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THE TRANSNATIONALIZATION OF NATIONAL CONTRACT LAW BY THE INTERNATIONAL ARBITRATOR [1]

Gabrielle KAUFMANN-KOHLER [2]

I. – THE QUESTION: HOW DO INTERNATIONAL ARBITRATORS APPLY NATIONAL CONTRACT LAW?

As the recipient of this volume notes in his "Droit du commerce international", international contracts develop in a legal environment that is not homogeneous [3]. The purpose of this paper is to explore how international commercial arbitrators take account of the heterogeneous contract environment when they are called to apply national contract law. How do they apply the national law governing the contract before them? In the same manner as a judge would? Differently? If differently, how so?

To answer these questions, this contribution will begin by laying the groundwork. It will establish how often arbitrators apply national contract law (I.A) and analyze the freedom they enjoy in applying such law (I.B). It will then review arbitral practice (II). Such review will show that, in the cases in which an issue of application of law arises (II.A), arbitrators tend to resort to non-national rules to reinforce (II.B) or to correct the applicable national law (II.C), when they do not apply non-national rules directly (II.D). On the basis of this analysis, this article will then draw some conclusions (III).

Before addressing these topics, some explanations on the meaning of certain terms are called for, because the terminology used by authors varies considerably, not to speak of the one employed in arbitral awards. The term non-national or

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1. *Cette contribution est publiée en anglais du fait que les nombreuses sentences arbitrales auxquelles elle se réfère sont publiées uniquement dans cette langue.*
2. This contribution is an expanded and updated version of an earlier writing entitled *Le contrat et son droit devant l'arbitre international* and published in F. BELLANGER *et al.*, *Le contrat dans tous ses états*, Bern, Stämpfli, 2004, p. 361-373. The author thanks Dr. Silja SCHAFFSTEIN of Lévy Kaufmann-Kohler for her research assistance.
3. J.-M. JACQUET, Ph. DELEBECQUE et S. CORNELOUP, *Droit du commerce international*, Paris, Dalloz, 2e éd. 2010, § 25, p.18.

transnational rules will be used to cover rules that pertain neither to a national legal system nor to public international law. Rules of this nature have multiple sources, including private codifications, such as the UNIDROIT Principles of International Commercial Contracts, arbitral case law, international conventions applied outside of their scope of application, and uniform rules emerging from a comparative review of national legal orders. They are part of the so-called *lex mercatoria*, which in addition comprises international trade usages (in the sense of practices generally followed in a given trade). As to the term transnationalisation appearing in the title of this contribution, it describes a process by which arbitrators detach a contract from the sole reach of a specific national law by relying either on national laws that are not applicable to the dispute or on non-national rules.

A. – Some statistics

It is well known that disputes arising out of international commercial contracts are resolved by arbitral tribunals rather than by courts. There are, however, no overall statistics which capture the magnitude of this occurrence. Nor are there general statistics that provide information on the application of law in international arbitration. For want of other data, we will rely on the statistics published by the ICC International Court of Arbitration ("ICC")[4]. Emanating from one of the main arbitral institutions worldwide, these statistics can be regarded as providing reliable insight into our issue. That said, one cannot rule out the possibility that data from other institutions, with a geographically different user pool, may lead to different results.

In 2010, the ICC registered 793 arbitrations with 2 145 parties from 140 different countries or independent territories. 50 % of these parties were from Europe, 24 % from the Americas, 20 % from the Asia-Pacific and 6 % from Africa[5]. The 1 331 arbitrators nominated for these cases came from 73 different countries. Swiss arbitrators occupied the highest nominations (13.52 %), closely followed by the British (13.30 %)[6].

In the vast majority of the cases registered at the ICC in 2010, the contract in dispute contained a choice of law clause. 99 % of the clauses chose a national

4. ICC 2010 Statistical Report, *ICC International Court of Arbitration Bulletin*, 2011, vol. 22, No.1.
5. The 2010 statistics of the London Court of International Arbitration ("LCIA") show similar figures. A slight majority of parties come from Europe, with UK parties representing 17 % of the total. Almost 50 % of the parties came from countries outside Europe. Most non-European parties come from North America (9.25 %) (See the LCIA Director General's Report of March 2011, p. 3).
6. The Swiss and British were followed by French (9.02 %), US (7.51 %) and German (6.61 %) arbitrators. The ICC also recorded an increase in arbitrators from other regions, in particular, from Central and West Asia.

law. Only in nine contracts did the parties choose a non-national law, such as the Convention on Contracts for the International Sale of Goods, 1980 ("CISG") (seven contracts) or the ICC Incoterms (two contracts). In one contract, the parties provided for the resolution of the dispute by *ex aequo et bono*.

The national laws most frequently chosen by the parties mirror their choices regarding the arbitrators' countries of origin. Laws most often chosen include English law (12.9 %) and Swiss law (11.6 %). By contrast, the nationality of the parties had less impact on the national law chosen. Most parties came from the US (8.67 %), followed by Germany (7.41 %) and France (6.11 %). Only 3.12 % of the parties were from the UK and 2.38 % from Switzerland. This means that in numerous cases, the choice of law was not made because of the connection of the law to the nationality of the parties, but rather because of the lack of such a connection. In other words, in a majority of cases, the parties chose a national law because of its perceived neutrality vis-à-vis the parties and their contract[7].

For our purposes, these statistics show two things. First, in the vast majority of cases, international arbitrators are called on to resolve disputes by applying a national law, not non-national rules or *lex mercatoria*. Hence, the question of how they apply such national law is of major practical relevance.

Second, arbitrators frequently apply a law with which they are not familiar, a law in which they have not been educated or trained. While, it is true that the statistics demonstrate some correlation between the most popular laws (English 12.9 % and Swiss 11.6 %) and favorite arbitrator nationalities (Swiss 13.52 % and British 13.30 %), taking the totality of cases and the relatively small percentage where such correlation may exist, it remains that arbitrators often apply a national contract law that they do not know or, at best, know only through practice. Intuitively, one's reaction is that this lack of knowledge of the applicable law cannot be without consequence. Common sense dictates that, consciously or not, the arbitrators will tend to rely more heavily on the contract provisions themselves and seek guidance from familiar legal concepts and general principles of law, to the detriment of the particularities or idiosyncrasies of the applicable law.

The following analysis will attempt to verify this intuitive (or common sense) reaction. It will do so by focusing on international arbitration law and on published arbitral awards. Due to the lack of systematic publication of awards, a comprehensive study of the manner in which arbitrators apply national laws is an impossible task. Further, several factors influencing a dispute resolver's application of the law – whether judge or arbitrator – may not be apparent from the

7. The 2010 International Arbitration Survey on Choices in International Arbitration, conducted by White & Case and the School of International Arbitration at Queen Mary, University of London, concluded that the most important factor influencing the parties' choice of law is the legal system's perceived neutrality and impartiality with regard to the parties and their contract. Familiarity with and experience of the law were also found to be important factors influencing the parties' choice of law (2010 International Arbitration Survey on Choices in International Arbitration, available under www.arbitrationonline.org, p. 11).

face of their decisions and may only become clear from an insight into tribunal deliberations, again an impossible task. In other words, any attempt at theorizing the issues under consideration is inevitably empirical to a certain degree.

B. – The legal framework: freedom in the application of the law governing the contract

Most national arbitration laws require arbitral tribunals to apply the rules of law chosen by the parties or, in the absence of a choice-of-law, "the law" or "the rules of law" most closely connected with the dispute [8]. The application of these choice-of-law rules will generally lead to the application of the law of a particular state [9].

Some national arbitration laws go further, allowing international arbitrators to decide the dispute by applying rules of law which they determine to be appropriate [10]. In addition, most institutional arbitration rules require arbitrators to consider the provisions of the contract and relevant trade usages [11]. It is also generally accepted that international arbitrators, instead of applying a national law, may decide the dispute by applying non-national rules of law or *lex mercatoria* [12].

Additionally, if authorized to do so by the parties, international arbitrators may decide the dispute *"ex aequo et bono"* [13], in which case they can dispense with the application of any legal rules, except those concerning international public

8. Article 187 (1) Swiss Private International Law Act (PILA); § 1051 (2) German Code of Civil Procedure (ZPO); § 46 of the English Arbitration Act 1996; Article 28 (2) UNCITRAL Model Law on International Commercial Arbitration (UNCITRAL Model Law). See also L. SILBERMAN and F. FERRARI, "Getting to the Law Applicable to the Merits in International Arbitration and the Consequences of Getting it Wrong", *in* F. FERRARI and S. KRÖLL (eds.), *Conflict of Laws in International Arbitration*, Munich, Sellier European Law Publ., 2011, p. 278 *et seq.*
9. In some cases, particularly those where the applicable choice-of-law provision authorizes the application of "rules of law", international arbitral tribunals may apply non-national rules of law even in the absence of a choice-of-law agreement (G. BORN, *International Commercial Arbitration*, The Hague, Kluwer Law International, 2009, p. 2143-2144. See also G. KAUFMANN-KOHLER and A. RIGOZZI, *Arbitrage international : Droit et pratique à la lumière de la LDIP*, 2nd ed., Bern, Editions Weblaw, 2010, § 636-637, p. 405).
10. Article 1511 French Decree no. 2011-48 of 13 January 2011.
11. See Article 21 (2) ICC Rules of Arbitration; Article 28 (4) UNCITRAL Model Law; Article 33 (3) SRIA.
12. On the *lex mercatoria*, see, *e.g.*, K. P. BERGER, *The Creeping Codification of the New Lex Mercatoria*, 2nd ed., The Hague, Kluwer Law International 2010. – B. GOLDMAN, *La lex mercatoria dans les contrats et l'arbitrage international : réalités et perspectives : JDI* 1979, n° 3, p. 475-505. – Ph. FOUCHARD, E. GAILLARD et B. GOLDMAN, *Fouchard Gaillard Goldman on International Commercial Arbitration*, The Hague, Kluwer Law International 1999, § 1443-1499, p. 801-834. See also, G. BORN, *op. cit.* fn 7, p. 2232-2237.
13. Article 187 (2) PILA; Article 28 (3) UNCITRAL Model Law; Article 21 (3) ICC Rules of Arbitration.

policy[14]. Parties rarely entrust tribunals with powers to decide *ex aequo et bono*[15]. Yet, while such arbitral awards *ex aequo et bono* are of no direct relevance to our topic, the very existence of a possibility for arbitrators to decide a dispute outside the boundaries of the law is telling. This possibility, which does not exist in court litigation, is indicative of the difference in the relationship between the arbitrator and the law, on one hand, and the judge and the law, on the other.

By and large, the manner in which an international arbitrator applies the law governing the merits of the dispute is not subject to the control of the courts having supervisory jurisdiction over the arbitration[16]. Under many modern national arbitration laws, review of an award on the merits is limited to violations of international public policy[17]. This ground for setting aside international arbitral awards is generally interpreted in a narrow fashion, requiring that the award results in an outcome that is incompatible with the fundamental principles of international public policy[18]. Errors in the application of the law will not suffice to have the award set aside.

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14. KAUFMANN-KOHLER et RIGOZZI, *op. cit.* fn 7, § 652, p. 412. – BORN, *op. cit.* fn , p. 2238.
15. BORN, *op. cit.* fn 7, p. 2238. As mentioned above under section I.A., only in one of the contracts giving rise to ICC arbitration in 2010 did the parties provide for resolution of the dispute by amiable composition. Likewise, according to the 2010 International Arbitration Survey on Choices in International Arbitration (*op. cit., supra* fn 5, p. 15), 81 % of the corporations participating in the survey indicated that they had never used determination *ex aequo et bono* or as *amiable compositeur*. 16 % indicated that they had used it occasionally. Only 2 % said they use it frequently.
16. On possible remedies for conflict of laws errors by the arbitrators, see SILBERMAN/FERRARI, *op. cit.* fn 6, p. 309-312. On the issue of judicial review of merits of arbitral awards see, in particular, BORN, *op. cit.* fn 7, p. 2638-2655. The lack of control of the arbitrators' handling of the contract and the law governing the merits has also been illustrated in case law: see, *e.g.*, *Norsolor S.A. vs. Pabalk Ticaret Ltd.*, Supreme Court of Austria, 18 November 1982, *Yearbook Commercial Arbitration*, 1984, vol. IX, p. 159 *et seq.*; *Compania Valenciana de Cementos Portland vs. Primary Coal Inc.*, French *Cour de Cassation* (1re ch. civ.), 22 October 1991, *Rev. arb.* 1992, n° 3 (1992), p. 457 *et seq.*
17. See, *e.g.*, Article 34 (2)(b)(ii) UNCITRAL Model Law; Article 190 (2)(e) PILA ; Article 1520 (5) French Decree 2011-48 of 13 January 2011; § 1059 (2)(2)(b) ZPO. In a decision of 16 December 2009, the Swiss Supreme Court confirmed that the review of how international arbitrators apply the law was limited to violations of public policy under Article 190 (2)(e) PILA (DTF 4A_240/2009, para. 2.2).
18. For Switzerland, see, *e.g.*, the decision of the Swiss Supreme Court of 8 April 2005 (DFT 4P.253/2004) (*"Pour qu'il y ait contrariété avec l'ordre public matériel, il ne suffit pas que les preuves aient été mal appréciées, qu'une constatation de fait soit manifestement fausse, qu'une clause contractuelle n'ait pas été correctement interprétée ou appliquée ou encore qu'une règle de droit applicable ait été clairement violée"*. An English translation is provided by BORN, *op. cit.* fn 7, p. 2649: *"it is not sufficient that the evidence be improperly weighed, that a factual finding be manifestly false, that a contractual clause not have been correctly interpreted or applied or that an applicable principle of law has been clearly breached"*). See also DTF 4P.143/2001 of 18 September 2001, para. 3.a. For a comparative analysis, see, *e.g.*, J.-F. POUDRET and S. BESSON, *Droit comparé de l'arbitrage international*, Zürich, Schülthess, 2002, paras. 817-827, p. 757-769.

These limitations exist at the enforcement stage as well. Under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, a review of the merits of an award is possible only to the extent the award is incompatible with the public policy of the country where recognition or enforcement is sought [19].

As a result of this very limited court control, international arbitrators enjoy considerable freedom in the application of the substantive law. How do they use this freedom in practice? This question is addressed next.

II. – NATIONAL CONTRACT LAW IN ARBITRAL PRACTICE

A. – To what extent does national law come into play at all?

As a threshold comment, one should note that in many cases the arbitrators do not make any use of the freedom they are granted in matters of applicable law. Indeed, in many cases, the resolution of the dispute may well require no more than an assessment of the facts and an interpretation of the contract [20]. Strictly speaking, the interpretation of the contract would call for the application of the rules of contract interpretation of the relevant national law. Often, however, international arbitrators rely exclusively on the facts and on what they consider to be the intentions of the parties without referring to any national rule of contract interpretation. Similarly, there is a trend among authors to consider that there is no need to determine the applicable law when the dispute can be resolved on the sole basis of the contract [21],

19. Article V (2)(a) of the New York Convention (NYC). See also SILBERMAN/FERRARI, *op. cit.* fn 6, p. 316-319. See also *Deutsche Schachtbau- und Tiefbohrgesellschaft GmbH vs. Ras Al Kaimah National Oil Co.*, English Court of Appeal, 24 March 1987, *Yearbook Commercial Arbitration*, 1988, vol. XIII, p. 522-536.

20. See SILBERMAN/FERRARI, *op. cit.* fn 6, under footnote 34, p. 264, who refer to arbitration case law and authorities where it has been suggested that it is not always necessary for arbitrators to determine the applicable law, even in the absence of a choice of law, as the dispute may be resolved simply by referring to the contract. In this sense, see also B. HANOTIAU, "International Arbitration in a Global Economy: The Challenges of the Future", *Journal of International Arbitration*, 2011, vol. 28, No. 2, p. 98.

21. See G. CORDERO-MOSS, "Does the use of common law contract models give rise to a tacit choice of law or to a harmonized, transnational interpretation?", *in* G. CORDERO-MOSS (ed.), *Boilerplate Clauses, International Commercial Contracts and the Applicable Law*, Cambridge, Cambridge University Press, 2011, p. 48 *et seq.*, according to whom the logic underlying this drafting style is to ensure that the contract is interpreted and applied exclusively on the basis of its words, irrespective of any legal tradition. According to Cordero-Moss, where the parties wanted to create a self-sufficient contract detached from the governing law, the assumption is that if the parties had wanted to restrict or qualify the application of the contract provisions,

especially when parties draft contracts on self-sufficient units disconnected from any applicable law [22].

By contrast, often arbitrators do apply the governing national law. Doing so, they encounter no difficulties that would cause them to make use of their freedom. As the following review shows, however, there are also other situations in which the arbitrators' freedom does come into play. Essentially, arbitrators appear to employ their freedom in the pursuit of three objectives: reinforcing a decision based on national contract law by supplementing it with elements of transnational law (B); correcting a decision reached in application of national law which is considered unsatisfactory or inadequate (C); taking into account the multinational character of the contract by applying transnational law from the outset (D).

B. – Reinforcement of national law

Many awards justify their outcome by relying on both the applicable national contract law and general principles of law. Frequently, they rely on the

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they would have specified this in the contract. Rules of interpretation of the governing law, principles of good faith and other mandatory rules would thus interfere with the parties' contract and create uncertainty. However, it is not always possible to avoid this uncertainty due to a lack of transnational rules providing a uniform standard of interpretation and application of international commercial contracts. To the contrary, even where the contract is governed by English law, which has provided the basis for the comprehensive drafting style and the related desire for self-sufficient contracts, it generally is not possible to meet the parties' ambition of creating a fully self-sufficient contract that is completely isolated from the governing law (see contributions in Part 3 of Boilerplate Clauses, International Commercial Contracts and the Applicable Law, *op. cit.*, p. 115 *et seq.*).

22. See, *e.g.*, ICC Case No. 1434/1975 (*JDI* 1976, n° 1, p. 978-988) ("*The interpretation of contracts is one of the fields in which international commercial arbitrators are most inclined to free themselves of national laws and refer to general principles of law*"). In this case, the arbitral tribunal referred to a "*reasonable principle of interpretation*", without specifying the national legal system from which this principle had been derived. See also ICC Case No. 7920/1993 (*in* ARNALDEZ, DERAINS, HASCHER (eds.), *Collection of ICC Arbitral Awards (1996-2000)*, The Hague, Kluwer Law International 2003, p. 227-231) where the arbitral tribunal followed a more careful approach ("*Under certain circumstances, therefore, the arbitrator can depart from the general conflicts of law theory which generally refers, for the rules of interpretation, to the law of the contract. The arbitrator may depart from the applicable national law, but should not bend it by voluntarily ignoring its jurisprudential rules*"). For a discussion of several ICC awards where the arbitrators applied general or autonomous interpretation principles and general practices, without referring to any national contract law and without going through any choice-of-law reasoning in order to determine the applicable national or non-national rules of contract interpretation, see H.-A. GRIGERA NAÓN, "Choice-of-law Problems in International Commercial Arbitration", *Collected Courses of the Hague Academy of International Law*, 2001, vol. 289, p. 86-98. See also the 2010 International Arbitration Survey on Choices in International Arbitration (cited *supra*, fn 5, p. 16) according to which 53 % of the corporations participating in the survey thought that an extensively drafted contract can limit the impact of the governing law "to some extent" and 29 % of the corporations thought that it could be limited "to a great extent".

UNIDROIT Principles of International Commercial Contracts ("UNIDROIT Principles") and sometimes, albeit much less frequently, on the Principles of European Contract Law. So for instance, in a dispute arising out of a long-term agreement for the supply of energy between two Brazilian energy traders [23]. The arbitrators applied Brazilian law, but also referred to an ICC arbitral award and to UNIDROIT Principles to reinforce their decision.

International arbitrators also frequently adopt a comparative approach, juxtaposing the decision under the *lex causae* with the one obtained under other laws to conclude that the result is the same, no matter which law is applied. In connection with a contract governed by Lybian law, the arbitrators indeed applied Libyan law, but then emphasized that the outcome resulting from Libyan law was the same under Swiss and German law as well as the *lex mercatoria* [24].

This process of reinforcement may serve different purposes and be directed at different audiences. It may first be directed to the parties, in particular the losing party, to convince it that the award is not the product of "arbitral roulette", but reflects the implementation of a widely recognized rule of law. The arbitrators may also choose this process with courts in mind, which may be called on to review the award in set aside or enforcement proceedings. While the power of

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23. See, *e.g.*, *Câmera FGV de Concilliação e Arbitragem (São Paulo, Brazil), Delta Comercializadora de Energia Ltda vs. AES Infoenergy Ltda*, Case no. 1/2008, 9 February 2009 (case abstract available under www.unilex.info). See also Award rendered under the auspices of the Corte arbitrale nazionale ed internazionale di Milano, March 2008 (case abstract (in English) and full text (in Italian) available under www.unilex.info): the arbitrators applied Italian law, which was chosen by the parties, but also referred to the UNIDROIT Principles as *"a confirmation of the same principles at international level"*; ICC Award of 9 October 2006 (case abstract available under www.unilex.info): the dispute arose from a sales contract of sale governed by Swiss law. The sole arbitrator held that the seller's impossibility to perform the contract did not entail the contract's nullity. He based this decision on the UNIDROIT Principles and pointed out that the same solution would prevail under Swiss law, even though the Swiss Code of Obligations does not contain an express provision to this effect; ICC Case No. 9651/2000 (*ICC Bulletin*, 2001, vol. 12, No. 2, p. 76-81): the arbitrators admitted that the parties had chosen Swiss law to govern the contract. However, because the choice of law was disputed, the arbitrators compared the outcome under Swiss law with the outcome prevailing under other national laws and the UNIDROIT Principles; ICC Case No. 7819/1999, *ICC Bulletin*, 2001, vol. 12, No. 2, p. 56-57; ICC Case No. 10346/2000 (available under www.unilex.info); ICC Case No. 6281/1989 (available under www.unilex.info). On the application by international arbitrators of the UNIDROIT Principles, see in particular the contributions in *ICC Bulletin*, Special Supplement (2002), *UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration*; *ICC Bulletin*, 1999, vol. 10, No. 2and *ICC Bulletin*, 2001, vol. 12, No. 2, *The Unidroit Principles of International Commercial Contracts in ICC Arbitration*.

24. ICC Case No. 4761/1987, *in* S. JARVIN, Y. DERAINS, J.-J. ARNALDEZ (eds.), *Collection of Arbitral Awards (1986-1990)*, Paris, Deventer, 1994, p. 519-525. See also ICC Case No. 9651, cited *supra* fn 21; Award dated 17 May 2002 rendered under the auspices of the Chamber of Commerce and Industry of Lausanne (case abstract available under www.unilex.info); ICC Case No. 8385/1995, *Collection of ICC Arbitral Awards (1996-2000)*, *op. cit.* fn 20, p. 474-485; ICC Case No. 3540/1980, *Yearbook Commercial Arbitration*, 1982, vol. VII, p. 124-133.

courts to review the merits may be practically nil in legal terms, they may nonetheless be tempted to look for an excuse to deny enforcement of an award (for instance, an award against a local corporation). Finally, the reinforcement process may simply suit the arbitrators' own purposes. They may wish to reassure themselves that their decision, reached by applying a law with which they may be unfamiliar, is compatible with the outcome under other legal systems with which they may be more familiar.

C. – Correction of the outcome resulting from application of national law

In some cases, arbitrators go further than reinforcing their decision under the applicable national law and seek to correct the outcome reached under that law. There are various techniques to correct an unwanted result. Some are latent or hidden; others are clearly visible. Among the latent techniques, the arbitrators may of course influence the result through the assessment and characterization of the facts or through the interpretation of the parties' intentions. Usually, the award will not reveal this hidden correction process. It will only be known to the arbitrators and may sometimes be suspected by the parties.

To the extent the process is visible for an outside observer, an analysis of international arbitration practice concerning the interpretation of the parties' intent leads to the following observations. First, as we have seen, international arbitrators often interpret a contract without reference to any national rules of contract interpretation. But even when the arbitral tribunal states that it relies on the applicable law, the interaction of tribunal members with different legal cultures tends to harmonize diverging approaches. For instance, whatever law it applies, an arbitral tribunal composed of Swiss and English lawyers is likely to choose an approach somewhere mid-way between the liberal Swiss approach to contract interpretation and the English approach, which adheres more closely to the text of the contract [25].

Second, the interpretation of the parties' intent seems the preferred means of international arbitrators to avoid the undesired, inadequate or even unjust consequences of some provisions in the contract or in the applicable national law. As an illustration, one may refer to an award rendered by an arbitral tribunal comprised of a German and two Swiss arbitrators in an *ad hoc* arbitration under the UNCITRAL Arbitration Rules between a French corpora-

25. M. FONTAINE and F. DE LY, *Droit des contrats internationaux : analyse et rédaction de clauses*, 2nd ed., Paris, Forum européen de la Communication, 2003, p. 126 *et seq.* See also A.-F. LOWENFELD, "International Arbitration as Comparative Procedure", in *Lowenfeld on International Arbitration : Collected Essays Over Three Decades*, New York, Huntington, 2005, p. 47. Lowenfeld suggests that choice of law is often of little importance due to the convergence of the contract laws of most countries and transnational decision-making.

tion and a Turkish entity. An important part of the sales price of a company's share capital was neither determined, nor determinable. In accordance with the applicable Turkish law (identical to Swiss law), the arbitral tribunal should have determined that the contract had never been concluded for lack of consent on an essential element of the contract. However, to arrive at the opposite conclusion, which the tribunal deemed more just, the tribunal decided that the missing part of the sales price did not constitute an essential term of the contract [26].

Third, on occasion, arbitrators may openly avoid a result imposed by the applicable national law, principally for two reasons:

– The applicable rule of law does not comply with generally accepted usages of international trade. Thus, an ICC tribunal applied the provisions of the CISG concerning the duty to inspect goods and to give notice of any lack of conformity. It did so even though the CISG was not applicable and the provisions of the applicable law were substantially more stringent [27].

– The content of the law chosen by the parties does not reflect the parties' true intentions. For instance, in an ICC arbitration [28], the parties had chosen New York State law, which allows an award of treble damages in certain circumstances [29]. The arbitrators dismissed the request for treble damages on the ground

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26. Award rendered on 26 February 2002 under the UNCITRAL Arbitration Rules in an *ad hoc* arbitration with seat in Geneva (unpublished). See also the award rendered in an *ad hoc* arbitration (place and date unknown; case abstract available under www.unilex.info) between a US oil company and a State formerly belonging to the Soviet Union. The contract in dispute contained a choice of law clause in favor of the State's national law. The arbitrators found that they could not adequately resolve the dispute by applying the chosen national law, as it had not yet been fully developed following the transition to a market economy. Moreover, it contained several lacunae and ambiguities. Thus, the arbitrators decided to supplement the applicable national law with the UNIDROIT Principles.
27. ICC Case No. 5713/1989 (available under www.unilex.info). See also ICC Case No. 8486/1996, *Collection of ICC Awards (1996-2000)*, *op. cit.* fn 20, p. 527-533 (excerpts in English available under www.trans-lex.org). In this case, the parties had made a choice of law in favor of Dutch law. Concerning *hardship*, Dutch law provided expressly that the "Dutch common opinion of law" was the first determining factor to evaluate whether the requirements for hardship were met. The arbitrators held that this rule could not apply in an international context and, therefore, replaced the "Dutch common opinion of law" by the common opinion in international contract law. By contrast, in ICC Case No. 8873/1997 (*ICC Bulletin*, 1999, vol. 10, No. 2, p. 78-81), the arbitrators applied Spanish law, which was the law chosen by the parties, and refused to take the UNIDROIT Principles or the FIDIC or ENAA Conditions into consideration, on the ground that these rules could not yet be considered generally accepted usages with regard to hardship. In this sense, see also ICC Case 9029/1998 (available under www.unilex.info).
28. ICC Case No. 8385/1995, cited *supra* n. 22.
29. The claims were based on the Racketeering Influenced and Corrupt Organizations Act (RICO Act).

that the Belgian party, who was the potential debtor, was unaware of this peculiarity of New York law when agreeing to the choice of law clause [30].

In the latter case, the arbitrators simply discarded the "unwanted" national rule; they did not replace it. This was different from the former case where the arbitrators substituted a transnational rule for the unwanted national rule [31].

This practice of correcting the outcome prevailing upon the application of national law is reminiscent of one of the traditional roles of international law under Article 42 of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of Other States, 1965 ("ICSID Convention"). Pursuant to Article 42, the arbitral tribunal is to apply the law chosen by the parties or, in the absence of a choice, the law of the host state of the investment and "such rules of international law as may be applicable". ICSID decisions have held that one function of international law under Article 42 is to correct a result arising from the application of a rule national law contrary to international law [32].

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30. See also ICC Case No. 7518/1994 (*Collection of ICC Arbitral Awards* (1996-2000), *op. cit.* fn 20, p. 516-522), where the arbitral tribunal refused to apply Portuguese law on consortium agreements, even though this law was expressly chosen by the parties, on the ground that this choice of law did not coincide with the parties' intentions. The tribunal then re-characterized the parties' agreement as a civil law partnership holding that, even though the parties had expressly defined their agreement as a consortium agreement, their real intention was to enter into a civil law partnership. See also, for a similar though not identical objective, the award rendered in Case No. 117/199 under the auspices of the Arbitration Institute of the Stockholm Chamber of Commerce (available under www.unilex.info, without further specifications), where the arbitral tribunal sought to apply rules of law corresponding to the parties' legitimate expectations: "*[i]n the Tribunal's view, it is reasonable to assume that the contracting parties expected that the eventual law chosen to be applicable would protect their interest in a way that any normal businessman would consider adequate and reasonable, given the nature of the contract and any breach thereof, and without any surprises that could result from the application of domestic laws of which they had no deeper knowledge*".

31. This substitution may be made using a rule drawn from an international treaty that is, as such, not applicable (in addition to the example cited above, see also ICC Case No. 5713/1989, available under www.unilex.info; ICC Case No. 8817/1997, *ICC Bulletin*, 1999, vol. 10, No. 2, p. 75-78; ICC Case No. 8453/1995, available under www.unilex.info; ICC Case No. 8502/1996, available under www.unilex.info; ICC Case No. 3493/1983, *Yearbook Commercial Arbitration*, 1984, vol. IX, p. 111-123) or general principles, such as the principle of good faith which international arbitrators have used in a myriad of ways (see, *e.g.*, ICC Case No. 8385/1995, cited *supra* fn 22; ICC Case No. 2291/1975, S. JARVIN, Y. DERAINS (eds.), *Collection of ICC Awards (1974-1985)*, , Paris, Deventer 1990, p. 274 *et seq.*). On this topic, see P. MAYER, *Le principe de la bonne foi devant les arbitres du commerce international*, in *Études de droit international en l'honneur de Pierre Lalive*, Basel, Frankfurt/Main, Helbing et Lichtenhahn, 1993, p. 543 *et seq.*

32. *Klöckner v. Republic of Cameroon*, *Ad hoc* Committee Decision on Annulment (English unofficial translation from French original), 3 May 1985, ICSID Review – *Foreign Investment Law Journal*, 1986, vol. 1, para. 69, p. 112; *Amco v. The Republic of Indonesia*, Final Award of 5 June 1990 and Decision on Supplemental Decisions and Rectification of 17 October 1990, *Yearbook Commercial Arbitration*, 1992, vol. XVII, p. 74-75. See also Ch. SCHREUER, L. MALINTOPPI, A. REINISCH and A. SINCLAIR, *The ICSID Convention: a Commentary on the Convention on the Settlement of Investment Disputes between States and Nationals of Other States*, 2nd ed., Cambridge, Cambridge University Press, 2009, paras 214-235, p. 620-627.

Undoubtedly, there are considerable differences between the application of substantive law in commercial arbitration and in ICSID proceedings. Additionally, the role of international law in investment arbitration is a complex and debated issue. Yet, beyond these differences, in the present context, the similarities are striking. They lead the observer to ask whether, even without a provision resembling Article 42 of the ICSID Convention, international commercial arbitrators are not progressively introducing a corrective function of transnational law over national law.

D. – Direct application of non-national or transnational law

There is nothing surprising about arbitrators applying non-national or transnational law whenever the parties have made a choice in favor of such law. The expressions used by the parties in choice of law clauses vary and the arbitrators are quick to interpret them to refer to transnational law. Terms such as "natural justice" [33] or "Anglo-saxon principles of law" – which, according to one arbitral tribunal, are reflected in the UNIDROIT Principles [34](!) –, or "general principles of equity" (which have also led an arbitral tribunal to apply the UNIDROIT Principles) [35] have thus been interpreted as referring to transnational law.

It is more remarkable that international arbitrators also readily accept that parties who have not chosen a national law have thereby manifested their intention to exclude the application of any national law altogether. Thus, in some arbitral awards, arbitrators have construed the parties' silence as an implied negative choice and applied transnational law [36].

Sometimes, arbitrators also consider that, in light of the difficulties in determining the applicable national law (for instance, because several national laws appear to have an equally close connection with the dispute), the better solution is to apply transnational law. For instance, in a case where the contract concluded between a European buyer and a Far East Asian seller did not provide for the application of any national law, the arbitral tribunal found that the contract had connections with several national legal orders, none of which had a preponderant interest in being applied. The tribunal then noted that two clauses of the contract

33. See, *e.g.*, ICC Case No. 7110/1995, *ICC Bulletin*, 1999, vol. 10, No. 2, p. 39-57 (republished [in French] in J.-J. ARNALDEZ, Y. DERAINS, D. HASCHER [eds.], *Collection of ICC Arbitral Awards (2001-2007)*, The Hague, Kluwer Law International 2009, p. 513-528).
34. Unpublished LCIA award of 1995 (case abstract available under www.unilex.info).
35. ICC Case No. 9797/2000, *Andersen Consulting Business Unit Member Firms vs. Arthur Andersen Business Unit Member Firms and Andersen Worldwide Société Coopérative*, *ASA Bulletin*, 2000, vol. 18, No. 3, p. 514-540.
36. ICC Case No. 7375/1996 (available under www.unilex.info); ICC Case No. 7710/1995, cited *supra* fn 31; ICC Case No. 10422/2001, *Collection of ICC Arbitral Awards (2001-2007)*, *op. cit.* fn 31, p. 609-622; ICC Case No. 7110, cited *supra* fn 31. See also several awards reported in F. DASSER, *Internationale Schiedsgerichte und lex mercatoria*, Zurich, Schulthess 1989, p. 190 *et seq.*: *Sapphire vs. National Iranian Oil Company*, 15 March 1963; ICC Case No. 1641/1969; ICC Case No. 4840/1986.

referred to the INCOTERMS 1990 and to the RUU 500 published by the ICC. From this, the tribunal inferred that the parties had agreed to submit their contract to recognized trade usages and customs. On this basis, the tribunal concluded that it would decide the dispute in application of the contract, trade usages and generally accepted principles of international commerce, namely the CISG (which was not applicable as such) and the UNIDROIT Principles [37]. Similarly, in some cases, the arbitrators consider that the multinational nature of the transaction which gives rise to the dispute is incompatible with the application of a single national law and therefore choose to apply transnational law [38].

This last category of cases is best illustrated by the award in *Arthur Andersen v. Andersen Consulting*. The award, rendered in 2002 in Geneva, dealt with a dispute involving 140 entities located in 70 different countries belonging to the (now defunct) Andersen group [39]. The relevant agreements provided that the sole arbitrator would decide the dispute in application of the relevant contracts and the rules governing the Andersen group. The arbitrator was also to apply "general principles of equity", but no national laws. On this background, the arbitrator based his award exclusively on the UNIDROIT Principles. Even without a contractual provision ruling out national law, the global nature of the dispute would have justified, or even required, the application of universal rules [40].

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37. ICC Case No. 8501 (date not specified), *Collection of ICC Arbitral Awards (2001-2007)*, *op. cit.* fn 31, p. 529-535. See also ICC Case No. 9875/1999, *ICC Bulletin*, 2001, vol. 12, No. 2, p. 95-99; ICC Case No. 9466/1999, *Collection of ICC Arbitral Awards (2001-2007)*, *op. cit.* fn 31, p. 97-106; Award No. 117/1999 (cited *supra* fn 28); ICC Case No. 3131/1979, *Yearbook Commercial Arbitration*, 1984, vol. IX, p. 109-110; ICC Case No. 3540/1980, cited *supra* fn 22; ICC Case No. 1859/1973, award reported by F. DASSER, *op. cit.* fn 34, p. 189-190.

38. ICC Case No. 8385/1995, cited *supra* fn 22; ICC Case No. 7719/1995, cited *supra* fn 31; ICC Case No. 5065/1986, reported by F. DASSER, *op. cit.* fn 34, under footnote 34, p. 219-221; ICC Case No. 3572/1982, *Yearbook Commercial Arbitration*, 1989, vol. XIV, p. 111-121.

39. Award cited *supra* fn 33.

40. Transnational law is also frequently used by arbitral tribunals to interpret and apply the applicable national law. See, *e.g.*, ICC Case No. 8486/1996, cited *supra* fn 25. See also the decision of the Swiss Supreme Court of 16 December 2009 (DTF 4A_240/2009, consid. 2.2). In this case, the contract was governed by "the laws of Switzerland as applied between domestic parties". The arbitral tribunal concluded that the parties had thereby excluded the application of the CISG. Nevertheless, the arbitral tribunal referred to the notion of "fundamental breach" under Article 25 of the CISG to determine the meaning of the notion of "material breach", which was referred to in the contract, but which does not exist in Swiss contract law. The arbitrators also referred to the UNIDROIT Principles. The Swiss Supreme Court upheld the award holding that the arbitrators had interpreted the contract in conformity with Swiss law. See also ICC Case No. 10335/2000, *ICC Bulletin*, 2001. vol. 12, No. 2, p. 102-106; ICC Case No. 7819/1999, cited *supra* fn 21; ICC Case No. 9651/2000, cited *supra* fn 21; unpublished award rendered in 1995 in an *ad hoc* arbitration with seat in Auckland (case abstract available under www.unilex.info); ICC Case No. 10022/2000, *ICC Bulletin*, 2001, vol. 12, No. 2, p. 100; ICC Case No. 7754/1995 (available under www.unilex.info; ICC Case No. 8908/1998 (available under www.unilex.info); *Himpurna California Energy Ltd. vs. PT. (Persero) Perusahaan Listruik Negara*, 4 May 1999, *Yearbook Commercial Arbitration*, 2000, vol. XXV, p. 11-432.

III. – CONCLUSIONS: ARBITRATORS TRANSNATIONALIZE NATIONAL LAW

On the basis of this analysis, let us now reach conclusions on the issues raised at the very beginning of this contribution. How do international arbitrators apply national law? Do they apply it like national judges or differently?

As part I above has shown, the conditions in which the international arbitrator applies national law are different from those prevailing in a national court in several fundamental respects. The first one pertains to what one could call the sociology of international arbitration. Arbitrators are often unfamiliar with the applicable law. They form part of a tribunal which often includes members with different legal backgrounds. They are subject to practically no control over the manner in which they apply the law. In other words, arbitrators act in a multinational, pluricultural, heterogeneous environment. These characteristics distinguish them from national courts. This is not to say that a court never applies a foreign law. Yet, there is a significant difference of scale: for an arbitral tribunal, which merely has a seat and lacks a forum, every substantive law is "foreign".

This last remark leads to the second set of reasons why the arbitrator's role in the application of national law differs from that of a court. These reasons are of a legal nature. As was recalled in part I.B above, there is no review of the merits of an arbitral award, and in particular of the application of the law governing the dispute, except under the extremely limitative prism of international public policy. Consequently, the arbitrator enjoys broad freedom in the manner in which he or she applies the governing national law. In this latter connection, an arbitral tribunal could at best be compared to the highest court of a given jurisdiction. That comparison would, however, be flawed. The supreme court of a jurisdiction does not deal with facts, when fact findings precisely provide one of the preferred techniques for arbitrators to avoid undesired consequences of the application of national rules.

Due to these legal and sociological differences, the context in which arbitrators act infuses a degree of freedom into their reasoning that is difficult, not to say impossible, to achieve in court litigation. Part II above illustrates the use arbitrators make of their freedom in the application of the law governing the merits of the dispute. Broadly speaking, when an issue of applicable law arises, they tend to base their decision on a rule that has wider recognition than the mere rule of the applicable national law. That rule of wider recognition may have a supportive or a corrective function or even provide the sole basis for the outcome. It may pertain to one or several national legal systems that are not applicable pursuant to the relevant conflict rules. It may also be a non-national or transnational rule. In both cases, the aim is to expand the tribunal's reasons beyond the reach of a single national system and thereby to broaden the foundation of the decision. Or, in other words, to transnationalize the law governing the contract.