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Book Review

The Practice of Transnational Law (Klaus Peter Berger ed., 2001)

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In a contribution to *Lex Mercatoria*,[1] a set of essays in honour of Francis Reynolds, Sir Roy Goode remarked that:

> [T]he attention given to these new doctrines [of an autonomous *lex mercatoria* enforced by an anational arbitration procedure leading to a stateless award] has been in inverse proportion to their practical impact. Yet we owe a good deal to the advocates of the *lex mercatoria*, and to others involved in the development and formulation of international principles of contract, commercial law and arbitration procedure, for they have had considerable success in shifting the balance of decisional authority from the courts to the arbitrators and in freeing the hands of arbitral tribunals from constraints which parties and their lawyers undoubtedly found unduly irksome.[2]

The book of conference proceedings edited by Klaus Peter Berger, reviewed here, demonstrates in fact the considerable practical importance of the *lex mercatoria* or "transnational law"—a term used largely interchangeably by the editor and some other contributors—as well as its ongoing theoretical importance. Legal advisers in international business transactions, and academic commentators on arbitration and contract law, should read it carefully.

The most remarkable parts of the book are found modestly towards the end, and deal with the first large-scale empirical study into the *lex mercatoria*.[3] Berger created and leads the Centre for Transnational Law (CENTRAL) at the University of Münster in Germany. He and three assistants from CENTRAL succinctly outline *The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration*.[4]

Annex I sets out CENTRAL's Questionnaire, which was mailed to 2,733 respondents, comprising inhouse counsel of large companies based in Germany, the United States and worldwide; attorneys in larger European law firms, specializing in either commercial arbitration or insurance; arbitrators based in Switzerland around the world and others known to CENTRAL to be working in international business law.[5]

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[1] LEX MERCATORIA (Francis Rose ed., 2000).

[2] Roy Goode, *The Role of the Lex Loci Arbitri in International Commercial Arbitration*, 17 ARB. INT'L 19, 22 (No.1, 2000), *originally published in* LEX MERCATORIA 245 (Francis Rose ed., 2000).

[3] *See also* Luke Nottage, *Practical and Theoretical Implications of the Lex Mercatoria for Japan: CENTRAL's Empirical Study on the Use of Transnational Law*, 4 VINDABONA J. INT'L COMM. L. & ARB. 132 (No. 2, 2000).

[4] At 91. Unless otherwise indicated, page references throughout this review refer to THE PRACTICE OF TRANSNATIONAL LAW, (Klaus Peter Berger ed., 2001).

[5] *Id.* at 133.

Annex II presents "Selected Results" which derive mainly from the 639 valid responses received from fifty-four countries (a respectable 23.4% response rate).[6] A key finding was that many respondents were "aware of Y cases occurring in [their] practice in which the parties have referred to transnational law,"[7] whether during the negotiation of an international contract (32%), in the text of an international contract (32%), and particularly in international arbitration proceedings (42%). Many respondents had dealt with two to five cases.[8] The most frequently reported references to transnational law in these contexts were to "general principles of law," then to "*lex mercatoria,*" and then to the "UNIDROIT Principles of International Commercial Contracts"[9] or the "transnational principles of law."[10] The most common set of aims involved supplementing and interpreting domestic law (and, to a much lesser extent, uniform international law such as the Vienna Sales Convention), although substituting for domestic law was also significant. Another important purpose reportedly behind references to transnational law in contract negotiations and arbitrations was "improving understanding."[11] This illustrates a more diffuse, but no doubt enduring benefit in deepening the debate about *lex mercatoria* through initiatives like the UNIDROIT Principles. However, other survey results suggest that this will not be plain sailing. Berger and his team stress that the main reasons "why … no reference has been made so far to Transnational Law" in contract negotiations, drafting or arbitration proceedings were "no chance to gain experience so far" and "no information available,"[12] and cumulatively there remain significant concerns about vagueness and uncertainty.[13] Further, the sub-set of British respondents reported statistically higher perceived risks, and lower benefits, in using transnational law principles.[14]

Arguably, this attitude reflects the deep-rooted orientation towards formal reasoning and bright-line rules in English law. Influential commentators and practitioners in Britain have maintained that this approach is precisely why commercial parties still choose English law and forums to resolve their cross-border disputes. That partly explains the initial opposition to reforming antiquated arbitration legislation by following the United Nations Commission on International Trade Law (UNCITRAL) Model Arbitration Law of 1985—thankfully largely overcome in the English Arbitration Act 1996—and the persistent disinterest in the United Nations Convention on Contracts for the International Sale of Goods,[15] acceded to by all other major trading nations (except Japan). CENTRAL's study—and the continuing

[6] *Id.* at 135.
[7] *Id.* at 153.
[8] *Id.* at 158.
[9] International Institute for the Unification of Private International Law ("UNIDROIT") Principles of International Commercial Contracts (1994); *available at http:*<//www.unidroit.org/english/principles/pr main.htm>.
[10] Berger, supra note 4, at 159.
[11] *Id.* at 160.
[12] *Id.* at 110.
[13] *Id.* at 194.
[14] *Id.* at 202.
[15] Opened for signature April 11, 1980, 1489 U.N.T.S. 3.

popularity of other arbitral venues such as the Paris-based International Chamber of Commerce (ICC), the American Arbitration Association and those in Switzerland—suggest that this attitude has resulted in business going elsewhere, and that it may remain a serious impediment to the globalization of commercial law. There have been indications of a formalization of substantive principles of the *lex mercatoria* since the 1980s, parallel to that of international arbitral proceedings; but there have also been important counter-tendencies in both respects since the mid-1990s, and the resulting amalgam seems much less formal than that with which English jurists tend to be comfortable.

The remainder of the book illustrates some important aspects of this ongoing globalization process. In an opening chapter, Berger traces the rebirth of the *lex mercatoria* from as early as the 1950s (notably by French comparativist Berthold Goldman); its "creeping codification" in recent decades, primarily through private endeavours like those of UNIDROIT; and the evolution of a global marketplace and civil society, matched by declining significance of state sovereignty and therefore legal positivism. Bonell, one of the main architects and proponents of the UNIDROIT Principles, details principles and cases regarding their application with and without express choice by the parties.[16]

Yves Derains then draws on his experience as a former Secretary General of the ICC's International Court of Arbitration.[17] He points out that *lex mercatoria* was applied in ICC arbitrations despite Arbitration Rules in effect from 1975–1997 that seemingly prohibited this, by requiring arbitrators to apply a (domestic) "law". Presumably this was to meet the expectations of parties, as well as the arbitration community. Derains points out that ICC arbitrators were still able to apply *lex mercatoria* because they almost never disregarded an express choice of law, and thus ensured ready enforceability of awards. Instead, it was used to fill a gap in the chosen domestic law (such as a duty to mitigate under French law) or to supplement domestic law (for example, by invoking a general duty to act in good faith rather than trying to uncover a specific rule). *Lex mercatoria* has also been applied where no domestic law has been selected, either following an "objectivist approach" (determining that no such law has the closest connection with the transaction) or, increasingly, a "subjectivist approach" (finding that failed negotiations about an applicable domestic law indicates the parties' implied intention to apply transnational law).

In the tradition of French academic writing dating back to Goldman, Emmanuel Gaillard returns to a more abstract perspective on the *lex mercatoria*.[18] Gaillard argues first that the *lex mercatoria* is not defined by its content, but is driven by the needs of international business, which national laws purportedly cannot accommodate. This approach was suggested by Lord Mustill in the late 1980s, in publishing a list of

[16] Berger, *supra* note 4, at 23.
[17] *Id.* at 43.
[18] *Id.* at 53, *reproduced as* Emmanuel Gaillard, *Transnational Law: A Legal System or a Method of Decision-Making*, 17 ARB. INT'L 59 (No.1, 2001).

substantive principles hitherto applied in arbitral awards, and then by more systematic rules elaborated by UNIDROIT and CENTRAL. Instead, Gaillard argues that the *lex mercatoria* is distinguished by its sources: its "rules are derived from various legal systems as opposed to a single one."[19] Likewise, he contends that the content of rules cannot be determined by a list, but by a distinctive method

> deriving the substantive solution to the legal issue at hand not from a particular law selected by a traditional choice-of-law process, but through a comparative law analysis which will enable the arbitrators to apply the rule which is most widely accepted, as opposed to a rule which may be peculiar to a legal system or less widely recognized.[20]

This may be based on Gaillard's own experience and observations of international arbitral proceedings, but his main purpose in making these distinctions is theoretical. This view, he submits, better establishes for the *lex mercatoria* four defining features of an autonomous legal system: completeness, structured character, ability to evolve, and predictability.

Berger's *Doktorvater*, Norbert Horn, brings readers back to earth by establishing four "transnational sources of law" and three modes of application. He argues that the sources consist not only of texts outside any legislative process (such as the UNIDROIT Principles) and non-codified principles applied by arbitrators or used by lawyers, which are the main focus of scrutiny in this book. Horn adds international treaties, such as the Vienna Sales Convention, and sui generis law like that of the European Union (EU). These certainly must be given their due in addressing the overall nature of the *lex mercatoria*, and especially its likely future development. Horn helpfully explains how all four sources are applied in three main ways: application of codified transnational law or EU law, incorporation of the UNIDROIT Principles mainly by express reference, and usage of standard forms or rules (such as the ICC's Uniform Customs and Practice for Documentary Credits). This chapter will be particularly helpful for students and for those embarking on a study of transnational law for the first time.

Finally, in what must be one of his last published works, the late Friedrich Juenger presents *Some Random Remarks from Overseas*, in a typically perspicacious and engaging manner.[21] In fact, his focus is the United States. Juenger points out that *Swift v. Tyson*,[22] which involved negotiable instruments, applied supra-state *lex mercatoria*, but the emergence of a "general federal common law" was undermined by growing legal positivism. Nonetheless, he argues that American jurists continued to work with supra-state "soft law," such as the many private Restatements, and are familiar with the even more encompassing *lingua franca* provided by "the common law: a supranational legal culture."[23] Because of American pragmatism—because "American law, like a sponge,

[19] *Id.* at 55.
[20] *Id.* at 56.
[21] *Id.* at 81.
[22] Swift v. Tyson, 41 U.S. (16 Pet.) 1 (1842).
[23] Berger, *supra* note 4, at 84.

can soak up almost anything that is worthwhile"[24]—Juenger concludes that there may well be a revival of the *lex mercatoria* in the U.S.

This rich variety of perspectives on transnational law, given a renewed sense of immediacy by the results of CENTRAL's empirical study, led not surprisingly to an energetic exchange of views at the conference, ably summarized by Sascha Lehmann.[25] Readers should reflect on these thought-provoking comments. Hopefully, even this brief review of the contributions to this unique book will prompt legal, jurisprudential, and particularly empirical studies of the *lex mercatoria* and the globalization of commercial law more generally.

[24] *Id.* at 87.
[25] *Id.* at 11.