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A NEW (QUASI-)CODIFIED LEX MERCATORIA BASED ON SOFT LAW REGULATORY COMPETITION AND THE USE OF COMPARATIVE LAW METHODOLOGY IN INTERNATIONAL COMMERCIAL ARBITRATION

Marco Torsello

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A NEW (QUASI-)CODIFIED LEX MERCATORIA BASED ON SOFT LAW REGULATORY COMPETITION AND THE USE OF COMPARATIVE LAW METHODOLOGY IN INTERNATIONAL COMMERCIAL ARBITRATION

Marco Torsello

Résumé

*Bien que dans la plupart des cas corroborant les solutions fondées sur le droit national, l'utilisation de règles a-nationales produites dans le domaine du droit transnational du commerce n'est pas rare dans l'arbitrage commercial international. Cependant, contrairement à la lex mercatoria traditionnelle, à laquelle on faisait référence principalement sous la forme de droit coutumier supranational non codifié, la tendance actuelle semble favoriser le recours à des instruments de soft law (*quasi-*)codifiés produits par divers acteurs et sous différents formats.*

Partant de cette observation, cet article examine de manière critique (et rejette) certaines des explications alternatives proposées dans la recherche juridique sur les raisons pour lesquelles les arbitres peuvent recourir à la lex mercatoria (comme celles qui se concentrent sur la réduction alléguée des coûts de transaction, ou les avantages pour les arbitres ou les organismes de formulation) et embrasse une théorie de la lex mercatoria basée sur une méthodologie comparative fonctionnelle. Contrairement à d'autres théories fonctionnelles, cependant, celle proposée ici postule que le recours des arbitres à des sources de droit non nationales est, dans la plupart des cas, strictement lié à la quête des parties d'impartialité et d'indépendance du tribunal arbitral, qui est mieux servie lorsque, en l'absence d'un choix de loi fait par les parties, les arbitres s'abstiennent de recourir à la loi nationale applicable en vertu des règles objectives de conflit de lois pertinentes. On observe ainsi que, lorsqu'ils adoptent cette approche, les arbitres s'appuient de plus en plus sur des instruments de soft law, tels que des collections (« codifiées » ou « quasi-codifiées ») de règles ou de principes, dont la légitimité et l'applicabilité peuvent être remises en question, à moins qu'elles ne soient dûment étayées par des arguments juridiques solides. De plus, on observe que l'essor récent de la promulgation d'instruments de soft law conduit à une sorte de concurrence réglementaire entre les instruments de soft law, qui appelle à une méthodologie pour sélectionner parmi les nombreux instruments (de hard et soft law) mis à la disposition des tribunaux arbitraux internationaux.

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L'affirmation de cette contribution, à cet égard, est que les arbitres devraient recourir à une méthode comparative en deux étapes afin de déterminer quels instruments juridiques (hard ou soft) appliquer. Premièrement, les arbitres devraient rechercher une solution fondée sur la volonté des parties, en examinant ainsi quelles règles les parties auraient choisies comme applicables à leur relation, si les parties avaient choisi une loi ou un instrument juridique applicable. À titre subsidiaire, si la première approche ne conduit pas à une solution satisfaisante, les arbitres devraient sélectionner et appliquer les règles juridiques (hard ou soft) qui semblent plus adaptées aux transplantations juridiques et plus adaptables à l'environnement juridique et aux circonstances spécifiques de l'affaire. Cette approche peut être dûment poursuivie en recourant à la recherche juridique comparative bien développée traitant de la mobilité transfrontalière du droit et des défis des transplantations juridiques, à condition que l'adaptabilité de l'instrument soit à tout moment mesurée au regard de sa compatibilité avec l'ordre public et les lois de police des systèmes juridiques concernés.

Mots clés: Lex mercatoria; soft law; droit transnational du commerce; arbitrage international; concurrence réglementaire; méthodologie du droit comparé; transplantations juridiques

Abstract

Although mostly corroborative of solutions based on national law, the use of a-national rules produced in the realm of transnational commercial law is not infrequent in international commercial arbitration. Unlike the traditional lex mercatoria, however, which was referred to primarily in the form of supranational, uncodified customary law, the current trend seems to favor recourse to (quasi-)codified soft law instruments produced by various actors and in various formats.

Starting from this observation, this paper critically reviews (and rejects) some of the alternative explanations proposed in legal scholarship as to why arbitrators may resort to lex mercatoria (such as those focusing on the alleged reduction of transaction costs, or the advantages for arbitrators or formulating agencies) and embraces a theory of lex mercatoria based on a functional comparative methodology. Unlike other functional theories, however, the one proposed here posits that arbitrators' reliance on non-national sources of law is, in most cases, strictly connected to the parties' quest for impartiality and independence, which is best served when, in the absence of a choice of law made by the parties, arbitrators refrain from resorting to the national law applicable by virtue of the relevant objective conflict-of-laws rules. It is thus observed that, when embracing this approach, arbitrators increasingly rely on soft law instruments, such as ("codified" or "quasi-codified") collections of rules or

principles, whose legitimacy and enforceability may be called into question, unless duly supported by solid legal arguments. Moreover, it is observed that the recent booming in the enactment of soft law instruments is leading towards a sort of soft law regulatory competition, which calls for a methodology to select among the many (hard and soft law) instruments made available to international arbitral tribunals.

The paper's claim, in this respect, is that arbitrators should resort to a two-step comparative methodology in order to determine which (hard or soft) legal instruments to apply. First, arbitrators should search for a solution based on the parties' own will, thus investigating which rules the parties would have selected as applicable to their relationship, had the parties chosen an applicable law or legal instrument. In the alternative, should the former approach fail to lead to a satisfactory solution, arbitrators should select and apply the (hard or soft) legal rules which appear to be more suitable for legal transplants and more adaptable to the specific legal environment and circumstances of the case. This approach can be duly pursued by resorting to the well-developed comparative legal scholarship dealing with the trans-frontier mobility of law and the challenges of legal transplants, provided that the adaptability of the instrument should at all times be measured having regard to its compatibility with the public policy and mandatory laws of the legal systems involved.

Keywords: Lex mercatoria; soft law; transnational commercial law; international arbitration; regulatory competition; comparative law methodology; legal transplants

TABLE OF CONTENTS

I. INTRODUCTION

Although mostly corroborative of solutions based on national law, the use of a-national rules produced in the realm of transnational commercial law is not infrequent in international commercial arbitration.[1] However, whereas the traditional notion of *lex mercatoria* was conceived and described primarily in the form of supranational, uncodified customary law originating from the

[1] For similar observations see, *e.g.*, Harold J. Berman and Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 Harv. Int'l L. J. 221, 224 (1978); Roy Goode, Herbert Kronke and Ewan McKendrick, Transnational Commercial Law. Text, Cases and Materials (2nd ed., 2015); Jan H. Dalhuisen, Dalhuisen on Transnational Comparative Commercial, Financial and Trade Law (3 volumes, 7th ed., 2019).

Medieval *ius mercatorum*,[2] and revived into contemporary *lex mercatoria*,[3] (or new *law merchant*)[4], the current trend in the application of transnational commercial law seems to favor the recourse to multiple and diverse (quasi-)codified soft law instruments, produced by various actors and in various formats.[5]

The increasing use of soft law instruments in international commercial arbitration cannot came as a surprise, as one of the characteristic features of soft law is its adaptability, while one of the most appreciated features of international commercial arbitration, as opposed to court litigation, lies in the former's more flexible approach to the case, guided by a pragmatic problem-solving attitude. Indeed, unless otherwise instructed by the parties, arbitrators can act in a way that is firmly precluded to national courts, in that they can somehow disregard the conflict of laws rules of the *forum* (for long time

[2] For a paper focusing on the application of the *lex mercatoria* in arbitration, see Berthold Goldman, *The Applicable Law: General Principles of Law - The Lex Mercatoria*, in Contemporary Problems in International Arbitration 113, 121 (Julian Lew, ed., 1986); for a revisited notion of the Medieval *ius mercatorum*, as a mixture of autonomous mercantile rules and official laws, see Emily Kadens, *Order Within Law, Variety Within Custom: The Character of the Medieval Merchant Law*, 5 Ch. J. Int'l L. 39, 42 (2004).

[3] See, among others, Philip Jessup, Transnational Law (1956); Clive Schmitthoff, *International Business Law: A New Law Merchant*, 2 Current Law and Social Problems 129 et seq. (1961); Id., *The Law of International Trade: Its Growth, Formulation and Operation*, in Sources of the Law of International Trade 3 (ICC ed., 1964); Berthold Goldman, *Frontières du droit et* lex mercatoria, Archives de philosophie du droit 177 (1964); Francesco Galgano, Lex Mercatoria. Storia del diritto commerciale 239 (Bologna, 4th ed., 2001); Michael Joachim Bonell, *La moderna lex mercatoria tra mito e realtà*, Dir. Comm. Int. 315 et seq. (1992). For a study on the renaissance of the *lex mercatoria* in the 20th Century, see Jan H. Dalhuisen, *Legal Orders and Their Manifestation: The Operation of the International Commercial and Financial Legal Order and Its Lex Mercatoria*, 24 Berkeley J. Int'l L. 129 (2006).

[4] For one of the first legal definitions of *Law Merchant*, see the one provided by John Bouvier and reported by Fabrizio Marrella, La nuova Lex Mecatoria. Principi UNIDROIT ed usi dei contratti del commercio internazionale 23 (Trattato di diritto commerciale e di diritto pubblico dell'economia, dir. Francesco Galgano, 2003): John Bouvier, A Law Dictionary Adapted to the Constitution and Laws of the United States of America and of the Several States of the American Union, with Reference to the Civil and other Systems of Foreign Law (6th ed. 1856), where the *Law Merchant* is defined as: «*A system of customs acknowledged and taken notice of by all commercial nations; and those customs constitute a part of the general law of the land; and being a part of that law thir existence cannot be proved by witnesses, but the judges are bound to take notice of them ex officio*».

[5] For a review of the geneaology of soft law, see Anna di Robilant, *Genealogies of Soft Law*, 54 Am. J. Comp. L. 499, 500 (2006); for an analysis of its notion in international law, *see* Andrew T. Guzman and Timothy L. Meyer, *International Soft Law*, 2 J. Legal Analysis 171 (2010).

deemed to coincide with the conflict rules of the *seat* of arbitration), as well as domestic substantive laws, and adopt a more flexible approach in their search for the proper rules applicable to the case.[6] This approach appears to be all the more justified when the arbitration rules applicable to the dispute contain a provision stating that, in the absence of an agreement between the parties as to the applicable law, «*the arbitral tribunal shall apply the rules of law which it determines to be appropriate*»,[7] a solution which is deemed to authorize resort to non-national legal rules.

The increasing attention gained by soft law instruments in recent years and the pivotal role played by these instruments in the adjudication of international commercial disputes require a careful review of the relationship between soft law and *lex mercatoria*. These two notions seem to share some relevant and highly appreciated features, such as flexibility, adaptability and problem-solving capacity, which make them extremely suitable to serve effectively regulatory goals which cannot be properly pursued by means of hard law instruments, due to the rigidity of the latter ones. As referred to soft law, these features make it suitable to be used in different fields of the law, as well as with respect to different geographical scopes, ranging from merely local to truly global ones.[8] In the context of the present work, however, as the focus is on international commercial arbitration, soft law is analyzed primarily as a legal tool used to promote the supranational unification of private and commercial

[6] For a paper dealing with the law applicable to the merits in arbitration, see Linda Silberman and Franco Ferrari, *Getting the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong*, in Conflict of Laws in International Arbitration 371-442 (Franco Ferrari and Stefan Kröll, eds., 2nd ed., 2019).

[7] Article 21(1) ICC Arbitration Rules (2017). For a very similar language, see Article 31(2) of SIAC Arbitration Rules (2016). Conversely, under Article Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006), failing a designation of the applicable rules by the parties, «*the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable*», thus suggesting that the arbitral tribunal enjoys a certain degree of flexibility with respect to the determination of the relevant conflict rules, but has to abide by those rules as regards the determination of the domestic law applicable to the dispute. In particular, the reference only to the 'law' applicable, without mention of the 'rules of law' may seem to limit the possibility to resort to a-national sources of law, such as the *lex mercatoria*.

[8] See, for instance, Marrella, *supra* n. 4, 63 et seq. and 89 et seq., who distinguishes between *lex mercatoria* '*universal in scope*' and '*local in scope*'.

law,[9] a field where traditionally any reference to non-state law has been ascribed to the general notion of *lex mercatoria*, conceived as the global merchants' system of self-regulation[10], applicable in international commercial arbitration. *Lex mercatoria* and soft law, however, seem to refer to rather different phenomena, the former one being characterized by its supranational (i.e. global[11]) scope and its uncodified, customary format; the latter one claiming its role in transnational commercial law irrespective of its status as an autonomous system of global law, and being susceptible of codification into collections of principles or rules. In fact, an overview of recent activities of most norm-formulating agencies shows that significant efforts have been put in the last decades into the enactment in a "codified" format of collections of rules or principles that allegedly already existed in the form of "uncodified" practices or usages.

The most notable example, in this regard, is that of the UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles"), whose latest edition was published in 2016.[12] The phenomenon, however, is not limited to substantive rules, as "codified" collections of rules, principles, or model laws are increasingly being enacted also in the field of procedural law (in particular as regards the procedural rules applicable in international arbitration), and even in the field of conflict-of-laws. To provide just a few examples of "codifications" of procedural rules in soft law format, one can refer

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[9] For a general overview of the topic of unification of private law, *see* René David, The International Unification of Private Law (International Encyclopedia of Comparative Law. Vol. II, Chapter V. The Legal Systems of the World: Their Comparison and Unification, 1971), for a more recent account on the subject, see Katharina Boele-Woelki, Unifying and Harmonizing Substantive Law and the Role of Conflict of Laws (2010).

[10] Filip De Ly, *Uniform Commercial Law and International Self-Regulation*, in The Unification of International Commercial Law 59 (Franco Ferrari ed., 1998); Gabriella Saputelli, *The European Union, the Member States, and the Lex Mercatoria*, 8 Notre Dame J. Int'l & Comp. L. 1, 2 et seq..

[11] See Harold J. Berman, Law and Revolution. The Formation of the Western Legal Tradition 332 et seq. (1983).

[12] The UNIDROIT Principles are available at: https://www.UNIDROIT.org/instruments/commercial-contracts/UNIDROIT-principles-2016. For a recent paper dealing with the UNIDROIT Principles and their role in the assessment of the law applicable to international commercial contract, see Michael J. Bonell, *The Law Governing International Commercial Contracts and the Actual Role of the UNIDROIT Principles*, 23 Unif. L. Rev. 15 (2018); for a paper on the use of the UNIDROIT Principles in investment arbitration, see Giuditta Cordero-Moss and Daniel Behn, *The Relevance of the UNIDROIT Principles in Investment Arbitration*, 19 UNIF. L. REV. 57 (2014).

to the 2006 UNIDROIT / ALI Rules on Transnational Legal Procedure,[13] to the UNCITRAL Model Law on International Commercial Arbitration,[14] or to the IBA Rules on the Taking of Evidence in International Arbitration.[15] One notable example of a soft law instrument in the field of conflict-of-laws is that of the 2015 Hague Principles on Choice of Law in International Commercial Contracts.[16]

At first sight, this massive production of codified collections of rules and principles may be regarded as a paradox, in that most of the benefits of soft law, such as flexibility, adaptability, and problem-solving capacity, are likely to be frustrated if confined into the rigid structure of a "codified" text. The question thus arises as to the reasons leading to this process of (quasi-) codification, and whether the ultimate goal of these efforts is the codification not only of collections of soft law principles, but of the *lex mercatoria* altogether.

This paper posits that the relationship between the traditional *lex mercatoria* and the current relevant production of (quasi-)codified soft law instruments should be described in terms of a progressive shift from the traditional uncodified *lex mercatoria*, to a new (codified, or quasi-codified) *lex mercatoria*, resulting from a regulatory competition of soft law instruments, whose claim for legitimacy and enforceability, and whose suitability to be applied by arbitrators, must be based on a comparative law methodology.

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[13] 2006 ALI / UNIDROIT Principles on Transnational Civil Procedure, available at: https://www.UNIDROIT.org/instruments/transnational-civil-procedure. Parallel to the ALI / UNIDROIT Principles, a working group is currently engaged in the draft of the ELI – UNIDROIT Principles of Transnational Civil Procedure, whose draft is available at: https://www.UNIDROIT.org/work-in-progress/transnational-civil-procedure.

[14] UNCITRAL Model Law on International Commercial Arbitration (1985, with amendments as adopted in 2006), available at: https://www.UNCITRAL.org/pdf/english/texts/arbitration/ml-arb/07-86998_Ebook.pdf.

[15] IBA Rules on the Taking of Evidence in International Arbitration, adopted by a resolution of the International Bar Association's Council of 29 May 2010, available at: https://www.ibanet.org/ENews_Archive/IBA_30June_2010_Enews_Taking_of_Evidence_new_rules.aspx.

[16] Hague Principles on Choice of Law in International Commercial Contracts, approved by the Hague Conference on Private International Law on 19 March 2015, available at: https://www.hcch.net/en/instruments/conventions/full-text/?cid=135.

The paper will thus proceed as follows: Section 2 will review the theories supporting the use of *lex mercatoria* as an autonomous legal order available in international commercial arbitration; Section 3 will provide a critical account of some of the most popular explanations of the goals and benefits of *lex mercatoria*, and will offer an alternative, functional approach to *lex mercatoria* as a tool serving the parties' quest for arbitrators' independence and impartiality; on the basis of the proposed approach, Section 4 will analyze the progressive shift from the use of uncodified rules and principles to that of competing soft law instruments; Section 5 will call for recourse to a comparative law methodology to review the mechanisms of selection among the multiple (hard and soft) law instruments available to international arbitrators, and will propose the use of an approach based on the analysis of the goals and will of the parties, as well as on the available instruments' suitability for legal transplant and adaptation to different legal environments. Section 6 will sum-up the analysis and draw some conclusions.

II. THE TRADITIONAL NOTION OF *LEX MERCATORIA* AS AN AUTONOMOUS LEGAL ORDER APPLICABLE TO THE MERITS OF THE DISPUTE IN INTERNATIONAL COMMERCIAL ARBITRATION

The prevailing notion of modern *lex mercatoria* originates from a revival of the Medieval *ius mercatorum*.[17] This notion emphasizes the autonomy and universality of commercial law, and the benefits of law-making mechanisms relying on merchants' self-regulation. Accordingly, the traditional theory of *lex mercatoria* posits the existence of a supranational autonomous legal order,[18]

[17] Cf. Francesco Galgano, Lex Mercatoria. , *supra* n. 3, *passimStoria del diritto commerciale (Bologna, 4th ed., 2001)*.

[18] For a national court's acknowledgment that *lex mercatoria* is an autonomous legal system, see Italian Supreme Court (*Corte di cassazione*), 8 February 1982, n. 722, *Damiano v Topfer*, Riv. dir. int. priv. proc. 835 (1982), with comment by Andrea Giardina, *Arbitrato transnazionale e lex mercatoria di fronte alla Corte di Cassazione*, at 835; for a similar ruling by the French Supreme Court (*Cour de cassation*), see decision of 22 October 1991, *Compania Valenciana v Primary Coal*, Yearbook 137 (1993), and the decision of 10 March 1993,

whose rules are applied primarily in international commercial arbitration.[19] The autonomous legal order, in particular, consists of rules originating from multiple sources, including customary commercial usages, generally accepted contractual practices, and arbitral tribunals' decisions rendered in international commercial arbitration.[20]

Under the theory at hand, when seeking for legal rules applicable to a dispute without resorting to domestic laws,[21] arbitrators may look into, and apply, *lex mercatoria* in search for a solution capable of avoiding the claim that the decision was rendered *ultra petita*, as would be the case if they were to decide *ex aequo et bono* in the absence of a specific mandate from the parties to that effect.[22] In fact, applying the *lex mercatoria* does not correspond to deciding *ex aequo et bono*, as *lex mercatoria* is deemed to represent the (uncodified) transnational law of international commercial transactions.

This traditional notion of *lex mercatoria* encompasses an implicit claim of normative legitimacy and enforceability, clearly evoked by the use of the Latin

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Polish Ocean, J. Dr. Int. 360 (1993); in England, see *Home and Overseas Insurance Co. v. Mentor* [1989] 1 Lloyd's Rep. 473.

[19] *Accord*, Christopher R. Drahozal, *Diversity and Uniformity in International Arbitration Law*, 31 Emory Int'l L. Rev. 393, 393 et seq. (2017).

[20] For further references, see Aldo Frignani and Marco Torsello, Il contratto internazionale. Diritto comparato e prassi commerciale, 24 et seq. (Trattato di diritto commerciale e di diritto pubblico dell'economia, dir. Francesco Galgano, 2nd ed., 2010).

[21] As is the case when the applicable arbitration rules authorize, in the absence of a choice of law by the parties, the resort to «*rules of law which* [the arbitral tribunal] *determines to be appropriate*».

[22] Indeed, it is well-known that, according to an approach largely adopted in international arbitration, arbitrators may «*assume the powers of an amiable compositeur or decide ex aequo et bono only if the parties have agreed to give it such power*»: Article 21(3) ICC Arbitration Rules (2017). This solution coincides also with the one set forth in Article 28(3) of the UNCITRAL Model Law on International Commercial Arbitration (1985, as amended in 2006), which states that «[t]*he arbitral tribunal shall decide ex aequo et bono or as amiable compositeur only if the parties have expressly authorized it to do so*». An exception to this, broadly accepted, rule is reported by Luca Radicati di Brozolo, *Applying the Rules Governing the Merits in International Commercial Arbitration. What Role for Inherent Powers?*, in Inherent Powers in International Arbitration 235, 241 (Franco Ferrari and Friedrich Rosenfeld, eds., 2019), who refers to Article 3 of the Law on arbitration and mediation of Ecuador (Ley de Arbitraje y Mediación de Ecuador, Codificación 14, Registro Oficial 417 de 14 de diciembre del 2006, as amended on May 22nd, 2015), which states that «*the parties shall indicate whether the arbitrators must decide in equity or in law. In the absence of agreement, the award will be in equity*». A similar approach is adopted also by Article 32 of the Arbitration Rules of the Mercosur International Arbitration Court.

noun "*lex*".[23] The discussion about the notion, theoretical foundations and practical functions of *lex mercatoria*, however, has focused more on the possible grounds of its legal enforceability, than on its normative legitimacy,[24] the latter being, in most cases, given for granted.

In fact, the notion and binding force of *lex mercatoria* can neither be explained solely on the basis of a reference to "party autonomy",[25] nor by merely invoking the binding force of "usages".[26] This is because neither one of these argumentative options would lead to the acknowledgment of *lex mercatoria* as an autonomous and exclusively applicable transnational legal order, existing and enforceable irrespective of an *imprimatur* received from a national sovereign jurisdiction.[27]

Reliance on party autonomy, on the one hand, would prove unsatisfactory in that *lex mercatoria* would not be applicable in the absence of an agreement between the parties on that private legal regime. Moreover, the scope of application of the rules incorporated by reference into the contract as a result of the parties' choice would be restricted and limited by all the mandatory rules of the otherwise applicable domestic law, so that *lex mercatoria* could not be referred to as an autonomous legal order.

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[23] It has been observed, however, that «[t]*he main issue is not the existence of a lex mercatoria, in the past or in the present. It is the theoretical possibility of a law merchant, and whether it can be considered to be law*»: Ralf Michaels, *The True Lex Mercatoria: Law Beyond the State*, 14 Indiana J. Global Leg. St. 447, 449 (2007), where the Author further posits (at 451) that «*a lex mercatoria as a truly anational legal system, though theoretically possible, has never existed […] At all times, the transnational law of commerce included both state and non-state norms and institutions*».

[24] Cf. Filip De Ly, International Business Law and the Lex Mercatoria 207 et seq. (1992).

[25] For a description of *lex mercatoria* focusing mainly on the role of party autonomy and freedom of contract (*contrat sans loi*), see Alfred E. von Overbeck, *L'irrésistible extension de l'autonomie en droit international privé*, in Hommage Rigaux 618, 619 et seq. (1992); for a revisited and actualized position based on the interplay between contracts and social institutions, *see* Gunther Teubner, *Breaking Frames: The Global Interplay of Legal and Social Systems*, 45 Am. J. Comp. L. 149, 162 et seq. (1997).

[26] For an approach to *lex mercatoria* primarily based on the notion of commercial customs and usages, see Roy Goode, *Usage and Its Reception in Transnational Commercial Law*, 46 Int'l & Comp. L. Q. 1, 1 et seq. (1997).

[27] This notion of *lex mercatoria* as an autonomous transnational legal order was proposed and strongly supported by Berthold Goldman, *Frontières du Droit et 'Lex Mercatoria'*, 9 Arch. de Philosophie du Droit 177 (1964).

Reference to usages, on the other hand, is also unsatisfactory. In fact, if *lex mercatoria* could simply be equated to usages, one could legitimately conclude that there would be no need for an autonomous concept of *lex mercatoria*, since the application of usages is broadly affirmed in most domestic legal systems, as well as in international conventions, as exemplified by the paradigmatic rule provided in Article 9 of the 1980 United Nations Convention on Contracts for the International Sale of Goods ("CISG").[28] In other words, usages play a role as suppletory rules to the extent that states recognize the applicability of those usages, whereas proponents of *lex mercatoria* claim for it the status of an autonomous legal order, capable of displacing in its entirety any national commercial law.[29]

The conclusion that usages in international commerce are entirely compatible with the application of national laws is confirmed by the fact that several trade associations provide model contracts, which are largely autonomous expressions of self-regulation based on sector-specific trade customs, but at the same time contain a gap-filling mechanism based on the choice of a national law, rather than on *lex mercatoria*, or the like. Just to give one example, the model contracts of the Grain and Feed Trade Association ("GAFTA") present themselves as self-sufficient autonomous contracts expressing the customs and usages of the associates' business community. With a view to preserving the autonomy and independence of the system, these contracts include a dispute resolution clause providing for arbitration under the GAFTA Arbitration Rules. However, they do not reject the application of national law, but, instead, provide that the contract «*shall be construed and take effect in accordance with the law of England*».[30]

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[28] Under Article 9 CISG, «*(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. // (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned*». For a comment on this provision, see, *ex multis*, Franco Ferrari and Marco Torsello, International Sales Law – CISG in a Nutshell 53 et seq. (2nd ed., 2018).

[29] For a similar description, see Gilles Cuniberti, *Three Theories of Lex Mercatoria*, 52 Colum. J. Transnat'l L. 369, 374 (2014).

[30] *See*, e.g., GAFTA Contract No. 64, *General Contract for Grain in Bulk*, Art. 24 (2006).

If proponents of the *lex mercatoria* wish to claim for it the status of an autonomous legal order, they cannot but reject the equation between *lex mercatoria* and usages and describe the former as an exclusively applicable system of law. A practical example of this approach, in sharp contrast with the GAFTA model referred to above, can be found in most ICC model contracts, which contain an optional model choice of law,[31] which provides for the choice of «*the rules and principles of law generally recognized in international trade as applicable to international contracts […]*», supplemented by the UNIDROIT Principles.[32] Under the latter provision, no national law is chosen, but instead an autonomous system of "rules and principles of law", which has led proponents of the *lex mercatoria* to conclude that one should, at least, admit that the *lex mercatoria* exists («*admettons au moins que la lex mercatoria peut prétendre qu'elle existe*»).[33]

Arguments positing the existence and autonomous status of *lex mercatoria* point at two different socio-economic and legal processes, which have led to its emergence in contemporary commercial practice. On the one hand, there stands the argument which emphasizes the need for an autonomous a-national legal order to govern commercial relationships where one of the parties is a State or a governmental entity.[34] Under these circumstances, it is posited, neither would the private party accept the contract to be governed by the national law of the governmental entity (not to mention disputes adjudicated by the national courts of the State of that counterparty),

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[31] Usually 'Option A', presented with the alternative ('Option B') of the choice of a national law.

[32] See, e.g., ICC *Model Form of International Sole Distributorship Contract*, Publ. 646, Art. 24.1(A) (3rd ed., 2002). An identical, or very similar solution is found in Article 24.1 (Option A) of the 2002 ICC *Model Commercial Agency Contract*, Article 23.1 (Option A) of the 2004 ICC *Model Selective Distributorship Contract*, Article 18.1(Option B) of the 2004 ICC *Model Mergers & Acquisitions Contract*, Article 13(1) of the ICC *Model Occasional Intermediary Contract* and Article 12 of the ICC *Model International Franchising Contract*. For a comment on this type of clauses, *see* Herbert Kronke, *The UN Sales Convention, the UNIDROIT Contract Principles and the Way Beyond*, 25 J. L. & Comm. 451, 454 et seq. (2005-2006).

[33] Dale Thompson, note to Cass. Civ. 1re 9 October 1984 (*Société Pabalk Ticaret Sirketi v Société Norsolor*) [English translation of the original French decision], 2 J. Int.'l. Arb. 67, 76 (1985).

[34] Cf. Prosper Weil, *Principes généraux du droit et contrats d'Etat*, in Le droit des relations économiques internationales. Etudes offertes à Berthold Goldman 387 et seq. (1982); Jean-Flavien Lalive, *Contrats entre Etats ou entreprises étatiques et personnes privées. Développements récents*, 9 Recueil des Cours 12 et seq. (1983).

as this would bear the risk of arbitrary changes in the applicable law,[35] nor could the State or governmental entity accept to be subject (not only to the law of the private counterparty, but also) to any foreign law, as this is perceived as incompatible with the national sovereignty of the State.[36] Under these circumstances, the only possible way out of the deadlock seems to be the resort to international arbitration to adjudicate possible disputes and to the choice of an entirely a-national legal order, such as the "the rules and principles of law generally recognized in international trade", or the like.[37]

The alternative argumentative path used to affirm the existence of *lex mercatoria* is more arbitration-specific, as it emphasizes the progressive loosening of the (*conflictualist*) connection[38] between the arbitrators' decision-

[35] Only to a limited extent could this risk be reduced by the inclusion in the agreement of a stabilization clause, on which *see*, e.g., Wolfgang Peter, *Stabilization Clauses in State Contracts*, 8 Int'l. Bus. L. J. 875 (1998); Abdullah Al Faruque, *The Rationale and Instrumentalities for Stability in Long-term State Contracts: The Context for Petroleum Contracts*, 7 J. World Invst. & Tr. (2006); May Tai, *Stabilisation Clauses: Is There A Middle Ground Between Competing Interests? Comments from the AIPN Europe and Africa Region Chapter Meeting and the Special Representative of the Secretary General of the UN's Consultation Meeting*, 13 IBA Arb. Newsl. 52 (2008); Katja Gehne and Romulo Brillo, Stabilization Clauses in International Investment Law: Beyond Balancing and Fair and Equitable Treatment 6 et seq. (2017).

[36] For a similar statement, see Fabio Bortolotti, Manuale di diritto commerciale internazionale, Vol. 1. Diritto dei contratti internazionali 32 (2nd ed., 2001).

[37] Yves Dezalay and Bryant G. Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order (1996). By way of example of the type of clause under consideration, *see*, e.g., the Accords establishing the Iran-United States Claims Tribunal, which provided that «[t]*he tribunal shall decide cases on the basis of respect for law, applying such choice of law rules and principles of commercial and international law as the Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances*»: Declaration of the Government of the Democratic and Popular Republic of Algeria Concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, Article V, available at http://www.iusct.org/claims-settlement.pdf. See also, *ex multis*, the reference to «*principles of law common to and recognized by civilized nations*» in Article XXI of the 1974 Agreement between Egypt and Esso, in I.L.M. 915 et seq. (1975), and reference to «*principes de droit généralement reconnus, en particulier le droit international*» in Article 41 of the 1966 Agreement between NIOC and ERAP, reported by Weil, *Principes généraux du droit et contrats d'Etat*, *supra* n. 34, 391.

[38] For a similar use of the term 'conflictualist', as opposed to 'internationalist', *see* Friedrich K. Juenger, *The lex mercatoria and private international law*, 5 Unif. L. Rev. 171 et seq. (2000), volume containing a collection of papers presented at the symposium on "International Uniform Law Conventions, Lex Mercatoria and Unidroit Principles" held at Verona University (Italy), Faculty of Law, 4-6 November 1999.

making process and the seat of arbitration. Unlike national courts, which are strictly bound to apply the conflict of laws rules of the *forum* in order to determine the applicable law, arbitral tribunals have long been granted more discretion in the selection of the conflict rules. A clear sign of this greater (conflict-of-laws) freedom can be found in Article 28 of the UNCITRAL Model Law, which states that, in the absence of a choice of law made by the parties, the arbitral tribunal shall apply the law determined by the «*conflict of laws rules which it considers applicable*».[39] However, once the rigid mechanics of the *conflictualist* approach are abandoned, the gates are open to further estrangement from the *forum* (*rectius*, in arbitration, the seat), and the discretion of the arbitral tribunal can reasonably be expected to focus on the substantive rules, rather than on the conflict of laws rules. Accordingly, in some Arbitration Rules, such as the UNCITRAL Rules, the solution to be adopted by the arbitrators in the absence of a choice of law expressed by the parties does no longer contain a reference to external conflict of law rules, but, instead, operates directly as a conflict rule by setting forth the criterion to select the applicable substantive law and requiring the arbitral tribunal to apply «*the law which it determines to be appropriate*»,[40] thus granting to the arbitral tribunal the power to select the *proper* (national) law to be applied to the case at hand.

The relevant loosening of the *conflictualist* connection to the *forum* (i.e., the arbitral *seat*) favors the further decisive step towards the establishment of *lex mercatoria* as an autonomous legal order. This last step consists of the substitution of the notion of "*rules of law*" for "*law*",[41] as illustrated by the

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[39] *UNCITRAL Model Law on International Commercial Arbitration*, *supra* n. 14, Article 28.

[40] *UNCITRAL Arbitration Rules* (originally adopted in 1976, revised in 2010, with a new Article 1, par. 4 as adopted in 2013), Article 35(1).

[41] In fact, the reference to "rules of law" instead of "law" was first used by the 1981 French law on international arbitration, which provided in the new Article 1496 of the Code of Civil Procedure that the parties were to select the "rules of law" applicable to their dispute. A similar solution is found also in Article 187(1) of the Swiss Private International Law Act (1987), Article 1054(1)(2) of the Dutch Code of Civil Procedure (1986), and other national laws on international arbitration. Under Article 46 of the English Arbitration Act (1996), instead, the arbitral tribunal shall decide the dispute in accordance with the law chosen by the parties, or, «*if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal*». For a thorough analysis of the consequences of this change, see, *inter alia*, Giuditta Cordero-Moss, *Limitations on Party Autonomy in International Commercial Arbitration*, Recueil des cours, vol. 372 (2015).

comparison between the aforementioned provision of the UNCITRAL Rules and the corresponding provision in the ICC Rules, which states that, in the absence of a choice of law, the arbitral tribunal shall apply «*the rules of law which it determines to be appropriate*», a solution which is also to be found in some domestic arbitration laws.[42] It is thus maintained that the reference to "rules of law" (instead of "law") is meant to include not only national legal systems, but also rules developed in the context of the a-national autonomous legal order which is being discussed here as *lex mercatoria*.[43]

Proponents of the *lex mercatoria* draw very far-reaching conclusions from the observation of the socio-economic phenomena that have just be described, in that they conclude that the foregoing is evidence of the existence of an autonomous a-national legal order, that perpetuates itself from the standpoint of a *contrat sans loi*.[44] By contrast, skeptical commentators observe that, in the end, not only does *lex mercatoria* lack comprehensiveness[45] (which thus requires a gap-filling role of national laws), but it could not exist altogether, unless national laws were to recognize freedom of contract and party autonomy, and to enforce foreign arbitral awards,[46] and it can only exist within the limits set by national laws.[47] National states, therefore, operate as conduits

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[42] *See* ICC *Arbitration Rules* (in force as from 1 March 2017), Article 21(1). A substantially identical solution is provided, for instance, by Article 31 of SIAC Arbitration Rules (2016).

[43] For a similar description of the phenomenon, *see*, *ex multis*, Lord Justice Michael Mustill, The *New Lex Mercatoria: The First Twenty-five Years*, in 4 Arb. Int'l 86, 103 et seq. (1988); for one of the first reported arbitral awards applying the approach described in the text, see Award of 26 October 1979 (*Pabalk Tikaret Limited Sirketi v Norsolor S.A.*), Rev. Arb., 525 (1983).

[44] Cf. Gralf-Peter Calliess, *Reflexive Transnational Law: The Privatisation of Civil Law and the Civilisation of Private Law*, 23 Zeitschrift für Rechtssoziologie 185 (2002); on the notion of '*contrat sans loi*', see Partice Level, *Le contrat dit sans loi*, in 25-27 Travaux du Comité français de droit international privé 209, 209-243 (1964-1966); L. Peyrefitte, *Le problème du contrat dit sans loi*, Chron. 113 et seq. (1965); Jean-Paul Beraudo, *Faut-il avoir peur du contrat sans loi?*, in Mélanges Paul Lagarde 93 et seq. (2005).

[45] *Accord*, Gary Born, International Commercial Arbitration 2236 (2009).

[46] Cf., e.g., Paul Lagarde, *Approche critique de la lex mercatoria*, in Le Droit des Relations Economiques Internationales: Etudes Offertes a Berthold Gldman 123 (1987); Keith Highet, *The Enigma of the Lex Mercatoria*, 63 Tulane L. Rev. 613 et seq. (1989).

[47] For a court decision applying this approach, see Bundesgericht (Switzerland), 20 December 2005, available at available at: http://www.unilex.info/case.cfm?pid=2&do=case&id=1124&step=Abstract. For an analysis of the limits of mandatory rules in arbitration, see George A. Bermann, *Mandatory Rules of Law in International*

of the *lex mercatoria* by "*re-stating*"[48] it in different forms, including *incorporation*[49] into the national legislation of the state, *deference* in the form of recognition of a normative role to usages, or *delegation* by granting wide enough a space to freedom of contract to develop an autonomous system.[50]

Whatever the position with respect to the degree of autonomy of *lex mercatoria* from national states, a crucial practical aspect to overcome the criticism of its being «*a myth without substance*»[51] relates to its contents. Given the difficulties in defining the true notion and the very existence of *lex mercatoria*, a deductive approach has proved unfeasible and scholars who have addressed the issue have primarily taken a inductive approach, focusing on the possibility to provide a list of rules and principles that are constituents of the *lex mercatoria*.[52] The need for prompt availability and systematicity of the system has not been addressed through a change in the approach (from an inductive to a deductive one), but rather through a change of paradigm, by introducing into the picture a *restatement method*, which is very well exemplified by the UNIDROIT Principles, with a view to systematizing, rationalizing and improving the accessibility to the *lex mercatoria*.[53]

Arbitration, in Conflict of Laws in International Arbitration 325 et seq. (Franco Ferrari and Stefan Kröll eds., 2010)

[48] Cf. Ralf Michaels, *The Re-state-ment of Non-State Law: The State, Choice of Law, and the Challenge from Global Legal Pluralism*, 51 Wayne L. Rev. 1209, 1238 (2005).

[49] The option of incorporating trade usages into national codes is deemed inappropriate by Lisa Bernstein, *Merchant Law in a Merchant Court: Rethinking the Code's Search for Immanent Business Norms*, 144 Penn. L. Rev. 1765 (1996); on the same issue, see also Clayton P. Gillette, *The Law Merchant in the Modern Age: Institutional Design and International Usages under the CISG*, 5 Chi. J. Int'l L. 157 (2004).

[50] *Accord*, Michaels, *The True Lex Mercatoria*, *supra* n. 23, 461.

[51] Georges R. Delaume, *The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal*, 3 ICSID Rev. For. Invest. L. J. 79, 81 (1988).

[52] For a similar 'list method' (as labeled by Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 380), see Klaus-Peter Berger, The Creeping Codification of the Lex Mercatoria, *passim* (1999).

[53] See, *ex multis*, Michael Joachim Bonell, *The law governing international commercial contracts and the actual role of the UNIDROIT Principles*, Unif. L. Rev. 15, 15 et seq. (2018); Allan E. Farnsworth, *An Interntional Restatement: The UNIDROIT Principles of International Commercial Contracts*, 26 Univ. Balt. L. Rev. 1 et seq. (1996); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 Int'l & Comp. L. Quart. 747 (1985).

III. A CRITICAL REVIEW OF THE ALLEGED GOALS AND BENEFITS OF THE TRADITIONAL NOTION OF *LEX MERCATORIA*

Given the *lex mercatoria*'s proclaimed status as an autonomous legal order, scholars have long discussed about its ultimate purpose and practical effectiveness, to be assessed on the basis of the identification of its ultimate goals and of the beneficiaries thereof.

The original claim of the proponents of *lex mercatoria* was that, notwithstanding the lack of specificity and predictability, *lex mercatoria* is better suited than national laws to serve the needs of the international business community. The alleged superiority of *lex mercatoria* has been argued on several different grounds,[54] including the fact that it provides rules that are specifically tailored for transnational commercial transactions, that it avoids the uncertainties of conflict of laws, and that it reduces transaction costs compared to the *conflictualist* approach leading to the application of national laws.[55]

None of the reported arguments, however, is entirely convincing, nor decisive in supporting the claim of *lex mercatoria*'s benefits. In particular, as regards the argument that *lex mercatoria* is better suited to serve the needs of the business community because it provides rules that are specifically tailored for transnational commercial transactions, this position is often presented in a dogmatic form, relying on the authority of some of the early proponents of the international unification of private law, who argued that the use of domestic tools to solve questions that are essentially international «*is to square the circle*».[56]

In practice, however, it is very difficult to identify any specific substantive rules which would apply under the system of *lex mercatoria*, but which, on the other hand, could not be found in at least some national legal systems. In other words, the specificity of *lex mercatoria* seems to be often proclaimed in abstract

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[54] For a similar presentation of the arguments, see Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 384 et seq.

[55] For a study addressing this issue, see Jürgen Basedow, *Lex Mercatoria and the Private International Law of Contracts in Economic Perspective*, in An Economic Analysis of Private International Law 63 (Jürgen Basedow and Toshiyuki Kono eds., 2006).

[56] David, The International Unification of Private Law, *supra* n. 9, 7.

terms, but never convincingly supported through concrete examples of specific substantive legal solutions that truly meet the demands of transnational commerce better than the corresponding domestic solutions. In fact, commercial practice seems to prove exactly the opposite, as in the vast majority of international contracts parties either ignore the issue of the law governing the contract,[57] or choose a national law to govern their transaction.[58]

Also the variant according to which the benefits of *lex mercatoria* stem from the fact that it gives the authority to adjudicate to highly-skilled adjudicators[59] is not convincing. In fact, prior to the appointment of the arbitral tribunal, the parties do not know the identity of the arbitrators, so the idea that they would trade specificity and predictability of legal rules for the benefit of being (possibly) assigned highly skilled arbitrators is, at best, doubtful.

The argument that *lex mercatoria* avoids the uncertainties of conflict of laws seems to rest on a purely dogmatic premise, according to which «*the disparity of national laws is contrary to the requirements of modern economy and inimical to the development of international relations; a uniform law is superior to a system of conflicts of law, which allows the existence of those specific differences on which it is based*».[60] The merits of this argument have been effectively contrasted by highlighting the possible benefits arising from regulatory competition.[61] Moreover, even if one were to agree with the claim

[57] As observed by Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 385.

[58] See Frignani and Torsello, Il contratto internazionale, *supra* n. 20, 18; Bortolotti, Manuale di diritto commerciale internazionale, *supra* n. 36, 8-9. Moreover, see the ICC data collection reported in Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 398, where the Author informs that «*parties chose the law governing their contract in 80-85% of the cases. [...] when they made a choice, they almost always chose a national law; on average, non-national rules were chosen in only 1-2% of the cases*».

[59] Reference to this possible argument is made by Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 394-395, who recalls the similar debate in the context of the US corporate charter competition debate and the arguments pointing at the experience and quality of the judges sitting in Delaware's Court of Chancery.

[60] Marc Ansel, *From the Unification of Law to its Harmonization*, 51 Tul. L. Rev. 108 (1976); for a critical comment on this position, see, e.g., Paul Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, 39 Va. J. Int'l L. 743, 746 (1999).

[61] For a thorough analysis of the relationship between unification and regulatory competition from a primarily European perspective, see the various contributions collected in Horst Eidenmüller (ed.), Regulatory Competition in Contract Law and Dispute Resolution (2013); as well as those collected in Andrea Zoppini (ed.), La concorrenza tra ordinamenti giuridici (2004).

of superiority of uniform law, one would still have to address the question why *lex mercatoria* should be preferred over other forms of uniform law, including (more detailed and predictable) uniform commercial law conventions, whose contents and enforceability are directly controlled by national states.

Finally, also the line of argument that *lex mercatoria* reduces transaction costs cannot be fully accepted. The argument largely reproduces the broader debate about the ability of uniform law to reduce transaction costs.[62] However, unlike legislative-based uniform law (in the form of treaties and conventions), *lex mercatoria* cannot claim a degree of comprehensiveness and legal certainty sufficient to rebut the criticism that it increases the uncertainty and resulting transaction costs inherent in its vagueness.[63]

Scholars have thus looked beyond the interests of the parties, in search for alternative explanations for the supportive sympathy to *lex mercatoria* often shown by scholars and (yet less often) practitioners. Some scholars, in particular, have argued that *lex mercatoria* serves primarily the interests of the International Chamber of Commerce and other international norm-making agencies, that have actively promoted *lex mercatoria*.[64] This *Production Cost Theory of Lex Mercatoria* maintains that one of ICC's most important activities is to produce international model contracts and «[r]*emarkably, the model contracts typically include a choice of law clause that encourages the parties to choose non-national rules to govern their relationship*».[65] Therefore, it is posited, in order to prevent possible issues of compatibility of the terms of the model contracts with any given national law, the ICC promotes the choice of *lex mercatoria*, thus displacing the application of any national law, which could override the terms of the model contracts, and by doing so, the ICC reduces its costs of production of viable model contracts.

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[62] For a paper addressing the debate referred to in the text, see Clayton P. Gillette and Robert E. Scott, *The Political Economy of International Sales Law*, 25 Int'l Rev. L. & Econ. 446, 446 et seq. (2005).

[63] For papers focusing on transaction costs of uniform law, see Paul B. Stephan, *The Futility of Unification and Harmonization in International Commercial Law*, *supra* n. 60, 743 et seq.; John Linarelli, *The Economics of Uniform Law and Uniform Lawmaking*, 48 Wayne L. Rev. 1387 (2003).

[64] Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, in particular at 424 et seq..

[65] Id., 425.

This argument, however, is not convincing. First, if *lex mercatoria* were not *per se* otherwise acceptable to business operators, the ICC would suffer from a loss of credibility and its model contracts would become less and less successful and possibly give way to other, more competitive models. It is, in fact, revealing that the ICC model contracts containing a choice of *lex mercatoria* combine that option with the alternative of a choice of national law.

Secondly, yet most importantly, the *Production Cost Theory of Lex Mercatoria* rests on the doubtful assumption that the contractual choice of an a-national legal regime can exempt the contract from the scrutiny of compatibility with domestic laws (thus reducing the costs of monitoring compatibility of the ICC models with domestic laws), whereas the contrary seems true. In fact, even if the parties choose *lex mercatoria*, the terms of the contract must not be contrary to the public policy of the states possibly involved and compliant with their overriding mandatory rules.

In support of this conclusion, one may refer to the 2015 Hague Principles of Private International Law,[66] which, although conceding that «[t]*he law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules*», further specify that the foregoing holds true «*unless the law of the forum provides otherwise*» (Article 2) and that the Principles shall not prevent a court (Article 11(1)) or an arbitral tribunal (Article 11(5)) «*from applying or taking into account public policy (ordre public) or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so*».[67]

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[66] For a comment on the Principles, see, e.g., Andreas Schwartze, *New Trends in Parties' Options to Select the Applicable Law? The Hague Principles on the Choice of Law in International Contracts in a Comparative Perspective*, 12 U. St. Thomas L. J. 87 (2015); Francesca Ragno, *I Principi dell'Aja e il Regolamento Roma I: complementarietà o alternatività?*, in Studi in onore di Maurizio Pedrazza Gorlero: I diritti fondamentali tra concetti e tutele (2014).

[67] On this topic see, among others, Giuditta Cordero-Moss, *Limits to Party Autonomy in International Commercial Arbitration*, Oslo L. Rev. 47 (2014); Luca Radicati di Brozolo, *Party Autonomy and the Rules Governing the Merits of the Dispute in Commercial Arbitration*, in Limits to Party Autonomy in International Commercial Arbitration 331 (Franco Ferrari ed., 2016); Id., *Mandatory Rules and International Arbitration*, 23 Am. Rev. Int'l Arb. 49 (2012).

Other scholars have argued that *lex mercatoria* serves primarily the interests of arbitrators, who can 'signal' their being *arbitration insiders* with unique specific skills by showing their knowledge and understanding of the autonomous legal order to be applied in international commercial arbitration.[68] Others have elaborated on this argument by turning to agency theory[69] to support the view that *lex mercatoria* was mainly conceived and developed to assure arbitrators discretion in adjudicating cases, either in the interest of developing countries willing to emancipate from the legal regimes of former colonies,[70] or in their own interest, so as to reduce their accountability in the event of erroneous application of national law, with which they are often not familiar.[71] However, the interest of the arbitrators *per se* could not provide legitimacy to the application of the *lex mercatoria*, unless its existence and the benefits of its application were shared also by the other stakeholders involved. Furthermore, if the interests of the arbitrators (as agents) and those of the parties (as principals) were conflicting, the formers' resort to vague and unspecified a-national principles would negatively affect the legitimacy and credibility of the arbitrators, as well as the legitimacy of international arbitration as a system of resolution of commercial disputes.

The foregoing agency theory may provide a valuable justification for the emergence of the 'restatement-method' as regards the definition of the contents of *lex mercatoria*, as is well exemplified by the success of the UNIDROIT Principles.[72] It does not, however, provide a satisfactory explanation of the purposes and effectiveness of *lex mercatoria*.

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[68] Christopher R. Drahozal, *Contracting Out of National Law: An Empirical Look at the New Law Merchant*, 80 Notre Dame L. Rev. 523, 550 et seq. (2005).

[69] Cf. the opinion of Judge Frank Easterbrook in *George Watts & Son, Inc. v Tiffany and Co.*, 248 F.3d 577 (7th Cir. 2001), arguing that the relationship between the parties and the arbitrators in arbitration proceedings was one of agency; see also Tom Ginsburg, *The Arbitrator as Agent: Why Deferential Review is Not Always Pro-Arbitration*, 77 U. Chi. L. Rev. 1013 (2010).

[70] Dezalay and Garth, Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order, *supra* n. 37, 136.

[71] Julian Lew, Loukas Mistelis and Stefan Kröll, Comparative International Commercial Arbitration § 18-2 (2003); see also Cuniberti, *Three Theories of Lex Mercatoria*, *supra* n. 29, 412-417.

[72] Accord, Ole Lando, *Assessing the Role of the UNIDROIT Principles in the Harmonization of Arbitration Law*, 3 Tul. J. Int'l & Comp. L. 129, 129 et seq. (1995).

All the proposed theories reported above, elaborated to identify goals and beneficiaries of the *lex mercatoria*, and ultimately to justify its existence and practical use, have proved unsatisfactory. Therefore, it is here argued that a more convincing explanation of the ultimate goal and effectiveness of *lex mercatoria* can be provided by applying a functional approach and by redefining *lex mercatoria* as a comparative legal methodology rather than a system.[73] In this perspective, the focus is back on the parties and their intent and *lex mercatoria* can be explained as a valuable tool serving the parties' quest for neutrality in the resolution of international disputes.

In fact, one of the main reasons for the parties to choose arbitration as the mechanism of resolution of international disputes is to avoid the possible (real or feared) bias of a national court adjudicating a case where one of the parties is a national of the court's same State.[74] Without overlooking the significant difference between the nationality of the adjudicator and the nationality of the applicable law, it is posited here that, in the view of the parties, also the application of the domestic law of one party could be perceived by the other party as an undue advantage to the former, which the latter is not willing to concede. Therefore, when the parties are called upon to choose the law applicable to their transaction, it is understandable that, as an alternative to the (still largely prevailing) solution to choose the national law of a State[75] (possibly a neutral third state, even if not otherwise connected to the parties),

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[73] Emmanuel Gaillard, *Transnational Law: A Legal System or Method of Decision Making?*, 17 Arb. Int'l 59 (2001); Id., *The Emerging System of International Arbitration: Defining 'System'*, in 106 Proceedings of the Annual Meeting of the American Society of International Law 287-92 (2012). See also Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 Tul. L. Rev. 575, 575 et seq. (1989).

[74] Cf. Jan Paulsson, *Delocalisation of International Commercial Arbitration: When and Why it Matters*, 32 Int'l & Comp. L. Quart. 53 et seq. (1983).

[75] It is a largely accepted principle of private international law that in commercial contracts parties can choose the law of a state that presents no connections whatsoever to the parties or the transaction. This principle is now enshrined in Article 2(4) of the 2015 Hague Principles of Private International Law, which states that «[n]*o connection is required between the law chosen and the parties or their transaction*».

the parties may choose a non-State regime, such as the *lex mercatoria* or the like, thus contracting out of any national law for the sake of neutrality.[76]

On the other hand, in the absence of a choice of law by the parties to a contract subject to an arbitration agreement, it is up to the arbitrators to duly serve the quest for neutrality implicit in the selection of the dispute resolution mechanism. Under these circumstances, if the arbitrators decide to exclude, for the sake of neutrality, the application of the national laws of the parties, in most cases they also find themselves deprived of the possibility to refer to the law that would be applicable under a conflict of laws analysis. Moreover, also the application of a 'neutral' third-country law (not otherwise connected to the contract or to the parties) could appear to the losing party, *ex post*, arbitrary and suspiciously leaning in favor of the winning party.

Therefore, in the absence of different indications by the parties, arbitrators may conclude that their mandate requires them to look into, and compare, the many possible legal solutions available with respect to the disputed issue, and to draw a conclusion on the basis of what appears to be the prevailing, or majoritarian solution.[77]

IV. A NEW FORM OF *LEX MERCATORIA*: THE SHIFT FROM UNCODIFIED SUPRANATIONAL PRINCIPLES TO A REGULATORY COMPETITION AMONG HARD LAW AND (QUASI-)CODIFIED SOFT LAW INSTRUMENTS

For more than four decades since its first appearance on the scene of the debate on transnational uniform commercial law, *lex mercatoria* has been depicted as a flexible toolbox of general principles and trade usages, whose rules were «*codified – if at all – in the form of lists of principles, rules and standards, codes of conduct, or best practices promulgated by private norm*

[76] For an analysis of this option, see Alejandro M. Garro, *The Contribution of the UNIDROIT Principles to the Advancement of International Commercial Arbitration*, 3 Tul. J. Int'l & Comp. L. 93, 111 (1995).

[77] The majoritarian solution is referred to also by Emmanuel Gaillard, Legal Theory of International Arbitration 48 et seq. (2010).

entrepreneurs».[78] None of those collections of rules and standards, however, presented itself with the authority, systematicity, claim of comprehensiveness, which typically characterize a "Code".

The foregoing changed dramatically in 1994, with the publication of the first edition of the UNIDROIT Principles, which appeared on the scene of transnational commercial law in the form, and with the status, of a soft law instrument, but with much greater aspirations. Indeed, not only did the UNIDROIT Principles provide, unlike any prior similar instrument, a comprehensive and systematic private "codification" of the law of international commercial contracts, but they also claimed for themselves the status of a restatement of the *lex mercatoria*,[79] thus conjugating the two categories of soft law and *lex mercatoria* into one single codified instrument.

The debate on the conditions and scope of application of the UNIDROIT Principles is still far from settled. No one doubts that they can be applied in cases where the parties chose them as the applicable law; however, the prevailing view is still that, as this application is based on the principle of freedom of contract, it is subject to the mandatory provisions of the law applicable by virtue of the conflict of laws rules of the forum. Moreover, the equation of the UNIDROIT Principles with *lex mercatoria* is at least questionable, as the former ones claim for themselves an innovative character in many respects, which seems incompatible with the long-standing, customary nature of *lex mercatoria*.

Whatever the view on the UNIDROIT Principles and their relationship with *lex mercatoria*, it is undeniable that the UNIDROIT Principles triggered a very significant shift in the approach used to identify a-national legal solutions applicable to the merits of disputes in international commercial arbitration. Indeed, the publication of the UNIDROIT Principles paved the way to a

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[78] Gralf-Peter Calliess, *Lex mercatoria*, in Encyclopedia of Private International Law 1119, 1125 (Jürgen Basedow, Giesela Rühl, Franco Ferrari and Pedro de Miguel Asensio eds., 2017), citing Berger, The Creeping Codification of the New Lex Mercatoria, *supra* n. 52.

[79] See the Preamble to the UNIDROIT Principles, where, starting from the 2004 edition (in addition to the provision that the Principles «*may be applied when the parties have agreed that their contract be governed by general principles of law, the* lex mercatoria *or the like*»), the provision was added according to which the Principles may also be applied « *when the parties have not chosen any law to govern their contract*».

progressive shift from reference to *uncodified customary law* to the more accessible use of *codified (or quasi-codified) collections of soft law* rules and principles, more readily available for present and future reference. In turn, the facilitated solution of resorting to a readily available legal text has led to a substantial increase in number and raise in targets of codified collections of rules and principles, to the extent that the "creeping codification of the *lex mercatoria*"[80] seems now to have become a *flooding codification of soft law* instruments.

Emphasis on the normative role of soft law raises, in the first place, a problem of definition. A positive definition of soft law, however, «*appears problematic, given the multiplicity and complexity of legal regimes*».[81] In fact, even if one were to limit the scope of the analysis only to transnational commercial transactions, soft law instruments would still appear to exist in very different, a-systematic and unrelated contexts, ranging from procedural law, to conflict-of-laws, to substantive contract law, corporate law, and many others.[82]

Also actors active in the production of soft law are numerous and diverse. Business associations, such as the International Chamber of Commerce ("ICC"),[83] the International Bar Association ("IBA"),[84] the International

[80] See Berger, The Creeping Codification of Lex Mercatoria, *supra* n. 52.

[81] Di Robilant, *Genealogies of Soft Law*, *supra* n. 5, 500 (2006).

[82] Based on anti-formalistic theories of social law and legal pluralism, soft law is a by-product of the privatization of law, which has led to a profound revision of the Westphalian notion of sovereignty and the role of the states and individuals in the production of law in the domestic context, as well as in the international arena; this statement points primarily to the fact that private law plays an increasingly pivotal role in governing not only the relations between individuals, but also those between individuals and governments, as well as those between governments or other sovereign entities (*cf*. Ronald A. Brand, *Sovereignty: The State, the Individual and the International Legal System in the Twenty First Century*, 25 Hastings Int'l & Comp. L. Rev. 279, 279 et seq. (2002)). The privatization of law, however, also implies that the law-making process is increasingly privatized, as sovereign governments and parliaments can no longer claim a monopoly on the production of legal rules.

[83] Among the many Soft Law instruments adopted by the International Chamber of Commerce, see, *e.g.*, the *ICC Incoterms® 2020*, publication No. 723 (2020), the *Uniform Customs and Practice for Documentary Credit* (publication "UCP, 600 ", 2007)), the *Uniform Rules for Demand Guarantees* (publication "URDG, 758", 2010), and many others.

[84] Among the Soft Law instruments adopted by the International Bar Association are the IBA *Rules on the Taking of Evidence in International Arbitration* (2010), which replaced the *Supplementary Rules Governing the*

Federation of Consulting Engineers ("FIDIC")[85] and many others coexist with mainly academically-oriented study groups, such as the Academy of European Private Lawyers,[86] Ole Lando's Commission on European Contract Law,[87] or Christian von Bar's Study Group on a European Civil Code.[88] Furthermore, also institutional actors are present and active on the scene of soft-law-making, including EU institutions,[89] the United Nation Commission on International Trade Law ("UNCITRAL"),[90] the International Institute for the Unification of

Presentation of Evidence in International Commercial Arbitration (1983), the IBA *Guidelines on Party Representation in International Arbitration* (2013), the IBA *Guidelines on Conflicts of Interest in International Arbitration* (2014), and others.

[85] Among the many (about 150) instruments published by FIDIC are: the *Conditions of Contract for Construction* (2010), the *Conditions of Subcontract for Contruction* (2011), the *Model Joint Venture (Consortium) Agreement* (2nd ed., 2017), and many others.

[86] Académie Des Privatistes Européens, *Code européen des contrats, Avant-projet, Coordinateur Giuseppe Gandolfi, Livre premier* (2001). On the activity of the Academy, see Jürgen Hans Sonnenberger, *Der Entwurf eines Europäischen Vertrag Gesetzbuchs der Akademie Europäischer Privat Rechtswissenschaftler – ein Meilenstein*, Recht der Internationalen Wirtschaft 409, 409 et seq. (2001).

[87] The 'Lando Commission' produced the well-known Principles of European Contract Law ('PECL'): Ole Lando and Hugh Beale (eds.), *Principles of European Contract Law - Parts I & II* (1999) and Ole Lando, Eric Clive, André Prün and Reinhard Zimmerman (eds.), *Principles of European Contract Law - Part III* (2003). On the PECL see Ole Lando, *Salient Features of the Principles of European Contract Law: a Comparison with UCC*, 13 Pace Int'L. Rev. 340 (2001); Carlo Castronovo, *Il diritto europeo delle obbligazioni e dei contratti. Codice o restatement?*, Eur. Dir. Priv. 1019, 1019 et seq. (1998).

[88] On the activities of the Group and the several Working Teams, see Christian von Bar, *From Principles to Codification: Prospects for European Private Law*, 8 Colum. J. Eur. L., 379, in particular at 387 et seq. (2002).

[89] Among the instruments of typical secondary legislation adopted by EU institutions are Opinions and Recommendations; other atypical Soft Law acts routinely adopted by EU institutions include 'Common Statements', 'Communications', 'Codes of Conduct', 'Green Papers', 'White Papers', and others. On the role of soft law in EU law, see David M. Trubek, Patrick Cottrell and Mark Nance, *Soft Law, Hard Law and EU Integration*, in Law and Governance in the EU and the US 65 (Gráinne de Búrca and Joanne Scott, eds., 2006).

[90] Soft Law instruments adopted by UNCITRAL include, *inter alia*, 'Model Laws', such as the *Model Law on Secured Transactions* (2016), the *Model Law on International Commercial Arbitration* (1985, amended in 2006), the *Model Law on Electronic Commerce* (1996), the *Model Law on International Credit Transfer* (1992); 'Guides', such as the *Legislative Guide on Secured Transactions* (2007), the *Legislative Guide on Insolvency Law* (2004), the *Model Legislative Provisions on Privately Financed Infrastructured Projects* (2003), the *Legal Guide on International Countertrade Transactions* (1992); 'Contractual Texts', such as the *Legal Guide on Drawing Up International Contracts for the Construction of Industrial Works* (1987), and the *Uniform Rules on Contract Clauses for an Agreed Sum Due upon Failure of Performance* (1983).

Private Law ("UNIDROIT"),[91] the Hague Conference on Private International Law,[92] and others. In recent years, the institutional actors seem to have acknowledged the difficulty in pursuing the international unification of private law through "hard law" treaties and conventions (as evidenced by the fact that most conventions adopted after the CISG have obtained scant attention and a limited number of adoptions or ratifications),[93] and seem to be increasingly favoring the format of soft law for the pursuance of their harmonizing goals.[94]

Not only the producers of soft law, but also the products of soft law are multiple and diverse, and they can be divided into three different groups. The first group of instruments includes documents of a descriptive, rather than preceptive, nature. This group (which can be referred to here as "Descriptive Soft Law Instruments") includes instruments such as Recommendations, Opinions, Position Papers, and the like. The second group includes instruments which are addressed primarily, although not exclusively, to business operators. These instruments seem to aim at becoming rules in the form of usages (so this group can be referred to as "Usage-Type Soft Law Instruments"), and they include Codes of Conduct, Model Contracts, Model Clauses, Sets of Principles, and other similar instruments. The third group includes instruments which are

[91] Soft Law instruments adopted by UNIDROIT include one of the best-known and most relevant instrument, namely the *UNIDROIT Principles of International Commercial Contracts* ("UNIDROIT Principles", or "PICC"), originally adopted in 1994 and now available in their fourth edition, published in 2016 (the text of the PICC is available online at: https://www.UNIDROIT.org/instruments/commercial-contracts/UNIDROIT-principles-2016). Other Soft Law instruments adopted by UNIDROIT include the *Legislative Guide on Intermediated Securities* (2017), the UNIDROIT / FAO / IFAD *Guide on Contract Farming* (2015), the *Model Law on Leasing* (2008), the ALI / UNIDROIT *Principles of Transnational Civil Procedure* (2006), the *Model Franchise Disclosure Law* (2002).

[92] One example of Soft Law instrument adopted under the auspices of the Hague Conference on Private International Law is the 2015 *Hague Principles on Choice of Law in International Commercial Contracts*.

[93] *Accord*: Herbert Kronke, *International Uniform Commercial Law Conventions: Advantages, Disadvantages, Criteria for Choice*, 5 Unif. L. Rev. 13, 13-20 (2000); for further references to the salient features of the CISG and the extent to which those features can be found also in subsequent conventions, *see* Marco Torsello, Common Features of Uniform Commercial Law Conventions. A Comparative Study beyond the 1980 Uniform Sales Law, *passim* (2004).

[94] For an authoritative and influential position in favor of unification through conventions, see Jürgen Basedow, *International Economic Law and Commercial Contracts: Promoting Cross-Border Trade by Uniform Law Conventions*, 23 Unif. L. Rev., 1, 1-14 (2018).

addressed primarily to States and national governments and legislatures, although they can also be used, or referred to, by business operators, courts and other legal actors. The instruments in this group (which can be referred to as "Treaty-Type Soft Law Instruments") include Legislative Guides, Model Laws and other similar instruments.[95]

The overview and grouping of soft law instruments is relevant in that it provides guidance as to some of the most salient features of soft law, which relate to its legitimacy and enforceability. In fact, the *softness* of soft law instruments varies on a sliding scale, possibly peaking towards hard law,[96] and the view can be shared that soft law instruments exhibit (varying degrees of) normative legitimacy, as evidenced by the fact that, «[i]*n spite of the lack of enforceability, the addressees of soft law norms can perceive it as binding and, even if they do not, they may choose to abide by it on their own accord*».[97]

The progressive shift from a *lex mercatoria* based on uncodified general principles to one based on (quasi-)codified soft law instruments carries relevant consequences. First, the growing phenomenon of (quasi-)codification of soft law instruments raises the question whether, besides and beyond the easy accessibility ensured by their codified format, the soft law instruments made available to international arbitrators should possess any specific normative requirements in order to qualify for use as legitimate sources of the law applicable in international arbitration. Secondly, the significant production of (codified and thus) easily accessible soft law instruments leads to a sort of soft law regulatory competition, and raises the question of the methodology that

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[95] For a similar approach, see Diego P. Fernández Arroyo, *The Growing Significance of Sets of Principles to Govern Trans-boundary Private Relationships*, in Eppur Si Muove: The Age of Uniform Law. Essays in Honour of Michael Joachim Bonell, Vol. 1, 251 (UNIDROIT ed., 2016), in particular at 257-258, where the Author observes that «*international instruments are often presented as if they had a progressive degree of feasibility. Consequently, if the conditions for the adoption of a convention do not seem favourable, a model law may be presented as a more accessible option. The same relation may be established between a model law and a legislative guide, or between any of these instruments and a set of principles*» (footnotes omitted).

[96] Cf. Friedrich Rosenfeld, *The Hardening of Soft Law in International Arbitration*, 7 Europ. Int'l Arb. Rev. 19 (2018).

[97] Gabrielle Kaufmann-Kohler, *Soft Law in International Arbitration: Codification and Normativity*, J. Int'l Disp. Settl. 1, 3 (2010).

arbitrators are required to adopt in selecting among the many (hard and soft) law instruments that are made available to them.

Indeed, codifying a soft law instrument makes it more readily available to its users, and reference to (quasi-)codified instruments on the part of arbitrators makes it easier for the parties to check and monitor the correct application of the instrument and to present their case in a more effective way. Hence, in a competitive environment, where the contents of the a-national applicable legal rules are increasingly being assessed on the basis of a comparative analysis of existing sources, which include both national sources and soft law instruments, the availability and accessibility of a soft law instrument is a key to its success, and an indispensable requirement for its very existence.

All in all, the more codified instruments are available to users, the less non-codified norms are likely to be relied upon. The change is of great significance, in that it marks the abandonment of an approach (the traditional *lex mercatoria*) based on the idea of the existence of a supranational unitary and autonomous legal system, and the emergence of a different approach (a new *lex mercatoria*) based on legal relativity and regulatory competition among multiple sources of (hard and soft) law.

In this respect, the conclusion that the environment is becoming increasingly competitive is difficult to deny as it is supported by the observation that soft law instruments are becoming not only more numerous, but also more specialized in various ways. *Sector-specific soft law instruments*, such as those produced by trade association like FIDIC, GAFTA and others, have long and successfully existed; more recently, however, also *region-specific soft law instruments* have been produced in unprecedented number and at an unprecedented pace. Examples of the latter ones include the ALI / UNIDROIT Principles on Transnational Civil Procedure,[98] which are now being paralleled by the ELI / UNIDROIT corresponding project.[99] Other examples in the field of substantive law include the projects (echoing the European PECL and the

[98] ALI / UNIDROIT Principles on Transnational Civil Procedure, *supra* n. 13.

[99] ELI / UNIDROIT Transnational Principles of Civil Procedure, as well as the joint Project "From Transnational Principles to European Rules of Civil Procedure".

UNIDROIT Principles) which have led to the establishment of a working group for the draft of the Principles of Asian Contract Law (PACL)[100] and to the recent enactment of the Principles of Latin-American Contract Law (PLACL).[101] Also long existing and successful soft law instruments like the ICC Incoterms seem to have acknowledged the importance of further specialization, in that starting from the 2010 edition the general clauses are clearly divided between rules applicable for any mode of transport (EXW, FCA, CPT, CIP, DAT, DAP and DDP), and rules specifically tailored for sea and inland waterway transport (FAS, FOB, CFR and CIF), and the 2020 edition of the ICC Incoterms has confirmed the same approach.

It is therefore safe to conclude that the proliferation of codified soft law instruments and their increasing specialization are producing a mechanism of soft law regulatory competition. Parties and arbitrators relying on the comparative functional approach to *lex mercatoria* are increasingly likely to be faced with the alternative between the various legal solutions provided (not only in different national legal systems, but also and increasingly) in competing soft law instruments. In the field of general contract law, for instance, they could be faced with the alternative between the global UNIDROIT Principles and the local Principles of Latin-American Contract Law. In the field of procedural rules in arbitration – to give just another example – they could be faced with the alternative between the IBA Rules on the Taking of Evidence in International Arbitration[102] and the recently drafted "Prague Rules".[103]

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[100] On the PACL project, which is now moving at a discontinued pace, *see* Shiyuan Han, *Principles of Asian Contract Law: An Endeavor of Regional Harmonization of Contract Law in East Asia*, 58 Villanova L. Rev. 589 (2013).

[101] On the PLACL *see* Rodrigo Momber and Stefan Vogenauer, *The Principles of Latin American Contract Law: text, translation, and introduction*, 23 Unif. L. Rev. 144 (2018), where the PLACL are defined as «*the most recent soft law instrument in the field of contract law*» (at 144); see also Pietro Sirena, *I "Principios Latinoamericanos de Derecho de los Contratos" e il diritto nazionale dei consumatori*, 8 Osserv. Dir. Civ. Comm. 3 (2019).

[102] IBA Rules on the Taking of Evidence in International Arbitration, *supra* n. 15.

[103] *Rules on the Efficient Conduct of Proceedings in International Arbitration* ("Prague Rules"), draft of 1 September 2018 available at: http://praguerules.com; according to Article 1.2 of the Prague Rules «[t]*he Arbitral Tribunal may apply the Rules or any part thereof upon the Parties' agreement or on its own initiative after having heard the Parties*».

As the process of codification of soft law moves forward, the price that *lex mercatoria* might pay is yet to be fully understood. It is apparent that codification comes at the price of a loss of flexibility, to the extent that some commentators have concluded that the attempts at codifying *lex mercatoria* constitute a step towards its decline.[104]

If the loss of flexibility were to result in the complete loss of dynamism of non-state transnational commercial law, one could not but agree with the reported conclusion about the prospective decline of *lex mercatoria*. The process of comparative assessment of the *lex mercatoria*, however, is a dynamic one,[105] and its dynamism results from the flexible mechanisms of production of soft law instruments, which rely on social and legal actors coordinating and adapting their actions to those of others that preceded. Accordingly, far from facing a decline, the development of a uniform system of transnational commercial law is likely to benefit from the competitive interaction of multiple private soft-law-makers, competing with each other in a fast-communicating system.

The paradigm is changing: the prevailing attitude seems no longer to be favoring the aspiration towards an autonomous supranational legal order based on customary law, but rather a supranational system based on multiple competing sources and legal relativity, which calls for a comparative methodology in order to develop selective criteria necessary for the system to operate.

V. THE USE OF COMPARATIVE LAW METHODOLOGY TO SELECT AMONG SOFT (AND HARD) LAW INSTRUMENTS: THE PARTIES' WILL AND THE INSTRUMENTS' SUITABILITY FOR LEGAL TRANSPLANT

Scholars who have proposed or endorsed the comparative approach to *lex mercatoria* have focused primarily on the comparison among national legal

[104] Celia Wasserstein Fassberg, *Lex Mercatoria – Hoist with Its Own Petard?*, 5 Chi. J. Int'l L. 67, 81-82 (2004).

[105] The dynamic typology of soft law is emphasized by Arroyo, *The Growing Significance of Sets of Principles*, *supra* n. 95, 255 et seq..

systems.[106] Conversely, under the functional approach to *lex mercatoria* proposed here arbitrators may also refer to a-national legal sources in order to meet the parties' quest for independence and impartiality. Rather than selecting one national law (according to a conflict of laws approach or otherwise), which may result in the application of a set of rules more favorable or at least more familiar to one party, arbitrators (and parties) may deem it preferable to rely on a supranational set of rules suited to apply to international commercial transactions. Under these circumstances, instead of limiting the analysis to a comparison between (hard) national laws, in search for a *tronc commun*[107] (expression of the aspiration towards a systematic supranational legal order), arbitrators can extend the spectrum of regulatory sources to be considered through the comparative analysis to soft law instruments, which are nowadays more readily available due to the extensive activity of (quasi-)codification carried out by many norm-formulating agencies. In turn, this progressive process of (quasi-)codification of soft law instruments facilitates their enactment and accessibility, and leads to a mechanism of dynamic soft law regulatory competition.[108] Hence, the aspiration towards unity gives way to

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[106] *See*, e.g., Gaillard, *Transnational Law: A Legal System or Method of Decision Making?*, *supra* n. 73, 59 et seq..

[107] On the so-called *tronc commun* doctrine, see Bertrand Ancel, *The* Tronc Commun *Doctrine: Logics and Experience in International Arbitration*, 7 J. Int'l Arb. 65 (1990); Mauro Rubino-Sammartano, International Arbitration. Law and Practice 630 (3rd ed. 2014).

[108] The application of the comparative approach to determine the prevailing solution in transnational commercial law is frequent not only before arbitral tribunals, but also before national courts. Just to provide a few examples, let us refer to the decision rendered by Cour d'appel Grenoble (France) 23 October 1996, available at: http://www.UNCITRAL.org/docs/clout/FRA/FRA_231096_FT_205.pdf, where the court, called upon to decide on the place of payment in international contracts applied a solution in contrast with French law (as in force at the time of the decision) on the basis of a comparison between several national laws, international conventions (CISG, 1972 Basle Convention and 1968 Brussels Convention), and soft law instruments (UNIDROIT Principles, ICC Incoterms). See also Tribunale Napoli (Italy) 29 March 2001 and Cass. (Italian Supreme Court), 16 November 2007, which in a domestic financial leasing transaction carried out a comparison of international instruments, including the 1988 UNIDROIT Convention on International Financial Leasing and the 2008 UNIDROIT Model Law on Leasing. Another field where the comparative approach is frequently applied before both domestic courts and arbitral tribunals is disputes arising from an allegedly fraudulent call on demand guarantees, where it is all but rare to encounter decisions resulting from the (express or implicit) comparison of domestic laws (such as, e.g., Article 5:114 of the UCC), international conventions, whether or not applicable to the case (such as the 1995 U.N. Convention on Independent Guarantees and

a multicentric system fostering legal relativity based on the competition among multiple legal instruments.

Considered from a different perspective, the increasing production of soft law instruments raises the question of legitimacy of these privately-produced legal instruments,[109] whose application cannot be simply justified on the grounds of their being readily available due to their codified format. In fact, whereas hard law instruments seem to qualify by definition for possible application, although their weight may vary in practice, the suitability of soft law instruments to be weighted in comparison to other instruments must be filtered by setting a minimum threshold of normative legitimacy. In particular, it has been noted, the soft law instrument must constitute a "*paradigmatic source*"[110] of transnational law, so as to be a clear expression of normativity, although possibly of mere "*soft normativity*".[111]

The review of the key question of the assessment of a minimum threshold of legitimacy of soft law instruments sheds lights on the importance of critically addressing the relationship between the formality of a codified style and layout and the substantive quality of normativity. In this regard, it has been observed that «[a]*t first sight, the strength of a norm should not depend on the form it adopts, whether codified or uncodified. Upon a closer look, however, this may not be as obvious*»,[112] and a formalistic and quantitative criterion to assess legitimacy may even become more relevant than a qualitative one.

As the theoretical notion of "normative legitimacy" *per se* seems unfit to serve the goal of selecting among multiple (quasi-)codified soft law instruments, a different methodology must be adopted to choose among the

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Stand-By Letters of Credit, Articles 14 and 19) and soft law instruments (such as the ICC URDG 758, Article 15-A).

[109] *See* Barack D. Richman, *Firms, Courts and Reputation Mechanisms: Towards a Positive Theory of Private Ordering*, 104 Colum. L. Rev. 2328 (2004); Christopher R. Drahozal, *Private Ordering and International Commercial Arbitration*, 113 Penn St. L. Rev. 1031, 1034 et seq. (2009).

[110] For a similar expression, used with respect to the UNIDROIT Principles, *see* Luca Radicati di Brozolo, *Non-National Rules and Conflict of Laws. Reflections in Light of the UNIDROIT and Hague Principles*, 48 Riv. Dir. Int. Priv. Proc. 841, 841 (2012).

[111] The expression is used by Kaufmann-Kohler, *Soft Law in International Arbitration*, *supra* n. 97, 13.

[112] Id., at 15.

(possibly multiple) available instruments of hard and soft law competing with each other on the scene of supranational commercial law. Comparative law methodology may thus be helpful in guiding arbitrators through the process of selection among multiple legal instruments, in search for the most suited one to be applied to the case at hand.

Accordingly, when faced with the issue of legitimacy of a soft law instrument and with the possible need to select among multiple instruments, arbitrators must, in the first place, review and scrutinize the parties' contractual goals and will,[113] so as to determine what instrument the parties would have chosen for themselves, had they been required to make an express choice at the time of the conclusion of the contract (or, anyway, prior to the start of the dispute). To provide one example, if the review of the parties' goals and will reveals deference by the parties to an existing ICC instrument, such as a model contract that they used as a template for the drafting of their agreement, the arbitrators may well comfortably refer to a different soft law instrument prepared by the same law-formulating agency, even though not expressly incorporated by reference in the contract, if that soft law instrument deals with an issue that was not otherwise addressed in the contract by the parties, and it is based on general principles similar to (or at least not incompatible with) those underpinning the contract between the parties.

The comparative analysis based on the parties' goals and will mimics an approach already largely applied in international commercial arbitration, due to the pivotal role of party autonomy and the broad mandate usually assigned to arbitrators to interpret the parties' will and to fill any gaps in the contract by resorting, in the first place, to implied terms, which the parties did not expressly set forth in the contract, but which can be inferred from an overall review of the contractual arrangements.

In addition to the approach based on the review of the parties' goals and will - and in any event if the former method cannot lead to a satisfactory result

[113] An approach showing deference to the will of the parties is in compliance with the contractual nature of international arbitration and with the approach primarily employed to determine the law applicable to the merits of the dispute. Cf. Lew, Mistelis and Kröll, Comparative International Commercial Arbitration, *supra* n. 71, 411.

-, arbitrators should base their choice on the analysis of the available instruments' suitability for legal transplant and adaptability to different legal environments, on the assumption that the mandate received from the parties, in the absence of a choice of law, includes the power to fill any gaps in the contract by resorting to a neutral supranational set of rules, which – in the alternative to a solution drawn from a comparative review of domestic laws – may be based on soft law instruments, provided that they can be regarded as a paradigmatic expression of supranational commercial law.

Under these circumstances, arbitrators may deem appropriate to explore other routes to corroborate the results thus far reached and this approach raises the question of legitimacy of the resort to soft law instruments that the parties had not chosen, in the absence of an explicit or implied expression of their will. A positive answer as to the legitimacy of the recourse to soft law instruments is possible on the basis of the assumption that the parties' choice of arbitration to settle their future disputes, without any choice of law, indicates that the parties intended to disengage their contractual relationship and any resulting dispute from any national legal system and to submit them to a system of a-national sources of transnational commercial law. A similar conclusion can only be reached after a careful review of the circumstances of the case, as it requires a positive and clear assessment as to the parties' will to detach the contract, as far as possible, from any national legal system. This conclusion, for instance, seems problematic when the parties, although failing to choose the law applicable to the contract, choose the seat of arbitration, thus linking the dispute to a specific national legal system.

If the foregoing assumption can be made as to the parties' intention to detach the contract from any national legal system, then arbitrators are called upon to fulfil their mandate by filling any regulatory gap by resorting to an external source of a-national legal rules. Again, arbitrators might address this issue by resorting to a domestic law, either by virtue of some conflict of laws rules (either those of the seat, or those deemed appropriate), or by resorting to the so-called *voie directe* approach,[114] which enables the arbitral tribunal to

[114] For an overview of the use of the so-called *voie directe* approach, which is exemplified in national legal systems such as the French one (as from Décret No. 81-500 of 12 May 1981, which introduced Art. 1496 to the

decide the dispute according to the substantive law that the tribunal considers appropriate. This approach, however, does not duly serve the quest for disengagement from national law, which has been assumed as a starting point of the analysis. Hence, according to an alternative scheme, arbitrators could consider multiple legal systems and compare them in search for a common core of rules and principles. This approach, however, may prove difficult in practice and its outcomes may be rather uncertain and questionable, so that it is not surprising that arbitrators are often reluctant either to use this methodology, or to use it on its own. Therefore, the search for alternative gap-filling methodologies is often not satisfied by the mere reference to one or more domestic laws.

As already mentioned, the loosening of the conflictualist connection to the forum (*i.e.*, the seat) and the abandonment of the rigid conflict of laws approach leading to the selection of the applicable law of a national state have opened the way to solutions based on the application of rules of law enacted in the form of soft law instruments. In turn, the application of soft law instruments raises the question of legitimacy of the instruments and that of the methodology to be adopted to select the most suitable instrument in the case at hand.

Comparative law provides a valuable methodology to serve the needs under discussion here. In fact, comparative lawyers are inclined to reject the unitary idea of law and are thus well equipped to deal with, and manage, the relativity of legal solutions and the multitude of legal sources. Moreover, comparative lawyers are used to study the changes and mobility of the law and to observe what makes certain legal solutions more suitable to circulate and be transplanted from one legal system to another.[115]

Code of civil procedure) and the Dutch one (as from the Law of July 2nd, 1986, which introduced Art. 1054 to the Code of civil procedure), see Doug Jones, *Choosing the law or rules of law to govern the substantive rights of the parties: A discussion of voie directe and voie indirecte*, 26 Singapore Acad. L. J. 911 (2014); Declan MacGuinness, *Applicable Law Chosen by Arbitrators. A Critical View on Arbitrators' Use of the Method of Voie Directe, Lex Contractus and Equity*, Stockholm Arbitration Reporter (2003).

[115] The main reference, in this respect, is to Alan Watson, Legal Transplants: An Approach to Comparative Law (Edinburg, 1974); see also, *ex multis*, Esin Örücü, *Law as Transposition* 51 Int'l Comp. L. Q. 205 (2002); M. Langer, *From Legal Transplants to Legal Translations*, 45 Harv. Int'l L. J. 1 (2004); Helen Xanthaki, *Legal*

All these comparatists' skills can be of paramount importance in the selection of the soft law instruments to be applied in international commercial arbitration. Indeed, the selection of the applicable instrument can be based on a comparative analysis of the instruments that address the issue in question, whereby arbitrators select the one that is more suitable to be transplanted from one legal context to another, and more likely to adapt to different legal environments and circumstances.

Under the aforementioned approach, arbitrators may rely on various hints, which provide valuable guidance as to the suitability for legal transplant and adaptability of the soft law instruments under consideration, and allow arbitrators to draw a conclusion about the instruments' being paramount expressions of transnational commercial law.

One of the main factors that arbitrators should consider, in this respect, is the extent to which a soft law instrument has already been used in diverse legal contexts, whether or not as a result of an express incorporation by reference made by the parties. In this regard, for instance, it would be hard to deny the adaptability to different legal contexts of an instrument such as the ICC Incoterms, which is often incorporated by reference, but also often applied in the absence of an express choice, as usages of international commerce.[116]

It is apparent, however, that linking the legitimacy and applicability of soft law instruments only to their prior application might limit excessively the possibility to rely on newly codified instruments. Therefore, the quantitative criterion based on an instrument's prior application may be regarded as a very important one, but certainly not the only one available to arbitrators.

Transplants in Legislation: Defusing the Trap, 57 Int'l & Comp. L. Q. 659 (2008); George Mousorakis, *Legal Transplants and Legal Development: A Jurisprudential and Comparative Law Approach*, 54 Hungarian J. Leg. St. 219 (2013); Jaakko Housa, *Developing Legal Systems, Legal Transplants, and Path Dependence: Reflections on the Rule of Law*, 6 Chinese J. Comp. L. 129 (2018). For a critical review of the notion and outcomes of legal transplants, see Otto Kahn-Freund, *On Use and Misuse of Comparative Law*, 37 Modern L. Rev. 1 (1974); Pierre Legrand, *The Impossibility of Legal Transplants*, 4 Maastricht J. Eur. & Comp. L. 111 (1997); Gunther Teubner, Legal Irritants: Good Faith in British Law or How Unifying Law Ends Up in New Divergencies, 61 MLR 11 (1998).

[116] See, among others, United States 11 June 2003 Federal Appellate Court [5th Circuit] (*BP Oil International v. Empresa Estatal Petroleos de Ecuador*), available at: http://cisgw3.law.pace.edu/cases/030611u1.html.

An alternative (institutional) criterion, for instance, can be based on the reliability of the norm-formulating agency. This criterion may come into play primarily with respect to government-participated norm-formulating agencies, such as UNCITRAL, UNCTAD, WIPO, UNIDROIT, the Hague Conference of Private International Law, and the like, but also with respect to widely recognized business associations, such as the International Chamber of Commerce and others. The factor based on the authority of the norm-formulating agency, however, is not limited only to government-participated agencies. In particular, this factor may come into play as a relevant one in disputes arising in sectors where there exists an active and prestigious sector-specific norm-formulating agency, even if it is not a government-participated one. This is the case, for instance, as regards the FIDIC model contracts in the construction industry, the GAFTA model contracts and arbitration rules in the grain and feed industry, and other similar sector-specific entities.

An additional criterion that arbitrators may take into account is the extent to which the soft law instrument has been preceded by accurate comparative law studies, which ensure that the instrument be the expression of rules and principles shared in multiple jurisdictions. In this respect, for instance, that of the UNIDROIT Principles is a very good example of a soft law instrument that was preceded by extensive comparative studies, and which, in fact, began to be applied very soon after its enactment, irrespective of the lack of prior application.[117] Reference to preliminary comparative studies does not mean that region-specific instruments (such as, for instance, the Principles of Latin American Contract Law) don't meet this requirement. In fact, these instruments are also often preceded by accurate comparative studies, although with a focus on the needs of the region where the instrument in intended to apply. Accordingly, also arbitrators should consider these instruments exclusively (or at least primarily) in cases with relevant connections to the region in question.

While the foregoing criteria are all relevant, the final assessment as to the legitimacy and applicability of a soft law instrument requires arbitrators to

[117] For a collection of cases applying the UNIDROIT Principles, see the Unilex database, at: http://www.unilex.info.

look more closely into the merits of the various instruments according to a functional criterion, and to come to a conclusion as to their suitability to be adapted to the dispute under consideration. This can be done only by determining the prevailing legal culture(s) on which the relationship between the parties in dispute is based, and by measuring the proximity to that legal culture of the competing soft law instruments. This task clearly requires a comparative methodology to measure similarities and differences between different legal texts.[118] In particular, as far as (hard) national laws are concerned, the analysis must focus on the suitability of those laws to be transplanted and likelihood of their being adaptable to different legal environments, including the one relevant to the case at hand. As far as soft law instruments are concerned, the analysis must focus on the trans-frontier mobility of the instrument in question and its compatibility with different contractual schemes commonly used in transnational commercial practice.

In all cases, however, the proposed functional criterion requires that the adaptability of the instruments in question be assessed from two specular perspectives: on the one hand, the instrument must be adaptable and suitable to enter the multiple potential legal environments of destination; on the other hand, however, a positive conclusion is necessary about the readiness of the legal systems of destination to allow the entry of the instrument in question, in light of the public policy and of the overriding mandatory law of that legal system. In other words, when selecting the instruments to be applied to the case, arbitrators cannot overlook the fact that the validity of the award will ultimately be reviewed by the domestic courts of the State of the seat and that the award must be suitable to be recognized and enforced not only in the State of the seat, but also in (possibly multiple) other States, including (but not limited to) those where the parties are located or domiciled.

Therefore, in compliance with the generally recognized duty of the arbitral tribunal to render an enforceable award, the selection of the (hard or

[118] For instance, when selecting between the IBA Rules on the Taking of Evidence in International Arbitration and the Prague Rules, in the absence of guidance from the parties, the arbitral tribunal may base its decision on the alleged IBA Rules' more vicinity to common law legal systems, as opposed to the Prague Rules' more civilian approach.

soft) legal instruments applicable to the case, although primarily guided by different criteria inspired by the will of the parties and the adaptability of the instrument, must in all cases be compliant with the public policy and the overriding mandatory law of the legal systems possibly involved. This conclusion is in line with the solution embraced by the 2015 Hague Principles on Choice of Law in International Commercial Contracts, which, although conceding that «[t]*he law chosen by the parties may be rules of law that are generally accepted on an international, supranational or regional level as a neutral and balanced set of rules*», specify that the foregoing shall not prevent an arbitral tribunal (Article 11(5)) «*from applying or taking into account public policy (ordre public) or from applying or taking into account overriding mandatory provisions of a law other than the law chosen by the parties, if the arbitral tribunal is required or entitled to do so*».[119]

VI. CLOSING REMARKS

Lex mercatoria and soft law instruments often play a similar role, but cannot be treated as expressions of the same phenomenon. The former is mainly regarded as a customary supranational autonomous legal order, whose flexibility and adaptability arise from its not being rigidly codified. Various different arguments have been put forward to justify the very existence of *lex mercatoria*, ranging from theories based on the assumption that *lex mercatoria* may reduce transaction costs to the benefit of the parties, to those claiming that *lex mercatoria* is primarily beneficial to arbitrators or to norm-formulating agencies. These theories have been rejected in this paper and the claim has been made that *lex mercatoria* serves primarily the goal of addressing the parties' quest for independence and impartiality of the arbitral tribunal, which in turn implies a disengagement from national courts and national laws, including, in the absence of parties' choice, as regards the law applicable to the merits of the dispute.

[119] Cf. Giuditta Cordero-Moss, *Limits to Party Autonomy in International Commercial Arbitration*, Oslo L. Rev. 47 (2014).

The identification of the goals of *lex mercatoria* in terms such as those described above, makes it easier to understand the rationale of the current shift from the uncodified *lex mercatoria* to a dynamic phenomenon of regulatory competition among a multitude of (quasi-)codified soft law instruments, the format of which makes them more readily available for reference and application. Arbitrators are, in fact, increasingly relying of these soft law instruments as the source of supranational commercial law applicable to the dispute in the absence of a choice of law made by the parties. This approach raises the question of legitimacy of the soft law instruments, and of the criteria on the basis of which arbitrators must choose among several (hard and) soft law instruments.

This paper's claim, in this respect, is that arbitrators should resort to a comparative methodology in order to determine, from an *ex ante* perspective and in light of the specific circumstances of the case, which (hard or soft) legal rules the parties would have selected as applicable to their relationship, had the parties chosen an applicable law or legal instrument. In other words, the arbitrators should not choose the functionally "best" solution according to their *ex post* evaluation, but rather the source of law that most likely, from an *ex ante* perspective, the parties would have selected to supplement their contractual arrangements. Relevant factors to be taken into account for this purpose include the review of the overall goals pursued by the parties by means of the contract to which the dispute to be arbitrated relates, and the suitability of the legal solutions under scrutiny to be transplanted and adapted to different legal environments.

This entire process, however, is not taking place in a legal vacuum. The parties' mandate to arbitrators may well be to disengage from any national legal system. In the end, however, the parties' relationship cannot be entirely detached from all national legal systems, and the arbitral award that the arbitrators are called upon to render may be annulled in the state of the seat, and must be capable of enforcement in multiple national legal systems. The foregoing does not mean that the approach that has been supported here cannot be adopted. In fact, most legal systems will pose no obstacle to the applicability of the said approach and the enforceability of the resulting arbitral award. However, the awareness that, in the end, the arbitral award must be

capable of being enforced in national legal systems suggests that there is a last (yet fundamental) review that the arbitrators must perform, namely the review of compatibility of the soft law instruments deemed applicable with the public policy of the state of the seat and of those states where the enforcement of the award will most likely be sought.

All in all, the proposed theory of a new (quasi-)codified *lex mercatoria* based on soft law regulatory competition and the use of comparative law methodology, although possibly less flexible than the traditional one, based on an uncodified autonomous legal order, presents relevant advantages in that it is less ideological and divisive. Indeed, on the one hand, the abandonment of the claim of autonomy and systematicity of the supranational legal order is consistent with the persistent final word reserved to national States, which is epitomized by the monitoring role played by the public policy exception, the notion of arbitrability, and the application of the overriding mandatory rules of the *forum* or seat; on the other hand, national legal systems may in the end be relieved by the multitude of soft law instruments and the resulting dynamic competition and therefore more inclined at operating as conduits and allowing the privatization of law-making in the field of transnational commercial law, whether through incorporation, deference, or delegation.