyond the state may receive legitimacy and support only by subjecting international relations to justificatory discourse⁵²: people will accept rules and institutions of global governance only in so far as they accept the aims and the principles according to which they function.⁵³ On this reading, legitimacy becomes the people's belief in the validity of the procedure by which a rule has been worked out⁵⁴. Habermasian communicative action is regarded as a significant tool for non-hierarchical steering in global governance, which may improve its legitimacy problems by providing "voice" opportunities to various stakeholders

Despite their status as inter-governmental bodies, these formulating agencies usually follow a decision-making process based on consensus, rather than on voting and veto mechanisms, which closely resembles the logic of communicative action and allows the adoption of widely acceptable solutions founded on rational arguments, rather than on a trade-off among the various stakeholders⁵⁵. Accordingly, they represent an example of legitimate governance in habermasian

⁵²J. Steffek, *Legitimacy in International Relations*, European Journal of International Relations, 2003, 9, 2, p. 188

⁵³J. Steffek, *op. cit.*, p. 250

⁵⁴T. Risse, *Global Governance and Communicative Action*, Government and Opposition, 2004, 39, 2, p. 293

⁵⁵J. Honnold, *The United Nations Commission on International Trade Law: Mission and Methods*, Am. J. Comp. L. 1979, 27, p. 210-211, who explains how consensus is reached within UNCITRAL. Much depends on the skills of the chairman: when he senses that the debate has produced the basis for consensus, he will invite the group to accept the result. When differences persist, he may appoint a small working group which discusses the different points of view and finds an acceptable solution. When objections still remain, a member of the commission may ask that the records show that he "reserves his position" on the point. This dissenting opinion shows that the state representative was loyal to his government's instructions and "fought the good fight". A similar decision-making process has been followed by UNIDROIT Working Group during the drafting of the UNIDROIT Principles. The Working Group appointed among its members some rapporteurs for each of the different chapters of the Principles, who were entrusted to prepare, after the necessary comparative studies, a first draft, together with comments. These preliminary drafts were discussed by the Group as a whole and then revised again by the rapporteurs in light of the comments expressed during the Group sessions. The revised drafts were circulated, together with a list of the most controversial issues, among a wider group of experts, mostly law professors, throughout the world. In addition, they were examined at the annual sessions of the UNIDROIT Governing Council, which provided its advice, especially in those cases where the Working Group had not reached a consensus. All the observations and proposals for amendment received were submitted to the Working Group, so as to enable it to take them into account when proceeding to the third and final reading of the drafts.

terms, i.e. a decision-making process aimed at reaching a reasoned consensus among actors and in which the various stakeholders' interests are taken into consideration.

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