

LEX MERCATORIA AND PRIVATE INTERNATIONAL ARBITRATION

LEX MERCATORIA Y ARBITRAJE PRIVADO INTERNACIONAL

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Abstract: The “*New Lex Mercatoria*” is not a “legal system” or a defined set of rules, but a “method”. In this sense, the *New Lex Mercatoria* consists of giving authorization to the courts and/or arbitrators to assess different legal materials regulating international trade; following that, they will extract the “most appropriate rules” to solve the litigation. It is, therefore, a method to achieve adequate decisions in international trade (*Method of Decision-Making*). Thus, the arbitrator is prevented from applying a single national Law, which is exactly what the parties intended to avoid at all costs and the reason why they chose the *New Lex Mercatoria*. In other words, it can be affirmed that the methodological approach to the *New Lex Mercatoria* is the most operative, useful and complete, as well as the one that enables us to develop a metacriticism of the *New Lex Mercatoria* as a source of Law in international trade.

Keywords: Arbitration, efficiency principle, general principles of Law recognized by civilized Nations, general principles of private international law, Globalization, international contracts, international trade, delocalization, mandatory rules (in international trade), *New Lex Mercatoria*, “Norsolor syndrome”, Private International Law, Public Policy, sources of Law, Uniform Law.

Resumen: La *Nueva Lex Mercatoria* es un “método” y no un “ordenamiento jurídico” ni un conjunto definido de reglas. En esta acepción, la *Nueva Lex Mercatoria* consiste en una habilitación ofrecida a los tribunales y/o a los árbitros para que éstos valoren distintos materiales jurídicos reguladores del comercio internacional y, tras ello, extraigan las “normas más adecuadas” para solventar el litigio. Es, por tanto, un método para alcanzar decisiones adecuadas en el comercio internacional (*Method of Decision-Making*). De ese modo, se evita que el árbitro acabe por aplicar una concreta Ley estatal lo que constituye, significativamente, eso mismo que la elección de la *Nueva Lex Mercatoria* por las partes quiere evitar a toda costa. En otras palabras, puede afirmarse que la acepción metodológica de la *Nueva Lex Mercatoria* es la más operativa, la más útil, la más completa y la que permite desarrollar, precisamente, una metacrítica de la *Nueva Lex Mercatoria* como fuente del Derecho de los negocios internacionales.

Palabras clave: Arbitraje, comercio internacional, contratos internacionales, Derecho Internacional Privado, Derecho Uniforme, deslocalización, fuentes del Derecho, Globalización, normas imperativas (en el comercio internacional), *Nueva Ley Mercatoria*, orden público, principios generales de De-

recho Internacional Privado, principios generales del Derecho reconocidos por las naciones civilizadas, “síndrome Norsolor”.

Sumario: I. Globalization, market and economic operators in the 21st century. II. Regulatory law of the international economic activity of companies. 1. A global market without a global law. 2. International business law created by commercial companies. A) Legal material prepared by transnational corporations. B) The mystery of the *New Lex Mercatoria*. a) The *New Lex Mercatoria* as Law developed by merchants. b) The *New Lex Mercatoria* as entrepreneurial class law. III. Application of the *New Lex Mercatoria* by arbitrators. 1. Arbitrators are the best applicators of the *New Lex Mercatoria*. 2. The *New Lex Mercatoria* as a legal system. 3. Critics to the theory of the *New Lex Mercatoria*. 4. Metacritical vision of the *New Lex Mercatoria* as a method to resolve disputes between companies. 5. Law applicable by arbitrators to the substance of the dispute. A) Preliminary aspects. B) Article VII.1 of the European Convention on International Commercial Arbitration, made in Geneva on April 21, 1961. C) Art. 34.2 of Spanish Arbitration Law 60/2003. a) Open attitude of the legislator toward non-national legal materials. b) Choice of the *New Lex Mercatoria* by the parties. c) Application of the *New Lex Mercatoria* in the absence of a choice of law by the parties. IV. Concluding thoughts. *New Lex Mercatoria*, regulatory competence and efficiency principle.

I. Globalization, market and economic operators in the 21st century

1. The economic process known as “Globalization” has completely transformed the scenario in which enterprises operate nowadays¹. The traditional idea of “national markets” has changed giving way to a single gigantic market, identified with the whole planet Earth. A single market in which capital flows fast, guided by a universal law: the production of profits. Globalization is a complex phenomenon formed by several structures of different characteristics; it allows the free global circulation of productive factors, information and social and cultural models. Some authors more technically define it as the “phenomenon of extension to the planet of social and economic interdependence”². For J. BASEDOW, it has to do with the fact that an increasing number of social problems show a global dimension that cannot be tackled with national solutions³. For G. DE LA DEHESA, it is a “dynamic process of increasing freedom and global integration of the labour, goods, services, technology and capital markets”⁴.

2. *Two large structures* make up Globalization⁵. The *first structure* or fundamental element consists of the elimination of economic and political barriers to the free circulation of productive factors. The *second structure* or element is the unprecedented technological development of physical communications and telecommunications, which allows a fluid movement of people and information, as well as cultural and social models around the world.

3. The final result is clear: a planetary extension of the market has taken place (= the world operates as a single market), the economic control law (= public economic law) experiences a remarkable downturn (= it is the crisis of Public Business Law, writes G. BROGGINI)⁶. It is the transition from state capitalism to world capitalism and in this new legal and evaluative picture, capital companies with a cross-border dimension rise up as the vectors that drive and move wealth throughout the planet. If assets

¹ The authors wish to thank warmly *Umberta Pennarolli* for her help with the English version of this work.

² M.S.M. MAHMOUD, “Mondialisation et souveraineté de l'Etat”, *JDI Clunet*, 1996, pp. 611-662; J. CHESNEAUX, “Dix questions sur la mondialisation”, *Les frontières de l'Economie globale, Le monde diplomatique*, 1994, manière de voir núm. 18.

³ J. BASEDOW, “The Effects of Globalization on Private International Law”, in J. BASEDOW / T. KONO, *Legal Aspects of Globalization*, The Hague - London- Boston, Kluwer Law International, 2000, pp. 11-26.

⁴ G. DE LA DEHESA, *Comprender la globalización*, Madrid, Alianza Editorial, 2000, p. 17.

⁵ H.P. MARTIN / H. SCHUMANN, *La trampa de la globalización (el ataque contra la democracia y el bienestar)*, Madrid, Ed. Taurus, 1998, pp. 22-24.

⁶ G. BROGGINI, “Sulle società nel diritto internazionale privato”, *RDI*, 1992, vol. LXXV, pp. 30-40; G. BROGGINI, “Considerazioni sul diritto internazionale privato dell'economia”, *RDIPP*, 1990, pp. 277-300.

move across borders, so do companies, because in a way they are also assets themselves, as T. VIGNAL points out⁷.

4. The current process of globalization shows new data hitherto unknown: never had the internationalization of people's lives reached such high levels or so many countries and sectors; never had private companies enjoyed so much economic power as they have at present; finally, never had the process of Globalization been supported so decidedly by transnational corporations, international institutions and the States⁸. The market has become global.

II. Regulatory law of the international economic activity of companies

1. A global market without a global law

5. Despite the unstoppable momentum of globalization, the world remains divided into almost 200 States, each with its courts, authorities and laws that regulate economic activity. Now, this "legal particularism" does not prevent us to observe something that has been pointed out by A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ⁹: large companies, corporations, enterprises and societies operate throughout the world respecting a single set of laws: the economic laws of supply and demand, of costs and benefits, and of free competition among economic operators. In this scenario, as F. GALGANO has indicated with his usual brilliance and legal elegance, there is no "world law" that regulates the international activity of commercial companies¹⁰. There is no such thing as a world government that can elaborate global legal rules to regulate the economic activity of companies on the planet. In fact, joint initiatives of the States to create such rules show very poor results. Few regulations can be described as examples of "world law". Among them we may mention –even if with extreme caution– the United Nations Convention on Contracts for the International Sale of Goods, made in Vienna on April 11, 1980; the Patent Cooperation Treaty, made in Washington on June 19, 1970; and the New York Convention of June 10, 1958 on the Recognition and Enforcement of Foreign Arbitral Awards. The substantive regulation of the *exequatur* of arbitral awards, clearly aimed at favouring the extraterritorial enforcement of arbitral awards as well as their international circulation, has been the key to its success. Spain joined the Convention in 1977, which entered into force for Spain on August 10, 1977¹¹. The NYC 1958 for Spain has an *erga omnes* character, thus it applies to the *exequatur* of any non-Spanish arbitration award, regardless of the country where the award was made (Order Tribunal Superior de Justicia, Madrid, 28 September 2016 [*exequatur* of award rendered in France against the Republic of Guinea], Order Tribunal Superior de Justicia, Catalonia, 15 May 2014 [unconfirmed arbitration award rendered in Paris])¹². This Convention has been a thorough success because of the very high number of States that are parties to it: as a matter of fact, one hundred and fifty-nine as of April 2019¹³. This entails a competitive advantage for the arbitral award compared to a judicial decision:

⁷ T. VIGNAL, "Nota a STJCE 16 diciembre 2008, Cartesio", *JDI Clunet*, 2009, pp. 893-902.

⁸ Y. DEZALAY, *Marchands de droit: la restructuration de l'ordre juridique international par les multinationales du droit*, Paris, Fayard, 1992; E. VERDEGUER PUIG / L. ALVAREZ ALONSO, *La globalización*, Madrid, Acento Editorial, 2001, pp. 10-11.

⁹ A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, "El Derecho internacional privado y la actividad internacional de las sociedades mercantiles", in A. ALONSO / L. VELASCO / J. PULGAR (Dir.), *Derecho de Sociedades y de los Mercados Financieros (Libro homenaje a Carmen Alonso Ledesma)*, Madrid, Iustel, 2018, pp. 174-196.

¹⁰ F. GALGANO, "Globalizzazione dei mercati e universalità del diritto", *Politica del diritto*, 2009-2, pp. 177-192; F. GALGANO, *La globalizzazione nello specchio del diritto*, Bologna, Il Mulino, 2005.

¹¹ BOE (Spanish Official Journal) N° 164 11 July 1977. *Vid.*, *ad ex.*, A.M. BALLESTEROS BARROS, "La relación entre la Convención de Nueva York de 1958 y otros instrumentos internacionales sobre jurisdicción, reconocimiento o exequátur", in A.M. LÓPEZ RODRÍGUEZ/K. FACH GÓMEZ (EDS.), *Reconocimiento y Ejecución de Sentencias Arbitrales Extranjeras en España y Latinoamérica*, Valencia, Tirant Lo Blanch, 2019, pp. 135-155; A. LÓPEZ DE ARGUMENTO PIÑEIRO, "La interpretación y aplicación de la Convención de Nueva York de 1958 en España", in A.M. LÓPEZ RODRÍGUEZ/K. FACH GÓMEZ (EDS.), *Reconocimiento y Ejecución de Sentencias Arbitrales Extranjeras en España y Latinoamérica*, Valencia, Tirant Lo Blanch, 2019, pp. 101-133.

¹² Order Tribunal Superior de Justicia Madrid 28 September 2016 [CENDOJ 28079310012016200059]; Order Tribunal Superior de Justicia Catalonia 15 May 2014 [CENDOJ 08019310012014200062].

¹³ *Vid.*: http://www.uncitral.org/uncitral/es/uncitral_texts/arbitration/NYConvention_status.html.

an award susceptible of obtaining the *exequatur* under the NYC 1958 is effective practically all over the world, something that a court ruling issued by the courts of a certain State cannot boast of. Not even in the EU. Only the three normative groups mentioned above can be considered “global rules” (= in the sense of rules having a worldwide scope, applicable in large areas of the planet) that regulate the economic activity carried out by companies, and even such global rules suffer from great operational limitations.

2. International business law created by commercial companies

A) Legal material prepared by transnational corporations

6. It seems appropriate, at this point, to examine in some detail the private law created by transnational corporations themselves. Companies have created a body of rules that regulate their transnational economic activity and have done so through several large movements of active legal creation: the elaboration of the so-called “standard contracts” developed by parent companies, employed by the most large corporate groups; “uniform contracts” drawn up by international business associations in each sector of the economy, which companies observe as members of such associations; the technocratic production of uniform technical rules adopted within international organizations and/or international business organizations and, finally, the *New Lex Mercatoria*.

B) The mystery of the *New Lex Mercatoria*

a) The *New Lex Mercatoria* as Law developed by merchants

7. Companies with international activity, as well as large corporations, enterprises and corporate conglomerates are the undoubted key players of the large international contracts that move wealth in the world. Wealth moves from one country to another thanks to a great legal invention: the contract. International contracts are the best legal vehicles to ensure exchange between companies from different countries. They ensure such exchange even if there is a border between the contracting companies, because the contract can be enforced in several countries, as long as it is a valid contract in the country where it is performed, needless to say.

8. However, the regulation of contracts varies from country to country. In opposition to this diversity, which is detrimental to legal certainty in the international scenario, adequate legal regulation of international contracts requires certain and predictable responses. The contracting parties must have available some “rules of contractual behaviour” whose application involves reduced costs and that they may know *ex ante*, so they are able to calculate the legal consequences of their contractual behaviour. At present, several legal initiatives coexist for this purpose.

9. In the face of proposals for unification put forward by the States, the primary actors in international trade have developed certain “rules of behaviour” that govern in a direct and material manner ^{3/4}and with no reference to the Law of any particular State^{3/4} certain aspects of international contracting¹⁴. It is the so-called “transnational law” or *New Lex Mercatoria*.

10. The concept of “*New Lex Mercatoria*” is and always has been controversial. Very controversial. A widespread definition is the classic one provided by GOLDMAN: the “*New Lex Mercatoria*” is “the law proper to international economic relations”¹⁵. Another sound definition is provided by A. FRIGNANI:

¹⁴ R. MICHAELS/N. JANSEN, “Private Law beyond the State? Europeanization, Globalization, Privatization”, *AJCL*, 54, 2006, pp. 843-890.

¹⁵ B. GOLDMAN, “Frontières du droit et lex mercatoria”, *Archives de Philosophie du droit*, 1964, vol. 9, pp. 46-69; Id., “La lex mercatoria dans les contrats et l'arbitrage international: réalités et perspectives”, *JDI Clunet*, 1979, vol. 106, pp. 475-508.

the *New Lex Mercatoria* constitutes “a series of usages and frequent practices in international trade that individuals assume in their relationships with the *opinio juris* that they are legally binding”¹⁶. The rules that make up the “*New Lex Mercatoria*” are contained in international conventions, state laws, arbitration practices, commercial legal usages, regulations drawn up by merchants’ associations, etc.

11. It has been said that the *New Lex Mercatoria* is an imprecise set of more or less nebulous legal rules developed by large companies and imposed on the various sectors of international contracting because their use is very widespread in contractual practice, and, as I. STRENGER points out, because such rules are applied by arbitrators who resolve disputes related to international trade¹⁷. As S.M. CARBONE has stressed, it is the companies of transnational dimensions and not other subjects or other instances, which create a “*new Lex Mercatoria*” that expands in the 21st century as an alternative criterion to national Law¹⁸. The *jus mercatorum* is not Law created for the leading companies of the international trade, but Law created by these companies to regulate their activities in the international trade sector. Conceiving the *New Lex Mercatoria* as a patchwork of all legal material created by States, institutions or companies to regulate the activity of the latter in international trade is inaccurate, notes S. SÁNCHEZ LORENZO¹⁹. Such a conception of the *New Lex Mercatoria* mixes up heteronomous law (= created by individuals and institutions that do not operate in international trade) and autonomous law (= created, precisely, by the key players of international trade themselves). Since the eighteenth century, and with greater impetus after Codification, Law is essentially heteronomous: it is created by the State under a monopoly regime. The originality, the distinctive feature of the *New Lex Mercatoria* ¾possibly the source of its virtues¾ resides in the very fact that the *New Lex Mercatoria* is created by the same individuals whose commercial activity it regulates: the merchants, as H.A. GRIGERA NAÓN has explained²⁰. It is a Law that the key players of international trade give themselves. The key feature that characterizes the *New Lex Mercatoria* is that traders have created all the materials that make it up in order to regulate the contracts of international commerce. It is a “Corporate Law” of sorts.

12. The legal materials not elaborated by the merchants, but by States or official institutions are not part of the *New Lex Mercatoria* unless, as S. SÁNCHEZ LORENZO correctly points out, they result in an “objectification” of the customs and usages previously created by the Companies that operate in international trade²¹. As a result, Incoterms 2010, effective as of January 2, 2011, drawn up by the International Chamber of Commerce (ICC) to regulate certain rights and obligations in the contract for the international sale of goods, are part of the *New Lex Mercatoria*. The same applies to the “Uniformed Customs and Practice for Documentary Credits” (latest version 2006) ¾also prepared by the ICC¾, that regulate certain aspects related to payment in international sales agreements, but only to the extent that the ICC has collected the Law that entrepreneurs and merchants had been putting in practice. It should be emphasized that it is the ICC, not UNCITRAL that has elaborated these rules. UNCITRAL merely “supports” the use of such rules. On the other hand, the *Unidroit Principles for International Commercial Contracts* (1994), which have been updated several times, most recently in 2016²², are not part of the *New Lex*

¹⁶ A. FRIGNANI, “Il contratto internazionale”, *Trattato di diritto commerciale e diritto pubblico dell'economia*, Milán, Cedam, 1990, pp. 86-90; A. FRIGNANI, *Il diritto del commercio internazionale*, Milán, IPSOA informática, 1986, p. 101.

¹⁷ I. STRENGER, “La notion de *lex mercatoria* en droit du commerce international”, *RCADI*, 1991, t. 227, pp. 207-356.

¹⁸ S.M. CARBONE, “Lex Mercatoria e lex societatis tra principi di diritto internazionale privato e disciplina dei mercati finanziari”, *RDIPP*, 2007, pp. 27-62; S.M. CARBONE, “Patti parasociali, autonomia privata e diritto internazionale privato”, *RDIPP*, 1991, pp. 885-894.

¹⁹ S. SÁNCHEZ LORENZO, “Derecho aplicable al fondo de la controversia en el arbitraje comercial internacional”, *REDI*, LXI, 1, 2009, pp. 39-74.

²⁰ H.A. GRIGERA NAÓN, “Choice-of-Law Problems in international commercial arbitration”, *RCADI*, 2001, vol. 289, pp. 9-396, esp. pp. 31-34.

²¹ S. SÁNCHEZ LORENZO, “Derecho aplicable al fondo de la controversia en el arbitraje comercial internacional”, *REDI*, LXI, 1, 2009, pp. 39-74.

²² *Vid.*, ad ex., E.J. BRÖDERMANN, *UNIDROIT Principles of International Commercial Contracts: An Article-by-Article Commentary*, Baden-Baden, Nomos Verlagsgesellschaft, 2018; P. DEUMIER, “Les principes Unidroit comme cadre de référence pour l’interprétation uniforme des droits nationaux”, *RIDC*, 2019, n° 2, pp. 413-430; A. MUÑOZ/D. GENY, “Les principes d’UNIDROIT dans l’arbitrage international”, *Revue de droit des affaires internationales*, 2016, n° 2, pp. 109-117; M.P. PERALES

Mercatoria with the exception of a handful of specific provisions which are a blend of the customs and practices of the merchants²³. It is known that these “Principles” have been mostly drawn up by experts in law coming from the Roman-continental sector and, for that reason, they are not an expression of the *Jus mercatorum*²⁴. Due to the above, the *New Lex Mercatoria* has been accused of being an expression of “Professors’ law” (*Jus Professorum*) and not merchants’ Law (*Jus mercatorum*)²⁵. It has been pointed out that many of the legal rules that make up the *New Lex Mercatoria* have not been drawn up by merchants, but by the States. In fact, when experts in international trade relationships say, for example, that CISG 1980 contains rules of the *New Lex Mercatoria*, they incur a profound contradiction: in that case, the rules do not belong to the *New Lex Mercatoria*, but to national law, because the CISG is part of the law of the States parties to such international agreement, as A. KASSIS notes²⁶.

b) The *New Lex Mercatoria* as entrepreneurial class Law.

13. The so-called transnational law, the *New Lex Mercatoria*, having been created by international trade professionals as a result of their private initiative, is not a neutral law. Its rules tend to reflect the interests and will of the large multinational corporations, which are the ones that elaborate the principles and provisions that make up this transnational law. Therefore, allowing the choice of transnational law as a contract law does not constitute an efficient solution for many entrepreneurs and individuals who, without being large corporations, also operate in international trade. And neither is it for States, which do not want to lose control over the legal rules applicable to international contracts.

III. Application of the *New Lex Mercatoria* by arbitrators

1. Arbitrators are the best applicators of the *New Lex Mercatoria*

14. The actual functionality of the *New Lex Mercatoria* depends on the circumstances in which it is applied. Disputes and controversies between companies can either be resolved by the courts of a State, or by means of private international arbitration. Now, when it is up to the courts to resolve such disputes, they will apply the rules of the *New Lex Mercatoria* only to the extent that their state Law allows it. Such Law allows the application of materials that are part of the *New Lex Mercatoria* through two different channels: (a) Through “material autonomy” of the contracting parties²⁷. The rules of the

VISCASILLAS, “La aplicación jurisprudencial de los principios de UNIDROIT”, in L.M. MIRANDA SERRANO/JAVIER PAGADOR LÓPEZ (Eds.), *Retos y tendencias del Derecho de la contratación mercantil*, Madrid, Marcial Pons, 2017, pp. 807-824; S. SÁNCHEZ LORENZO, “UNIDROIT principles and OHADAC principles on international commercial contracts: convergences and divergences”, in S. LEIBLE/R. MIQUEL SALA (Eds.), *Legal integration in Europe and America: international contract law and ADR*, Jena, JWV Jenaer Wissenschaftliche Verlagsgesellschaft, 2018, pp. 69-106.

²³ M. GALLARDO SALA, “Os princípios propostos pelo Unidroit: relação com a lex mercatoria e sua utilização na esfera do comércio internacional”, *Revista do IBRAC*, 21, 25, 2016, pp. 241-273.

²⁴ <https://www.unidroit.org/english/principles/contracts/principles2016/principles2016-e.pdf>.

²⁵ A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, “Contrato internacional, nueva *Lex Mercatoria* y Principios Unidroit sobre los contratos comerciales internacionales”, in *Estudios Jurídicos en homenaje al Profesor Luis Díez-Picazo*, vol. II, Madrid, Civitas, 2003, pp. 1539-1567; A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ, “Los contratos internacionales y el mito de la Nueva *Lex Mercatoria*”, in A.-L. CALVO CARAVACA / J. CARRASCOSA GONZÁLEZ (Dir.), *Estudios sobre Contratación Internacional*, Madrid, Colex, 2006, pp. 55-80; A. LEDUC, “L’émérgence d’une nouvelle lex mercatoria à l’enseigne des principes d’UNIDROIT relatifs aux contrats du commerce international: thèse et antithèse”, *Revue Juridique Thémis*, 35, 2001, pp. 429-451.

²⁶ A. KASSIS, *Le nouveau droit européen des contrats internationaux*, Paris, LGDJ, 1993, pp. 99-101; A. KASSIS, *Théorie générale des usages du commerce (droit comparé, contrats et arbitrales internationaux, lex mercatoria)*, Paris, Pichon & Durand-Auzias, 1984.

²⁷ E. CASTELLANOS RUIZ, “Lex Mercatoria y autonomía privada en materia de contratos internacionales” in A.L. CALVO CARAVACA/J. OVIEDO ALBÁN (Eds.), *Nueva Lex Mercatoria y contratos internacionales*, Bogotá D.C., Grupo Editorial Ibáñez, 2006, pp. 55-117; S. PATTI, “Autonomia negoziale nei codici civili europei e nei contratti transnazionali”, in *Liber amicorum Angelo Davi: La vita giuridica internazionale nell’età della globalizzazione*, vol. I, Napoli, Editoriale Scientifica, 2019, pp. 271-280.

New Lex Mercatoria are considered substantial “private agreements” and will be applied to the contract insofar as the Law that governs it considers that such *inter partes* private agreements made under the *New Lex Mercatoria* are valid (e.g., for Spain, article 1255 CC); (b) By accepting the “legal nature” of certain rules of the *New Lex Mercatoria*. On very specific occasions, certain rules of the *New Lex Mercatoria* are “raised” by some rules of private international law to an “objective” legal rank. They become “objective law” rules. Examples: art. 9 CISG²⁸ and art. 25 BR I-bis²⁹.

15. However, it is only when litigation is resolved by arbitration bodies that the *New Lex Mercatoria* can deploy its broader normative and regulatory potential. In international practice, it is very common for contracting parties to invest arbitration bodies with the competence to resolve disputes arising from an international contract. More than 80% of international contracts have an arbitration clause in favour of private law international arbitration, as F. MARRELLA stresses³⁰. Concretizing the rules (= the “conflict solving criteria or guidelines”) that the arbitrators will apply to the international contract becomes, then, a matter of the utmost importance.

16. At a contentious arbitration level, it must be kept in mind that the competence of the arbitrators emanates from the parties. In the case of arbitration subject to Law, it must be kept in mind that the arbitrators are not “guardians” of any state legal system (A. REMIRO BROTONS)³¹. Therefore, the arbitrators will resolve the dispute according to the “rules” that the parties indicate as the normative basis. The parties may direct the arbitrators to rule under a non-state regulation (“*droit non étatique*”) ^{3/4}as P. LAGARDE / A. TENENBAUM indicate^{3/4} provided that the rules governing the arbitration in the State where it is carried out admit the designation of the *New Lex Mercatoria* as the law regulating the contract (O. LANDO / P.A. NIELSEN), as it is the case in Spain³². The arbitrators apply those rules of the *New Lex Mercatoria* that are indicated by the parties.

17. In this context, the arbitrators can resolve the controversy by applying rules of the *New Lex Mercatoria*. The arbitrators have no reason to apply any State Law or any principle of any non-existent “transnational public order”³³, so be it. If any of the parties urges the public authorities to enforce an arbitral award by means of which a dispute has been resolved without applying any State Law, it will result that said state authorities are not allowed to control the “Law applied by the arbitrators” and the award will be enforced. However, several caveats are required: (a) If the award infringes the basic principles of the State law of the country of execution, it will not be performed because it violates the “international

²⁸ Vid., ad ex., A.-L. CALVO CARAVACA, “Artículo 9”, in LUIS DIEZ-PICAZO Y PONCE DE LEÓN (Dir.), *La compraventa internacional de mercaderías. Comentario de la Convención de Viena*, Madrid, Editorial Civitas, S.A., 1998, pp. 132-144; P. MANKOWSKI, “Article 9 CISG”, in P. MANKOWSKI (Ed.), *Commercial Law: Article-by-Article Commentary*, Baden-Baden, Nomos Verlagsgesellschaft, 2019, pp. 47-51.

²⁹ Vid., ad ex., A.-L. CALVO CARAVACA/J. CARRASCOSA GONZÁLEZ, “El foro de la sumisión expresa”, in A.-L. CALVO CARAVACA/J. CARRASCOSA GONZÁLEZ/C. CAAMIÑA DOMÍNGUEZ, *Litigación internacional en la Unión Europea I. Competencia judicial y validez de resoluciones en materia civil y mercantil en la Unión Europea. Comentario al Reglamento Bruselas I Bis*, Cizur Menor, Thomson Reuters Aranzadi, 2017, pp. 221-264 (pp. 240-242); U. MAGNUS, “Article 25”, in *European Commentaries on Private International Law ECPII*, vol. I (*Brussels Ibis Regulation*), Köln, Verlag Dr. Otto Schmidt KG, 2016, pp. 584-669 (pp. 645-651).

³⁰ F. MARRELLA, *La nuova Lex Mercatoria*, Padova, Cedam, 2003, pp. 33-39.

³¹ A. REMIRO BROTONS, “Reglas de conflicto y normas materiales de Derecho internacional privado”, *Temis (Symbolae García Arias)*, N° 33-36, 1973/1974, pp. 605-646.

³² P. LAGARDE / A. TENENBAUM, “De la convention de Rome au règlement Rome I”, *RCDIP*, 2008, pp. 727-780; P.A. NIELSEN / O. LANDO, “The Rome I Regulation”, *CMLR*, 2008, pp. 1687-1725.

³³ L. CHEDLY, *L’arbitrage commercial international & ordre public transnational*, Tunis, Centre de Publ. Univ., 2002; P. LALIVE, “Ordre public transnational (ou réellement international) et l’arbitrage international”, *Revue de l’arbitrage*, 1986, pp. 329-373; ID., “L’ordre public transnational et l’arbitre international”, in G. VENTURINI/S. BARIATTI (Eds.), *Nuovi strumenti del diritto internazionale privato: Liber Fausto Pocar*, Milano, Giuffrè Editore, 2009, pp. 599-611; F. LATTY, “L’ordre public sans l’Etat (quelques remarques sur un oxymore en trompe-l’oeil)”, in C.A. DUBREUIL (Dir.), *L’ordre public*, Paris, Cujas, 2013, pp. 21-31; F. MEGERLIN, *Ordre public transnational et arbitrage international de droit privé: Essai critique sur la méthode*, Paris, Atelier National de Reproduction des Thèses - A.N.R.T., 2003.

public policy” of that country³⁴; (b) In addition, the award may also be attacked before the state authorities by an appeal for nullity or annulment on the same ground (Judgment ECJ June 1, 1999, *Swiss China*, and Judgment ECJ March 23, 1982, 102/81, *Nordsee*)³⁵.

2. The New Lex Mercatoria as a legal system

18. Actually, the controversy regarding the concept of “*New Lex Mercatoria*” is a controversy that affects its functions. In such scenario, there are various “approaches” to the “*New Lex Mercatoria*”, well illustrated by authoritative academic literature³⁶.

The “*New Lex Mercatoria*” traditional approach argues that the rules that make it up merely regulate a few aspects of international contracting. Thus, the contract is governed by a national law; however, some of the international usages and practices developed by transnational traders may also be applicable (C. SCHMITTHOFF)³⁷.

The the “*New Lex Mercatoria*” progressive approach, i.e. the true theory about the “*New Lex Mercatoria*”, indicates that in the real world, it functions as a veritable legal system, as it has been extensively shown by the academic literature³⁸: in fact, it competes with national Laws, it can regulate an

³⁴ M.A. CEBRIÁN SALVAT, “La excepción de orden público internacional de la Convención de Nueva York de 1958 y los tribunales españoles”, en A.M. LÓPEZ RODRÍGUEZ/K. FACH GÓMEZ (EDS.), *Reconocimiento y Ejecución de Sentencias Arbitrales Extranjeras en España y Latinoamérica*, Valencia, Tirant Lo Blanch, 2019, pp. 263-284; P. MAYER, “La sentence contraire à l'ordre public au fond”, *Revue de l'arbitrage*, 1994, n° 4, pp. 615-652; P. MAYER/A. SHEPPARD, “Final ILA Report on Public Policy as a Bar to Enforcement of International Arbitral Awards”, *Arbitration International*, 19, 2, 2003, pp. 249-263; J.A. PÉREZ BEVIÁ, “Algunas consideraciones sobre el árbitro y el orden público en el arbitraje privado internacional”, *Revista de la Corte Española de Arbitraje*, 6, 1990, pp. 81-99; J.-B. RACINE, *L'arbitrage commercial international et l'ordre public*, Paris, LGDJ, 1999.

³⁵ Judgment ECJ 1 June 1999, C-126/97, *Eco Swiss China Time Ltd vs. Benetton International NV*, Rec., 1999, p. I-03055, ECLI:EU:C:1999:269; Judgment ECJ 23 March 1982, C-102/81, *Nordsee Deutsche Hochseefischerei GmbH v Reederei Mond Hochseefischerei Nordstern AG & Co. KG and Reederei Friedrich Busse Hochseefischerei Nordstern AG & Co. KG*, ECLI:EU:C:1982:107.

³⁶ J. BASEDOW, “Lex mercatoria e diritto internazionale privato dei contratti: una prospettiva economica”, in *Liber Fausto Pocar*, vol. 2, Milano, Giuffrè, 2009, pp. 55-74; K.P. BERGER, *Formalisierte oder “schleichende” Kodifizierung des transnationalen Wirtschaftsrechts: zu den methodischen und praktischen Grundlagen der lex mercatoria*, Berlin, de Gruyter, 1996; Id., *The creeping codification of the new lex mercatoria*, 2ª ed., Alphen aan den Rijn, Kluwer Law International, 2010; K.P. BERGER (ED.), *The practice of transnational law*, The Hague, Kluwer Law International, 2001; M. CÁNDANO PÉREZ, “La unificación del derecho comercial internacional: nueva lex mercatoria como alternativa al derecho estatal”, *Revista Prolegómenos. Derechos y Valores de la Facultad de Derecho*, 21, 41, 2018, pp. 150-162; G. CUNIBERTI, “Three theories of Lex Mercatoria”, *Columbia Journal of Transnational Law*, 52, 2, 2014, pp. 369-434; Id., “La Lex Mercatoria au XXI siècle. Une analyse empirique et économique”, *JDI Chûnet*, 2016, 3, pp. 765-780; N. HORN, “Transnationales Handelsrecht: zur Normqualität der lex mercatoria”, en *Festschrift für Karsten Schmidt zum 70. Geburtstag*, Köln, O. Schmidt, 2009, pp. 705-724; L. LONGHI, “Il nuovo diritto globale: lex mercatoria o ius gentium?”, *Rassegna di diritto pubblico europeo*, Anno XV, n. 2, 2016, pp. 137-149; M.A. PETSCHKE, “The application of transnational law (lex mercatoria) by domestic courts”, *Journal of Private International Law*, 10, 3, 2014, pp. 489-515; J.A. SILVA (COORD.), *Estudios sobre lex mercatoria. Una realidad internacional*, 2ª ed., México, UNAM, Instituto de Investigaciones Jurídicas, 2013; O. TOTH, *The lex mercatoria in theory and practice*, Oxford, Oxford University Press, 2017; M. VIRGÓS SORIANO, “Lex Mercatoria”, en *Enciclopedia Jurídica Básica*, Madrid, Civitas, 1995, pp. 3992-3994; Id., “Obligaciones contractuales” in J.D. GONZÁLEZ CAMPOS ET AL., *Derecho internacional privado, parte especial*, 6ª ed. rev., Madrid, Eurolex, 1995, pp. 143-208; Id., “El Convenio arbitral en el arbitraje internacional”, *Actualidad Jurídica Uriá Menéndez*, n.º 14, 2006, pp. 13-28; Id., “Arbitraje comercial internacional y Convenio de Nueva York de 1958”, *La Ley*, n.º 6679 (26 de marzo de 2007), pp. 1-5.

³⁷ C.M. SCHMITTHOFF, “International Trade and Private International Law”, *Von Deutschen zum Europäischen Recht. Festschrift für H.Dölle*, vol. II, Tübingen, Mohr, 1963, pp. 261-280; C.M. SCHMITTHOFF, “The Limits of Party Autonomy”, in C.J. CHENG (ED.), *Clive M. Schmitthoff's Select Essays on International Trade Law*, Dordrecht, Boston, London, Nijhoff, 1988, pp. 584-595; H. WULFERT-MARKERT, *Clive M. Schmitthoff's Konzeption eines transnationalen Welthandelsrechts: ein Beitrag zum Leben und Werk von Clive M. Schmitthoff (1903-1990)*, Tübingen, Mohr Siebeck, 2018.

³⁸ U. DRAETTA, *Il diritto dei contratti internazionali*, Padova, Cedam, 1984; S.M. CARBONE, “Il 'contratto senza legge' e la convenzione di Roma del 1980”, *RDIPP*, 1983, vol. XIX, pp. 279-287; S.M. CARBONE, “L'autonomia privata nel diritto internazionale privato delle obbligazioni”, *DCSI*, 1982, pp. 15-38; S.M. CARBONE, “L'autonomia privata nei rapporti economici internazionali ed i suoi limiti”, *RDIPP*, 2007, pp. 891-920; S.M. CARBONE, “Autonomia privata nel diritto sostanziale e nel diritto internazionale privato: diverse tecniche e un'unica funzione”, *RDIPP*, 2013, vol. 49, núm. 3, pp. 569-592; F.K. JUENGER, “The lex mercatoria and private international law”, *Unif. Law Review*, 2000-I, pp. 171-187.

international contract without the help or interference of any State Law, and it allows parties to litigate on the basis of a legal system that does not correspond to the national law of any of the contracting parties in particular. Thus, if litigation arises, no contracting party “is playing at home” because “their” law governs the contract, while the other party “is playing away” because he has to litigate in accordance with the Law of the “other contracting party” (O. LANDO / P.A. NIELSEN)³⁹. This is the true “theory of the *New Lex Mercatoria*”.

3. Critics to the theory of the New Lex Mercatoria

19. The well-known “theory of the *New Lex Mercatoria*”, which corresponds to the “progressive approach”, is characterized by the following data and elements

In the first place, the *New Lex Mercatoria* is conceived as a true “legal system”, alternative to the Law of the States. The *new Lex Mercatoria* does not need the help of State Laws; it is self-reliant in regulating international contracts. If in the early Middle Ages there was a *Lex Mercatoria*, a law that regulated international trade and operated independently of State Laws, now there is a *New Lex Mercatoria*.

Secondly, international trade operators $\frac{3}{4}$ the *Societas Mercatorum* or *Business Community* $\frac{3}{4}$ operate as a “private international legislator” completely apart from national legislators and parliaments⁴⁰. The merchants, and especially the most powerful merchants, the Big Corporations of the 21st century, are the creators of the transnational law that governs international contracting⁴¹. In the 21st century, the legislator legislates in English and his name is “entrepreneurial class”, writes F. GALGANO⁴².

Thirdly, the *New Lex Mercatoria* features contents of three different kinds (Y. DERAÏNS)⁴³: (a) *General Principles of Law regarding international commercial relationships*⁴⁴. The most important, as J.D.M. LEW / L.A. MISTELIS / S.M. KRÖLL and L. MUSTIL have pointed out, are the following: *pacta sunt servanda* and *rebus sic stantibus*, non-enforceability of unfair terms; *culpa in contrahendo* in contractual negotiations, performance of the contract in good faith, invalidity of contracts whose object is illegal or made through bribery, duty to negotiate the contract in good faith; *exceptio non adimpleti contractus*, the court is not bound by the qualification that the parties give to the contract; *actor incum-bit probatio*, limitation of damages arising from breach of contract that include both actual damage and loss of profits, the party that suffers the breach of contract can take measures to reduce the damage, calculation of damages for non-delivery of goods made on the basis of market prices, interpretation of the contract aimed at giving an effective sense to its terms, etc.⁴⁵; (b) *Uniform customs and practices observed in international trade practice*⁴⁶. Many of such customs and practices have been compiled by certain associations that intervene in international trade. Examples: the “Uniform Customs and Practice for Documentary Credits”, whose latest version dates of 2006, the “Uniform Rules for Collection of Documents”, or Incoterms 2010, all of them drawn up by the International Chamber of Commerce; (c) *Rules produced by arbitrators in international trade*. Arbitrators usually refer to certain “precedents” established on previous occasions by the arbitration practice (*stare decisis*)⁴⁷.

³⁹ P.A. NIELSEN / O. LANDO, “The Rome I Regulation”, *CMLR*, 2008, pp. 1687-1725.

⁴⁰ P. KAHN, “Les principes généraux du droit devant les arbitres du commerce international”, *JDI Clunet*, 1989, vol. 116, pp. 305327; F. FOUCHARD, *L'arbitrage commerciale internationale*, Paris, Dalloz, 1965, pp. 89-91; F. GALGANO, *La globalizzazione nello specchio del diritto*, Bologna, Il Mulino, 2005.

⁴¹ J. HERNÁNDEZ ZUBIZARRETA/P. RAMIRO, *Contra la “Lex Mercatoria”: propuestas y alternativas para desmantelar el poder de las empresas transnacionales*, Barcelona, Icaria, 2015.

⁴² F. GALGANO, “Globalizzazione dei mercati e universalità del diritto”, *Politica del diritto*, 2009-2, pp. 177-192.

⁴³ Y. DERAÏNS, “Les tendances de la jurisprudence arbitrale internationale”, *JDI Clunet*, 1993, pp. 829-856.

⁴⁴ E. GAILLARD, “Treinte ans de Lex Mercatoria. Pour une application sélective de la méthode des principes généraux du Droit”, *JDI Clunet*, 122, 1995, pp. 5-30.

⁴⁵ J.D.M. LEW / L.A. MISTELIS / S.M. KRÖLL, *Comparative International Commercial Arbitration*, The Hague / London / New York, Kluwer, 2003, p. 454 and pp. 258-240.

⁴⁶ E. MAZZOLETTI, “Gli usi contrattuali e la nuova lex mercatoria”, *Giurisprudenza commerciale*, 34.4, 2007, parte I, pp. 519-548.

⁴⁷ Y. DEZALAY & B.G. GARTH, *Dealing in virtue: international commercial arbitration and the construction of a transnational legal order*, Chicago, University of Chicago Press, 1996; J.M. JACQUET, “Avons-nous besoin d’une jurisprudence arbitrale?”

20. The theory of the “*New Lex Mercatoria*” has been unmercifully criticized for different reasons, invoked by an important sector of academic literature. It has been condemned for representing a heterodox perspective that questions the monopoly of the State in normative production.

21. In the first place, it has been said that the *New Lex Mercatoria* is not “objective law”. The merchants who create the *New Lex Mercatoria* are not “legislators”, as M. VIRGÓS SORIANO recalls⁴⁸. Therefore, the rules developed by merchants are not “objective law”. The *New Lex Mercatoria* is not part of the State’s sources of law.

22. Secondly, the *New Lex Mercatoria* is not a real “legal system”, for several reasons intertwined with one another and very well exposed by C.W.O. STOECKER⁴⁹. There is not a single and unique *Lex Mercatoria*; there are, as P. LAGARDE notes, several *Leges Mercatoriae*: different sets of rules that are valid for oil contracts, construction contracts, contracts for the purchase of raw materials, etc. These rules are different and only casually related with one another. It has also been indicated that the *New Lex Mercatoria* constitutes a compendium of rules, oftentimes fragmentary, that exclusively govern some very specific aspects of certain international contracts⁵⁰. In particular, the *New Lex Mercatoria* is accused of being conceived on the basis of and very much focused on the international sale of goods, without taking into account the features of other contracts that are also quite common in international trade (P. KAHN)⁵¹. Moreover, the *New Lex Mercatoria* has numerous loopholes (R. DAVID), so much so that it is rare that an international contract is regulated exclusively by it. When it is said that arbitrators have resolved a case exclusively on the basis of the *New Lex Mercatoria*, the truth is that the arbitrators have deduced the content of such *New Lex Mercatoria* from the national Laws connected with the case (ICC award October 26, 1979, n.3131, *Palbak vs. Norsolor*, Judgment Corte di Cassazione, Italy February 8, 1982, Judgment Cour de Cassation, France October 22, 1991, *Valenciana*), or have simply decided *ex aequo et bono*.

The *New Lex Mercatoria* has been accused of being “made up Law”, as reported by O. LANDO⁵². The risk that the arbitrators “make up” the rule they are applying and they maintain that such rule belongs to the *New Lex Mercatoria* in its progressive interpretation is no little risk (P. MAYER / V. HEUZÉ)⁵³. It is clear that arbitrators do not have legal power to “invent a legal system” that gives the agreement the value of a contract (= arbitrators cannot “create a legal system”, as they lack “constituent power” of a hypothetical legal system called “*New Lex Mercatoria*”), as M. VIRGÓS SORIANO indicates⁵⁴. On the other hand, not even the parties to the contract, the companies, invest the arbitrators of the power to create rules to resolve their disputes. As A. GIARDINA explains, the parties grant the arbitrators the power to apply the existing *New Lex Mercatoria*, not to invent new rules for the *New Lex Mercatoria* to settle their disputes, as this would be extremely unsafe for the parties⁵⁵. The *New Lex Mercatoria* does not constitute case law either. Some authors ³/₄it is the case of R. DAVID³/₄ have maintained the idea that the *New Lex Mercatoria*

Revue de l'arbitrage, 2010, n° 3, pp. 445-467; U. LIUKKUNEN, “Lex mercatoria in international arbitration”, in J. KLABBERS/T. PIIPARINEN (EDS.), *Normative pluralism and international law: exploring global governance*, New York, N.Y., Cambridge University Press, 2013, pp. 201-228; H.-P. SCHROEDER, *Die lex mercatoria arbitralis: strukturelle Transnationalität und transnationale Rechtsstrukturen im Recht der internationalen Schiedsgerichtsbarkeit*, München, Sellier European Law Publishers, 2007.

⁴⁸ M. VIRGÓS SORIANO, “*Lex Mercatoria*”, *Enciclopedia Jurídica Básica*, Madrid, Civitas, 1995, pp. 3992-3994.

⁴⁹ C.W.O. STOECKER, “The lex mercatoria: To what extent does it exist?”, *J.Int.Arb.*, 1990, pp. 101-126.

⁵⁰ F. RIGAUX, “Droit économique et conflits de souverainetés”, *RabelsZ*, 1988, pp. 104-156; F. RIGAUX, “Examen de quelques questions laissées ouvertes par la convention de Rome sur la loi applicable aux obligations contractuelles”, *Cahiers de droit européen*, 1988, vol. XXIV, pp. 306-321.

⁵¹ P. KAHN, “Les principes généraux du droit devant les arbitres du commerce international”, *JDI Clunet*, 1989, pp. 305-327.

⁵² O. LANDO, “The lex mercatoria in International Commercial Arbitration”, *ICLQ*, vol. 34, 1985, pp. 747-768; O. LANDO, “Lex mercatoria 1985-1996”, en *Festschrift till Stig Strömholm*, II, Uppsala, Iustus Förl., 1997, pp. 567-584.

⁵³ P. MAYER / V. HEUZÉ, *Droit international privé*, 11^a ed., Issy-les-Moulineaux, LGDJ Lextenso Éd., 2014, pp. 520-521; A. REMIRO BROTONS, “Reglas de conflicto y normas materiales de Derecho internacional privado”, *Temis (Symbolae García Arias)*, núms. 33-36, 1973/1974, pp. 605-646.

⁵⁴ M. VIRGÓS SORIANO, “*Lex Mercatoria*”, *Enciclopedia Jurídica Básica*, Madrid, Civitas, 1995, pp. 3992-3994.

⁵⁵ A. GIARDINA, “La *Lex mercatoria* et la sécurité du commerce et des investissements internationaux”, *Nouveaux itinéraires en droit: hommage à François Rigaux*, Bruxelles, Bruylant, 1993, pp. 223-234; ID., “La *lex mercatoria* e la certezza del diritto nei commerci e negli investimenti internazionali”, *RDIPP*, 1992, pp. 461-470.

constitutes a set of normative usages or customs⁵⁶. However, the proliferation of arbitration bodies that follow different criteria as well as the limited publicity of their awards are factors that make it impossible to consolidate legal rules as “trade usages” or “internationally observed customs”, as G. KEGEL observes⁵⁷.

23. Thirdly, it has also been pointed out that the *New Lex Mercatoria* lacks a true and effective sanctioning system. The presumed sanctions of the *New Lex Mercatoria*, such as boycott among merchants or the expulsion from a specific market of the merchant who does not abide by the “*New Lex Mercatoria*”, are more apparent than real, as F. RIGAUX observes⁵⁸. Although such factual sanctions can sometimes be very effective, they lack an imperative coercive apparatus of their own; besides, they cannot always be applied effectively.

24. Finally, to refine and adjust the tenor of criticism, it seems appropriate to recall the words P. MANKOWSKI: “*the so-called lex mercatoria is and will ever be a mere pseudo-law, an amorphous phenomenon with unclear contents and of extremely dubitable quality*”⁵⁹. Reams and reams written by the most prestigious specialists in *Lex mercatoria* have not achieved that the international trade practice back up the universal and seamless application of the *new lex mercatoria* to international contracts.

4. Metacritical vision of the New Lex Mercatoria as a method to resolve disputes between companies

25. The above criticism notwithstanding, at this point it seems appropriate to make a metacriticism of the theory of the *New Lex Mercatoria*. The object of such metacriticism is to prove that, with the appropriate nuances, the *New Lex Mercatoria* constitutes a set of normative elements that is extremely useful in solving international trade disputes between companies of cross-border dimensions.

26. In this perspective, there exists a methodological approach to the “*New Lex Mercatoria*”: some authors maintain that the “*New Lex Mercatoria*” is not a “legal system” or a defined set of rules, but a “method”. In this sense, the *New Lex Mercatoria* consists of giving authorization to the courts and/or arbitrators to assess different legal materials regulating international trade; following that, they will extract the “most appropriate rules” to solve the litigation, as M. GÓMEZ JENE has explained very well⁶⁰. It is, therefore, a method to achieve adequate decisions in international trade (*Method of Decision-Making*). As the aforementioned author points out, this seems to be the approach followed by the Spanish legislator, since the preamble of the Spanish Arbitration Law states (VII) that “... in some cases it will be necessary to apply rules of several legal systems, or common rules of international trade...”. Thus, as E. GAILLARD states, the arbitrator is prevented from applying a single national Law, which is exactly what the parties intended to avoid at all costs and the reason why they chose the *New Lex Mercatoria*⁶¹. In other words, it can be affirmed that the methodological approach to the *New Lex Mercatoria* is the most operative, useful and complete, as well as the one that enables us to develop a metacriticism of the *New Lex Mercatoria* as a source of Law in international trade.

⁵⁶ R. DAVID, “Il Diritto del commercio internazionale, un nuovo compito per i legislatori nazionali o una nuova lex mercatoria?”, *Rivista di Diritto civile*, 1976, pp. 577-598; Id., *L'arbitrage dans le commerce international*, Paris, Economica, 1982, pp. 106-116.

⁵⁷ G. KEGEL, “Introduction to Private International Law”, *IECL*, 1986; Id., “Fundamental Approaches”, *IECL*, 1986.

⁵⁸ F. RIGAUX, “Examen de quelques questions laissées ouvertes par la convention de Rome sur la loi applicable aux obligations contractuelles”, *Cah.DE*, 1988, vol. XXIV, pp. 306-321.

⁵⁹ P. MANKOWSKI, “The role of party autonomy in the allocation of jurisdiction in contractual matters”, en F. FERRARI/F. RAGNO (ED.), *Cross-border litigation in Europe: the Brussels I Recast Regulation as a panacea?*, Padova, CEDAM, 2015, pp. 97-125; P. MANKOWSKI / U. MAGNUS [Eds.], *Rome I Regulation: commentary*, Köln, O. Schmidt, Sellier European Law Publishers, 2017; P. MANKOWSKI, “Just how free is a free choice of law in contract in the EU?”, *Journal of Private International Law*, vol. 13, 2017, pp. 231-258.

⁶⁰ M. GÓMEZ JENE, *Arbitraje comercial internacional*, Madrid, Ed. Civitas, 2018, pp. 331-341.

⁶¹ E. GAILLARD, *Aspects philosophiques du droit de l'arbitrage international*, Leiden, Boston, Martinus Nijhoff Publishers, 2008, pp. 152-188.

5. Law applicable by arbitrators to the substance of the dispute

A) Preliminary aspects

27. The arbitration proceedings come to an end when the institution that has heard the case renders the award or arbitration ruling that resolves the differences between the parties. The arbitral award constitutes a legal response to the claims of those who resorted to arbitration. The most relevant issue of the legal regime of the arbitral award is the determination of the law or rules that the arbitrators must apply to resolve, in the arbitral award, the merits of the matter submitted to arbitration, which will oftentimes be an international contract.

28. International commercial arbitration can either be an equity arbitration (*ex aequo et bono*), or an arbitration subject to Law. In the first case, the arbitrators offer a solution built on the “justice of the specific case”, on equity, dissociated from any specific national legal system. In the arbitration subject to Law, on the contrary, first of all it is necessary to determine the applicable Law to the merits of the controversy that the arbitrators will resolve in the arbitral award. This matter has been the object of a long polemic within the doctrine that has come to be considered a classic. The opposing positions can be basically synthesized as follows:

29. Some experts argue that the law applicable to the substance of the case must be chosen by means of a conflict rule, which will define the national law that the arbitrators must apply. On the other hand, however, other specialists argue that the legal regime applicable to the merits of the dispute must be established through special material rules designed for international business, with no reference to any national law. The issue is addressed by the Geneva Convention 1961 and, in cases not falling into its scope, by art. 34 of the Spanish Arbitration Law 2003; moreover, it has been carefully studied by academic literature⁶².

⁶² About the law to be applied by the arbitrators to the substance of the dispute, D. BABIĆ, “Rome I Regulation: binding authority for arbitral tribunals in the European Union?”, *Journal of Private International Law*, vol. 13, 2017, pp. 71-90; H. BATIFFOL, “L’arbitrage et les conflits de lois”, *Rev.Arb.*, 1957, pp. 110-112; N. BLACKABY/C. PARTASIDES, *Redfern and Hunter on International Arbitration: Student Version*, 6th ed., Oxford, Oxford University Press, 2015, pp. 185-225; G.A. BERGMANN, “Mandatory rules of law in international arbitration”, in F. FERRARI/S. KRÖLL (Eds.), *Conflict of laws in international arbitration*, München, Sellier European Law Publishers, 2011, pp. 325-340; J. BEULKER, *Die Eingriffsnormenproblematik in internationalen Schiedsverfahren: Parallelen und Besonderheiten im Vergleich zur staatlichen Gerichtsbarkeit*, Tübingen, Mohr Siebeck, 2005; K. BOELE-WOELKI, “Party Autonomy in Litigation and Arbitration in View of The Hague Principles on Choice of Law in International Commercial Contracts”, *RCADI*, 2016, t. 379, pp. 35 y ss.; F. BORTOLOTTI/P. MAYER (Eds.), *The application of substantive law by international arbitrators: proceedings of the 33rd Annual Meeting of the ICC Institute, held on December 5, 2013*, Paris, International Chamber of Commerce, 2014; P. MANKOWSKI, “Schiedsgerichte und die Rom I-VO”, *RIW*, 64, 1-2, 2018, pp. 1-19; P.A. DE MIGUEL ASENSIO, “The Rome I and Rome II Regulations in International Commercial Arbitration”, in F. FERRARI (Ed.), *The Impact of EU Law on International Commercial Arbitration*, Huntington, New York, Juris, 2017, pp. 177-243; ID., “Eficacia de los Reglamentos Roma I y Roma II en el arbitraje comercial”, in *Le Droit à l’épreuve des siècles et des frontières: Mélanges en l’honneur du Professeur Bertrand Ancel*, Paris, Madrid, LGDJ, Iprolex, 2018, pp. 489-520; F. EISEMANN, “La lex fori de l’arbitrage commercial international”, *TCFDIP*, 1973-1975, Paris, Dalloz, 1977, pp. 189-213; H.A. GRIGERA NAON, *Choice-of-law problems in international commercial arbitration. The law applicable to the substance of arbitral dispute*, Tübingen, 1992; H.A. GRIGERA NAON, “Choice-of-Law Problems in international commercial arbitration”, *RCADI*, 2001, vol. 289, pp. 9-396; D. HOCHSTRASSER, “Choice of Law and Foreign Mandatory Rules in International Arbitration”, *J.Int.Arb.*, 1994, pp. 57-86; P. KAHN, “Les principes généraux du droit devant les arbitres du commerce international”, *JDI Clunet*, 1989, pp. 305-327; A. LEANDRO, “Qualche riflessione sul rinvio nell’arbitrato commerciale internazionale”, in *Liber amicorum Angelo Davi: La vita giuridica internazionale nell’età della globalizzazione*, vol. III, Napoli, Editoriale Scientifica, 2019, pp. 1881-1895; M. MARTINEK, “Reflections on the choice of law in international commercial arbitration proceedings”, in *Mélanges en l’honneur du professeur Claude Wiltz*, Paris, LexisNexis, 2018, pp. 597-624; P. MAYER, “Mandatory Rules of Law in International Arbitration”, *Arbitration International*, 2, 4, 1986, pp. 274-293; J.A. MORENO RODRÍGUEZ, *Derecho aplicable y arbitraje internacional*, Cizur Menor, Aranzadi, 2014; M.L. MOSES, *The Principles and Practice of International Commercial Arbitration*, 3th ed., Cambridge, Cambridge University Press, 2017, pp. 63-89; A.-S. PAPEIL, “Conflict of overriding mandatory rules in arbitration”, in F. FERRARI/S. KRÖLL (Eds.), *Conflict of laws in international arbitration*, München, Sellier European Law Publishers, 2011, pp. 341-378; J.A. PÉREZ BEVIÁ, “Sobre la ley aplicable por el árbitro al fondo de la controversia en el DIPr. español”, *RCEA*, 1988-89, pp. 213-233; J.C. POMMIER, “La résolution du conflit de lois en matière contractuelle en présence d’une élection de droit: le rôle de l’arbitre”, *JDI Clunet*, 1992, pp. 5-44; L.G. RADICATI DI BROZOLO, “Arbitrage commercial international et lois de police: considérations sur les

B) Article VII.1 of the European Convention on International Commercial Arbitration, made in Geneva on April 21, 1961

30. Art. VII.1 of the Convention recites: “*The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.*”⁶³. This provision, despite its apparent simplicity, is actually a hornets’ nest. The provision establishes two connecting factors, structured in cascade.

31. The provision does not specify whether the parties in order to regulate their contract must choose the Law of a State or a non-national legal regulation. However, the letter of art. VII.1 Geneva Convention 1961, which refers expressly to a “Law”, seems more inclined to admit that the parties can only choose the legal system of a State as “Law applicable to the substance of the dispute”, as M. GÓMEZ JENE points out⁶⁴. Once the application of a specific national Law is determined, such Law is applicable in its entirety, that is to say, including the International Agreements and other international regulations that are in force in that State. Consequently, the parties can only exclude the application of a particular international agreement when that is allowed by the national law applicable to the substance of the dispute (*vid. arts. 1 and 6 CISG 1980*) (J.C. FERNÁNDEZ ROZAS)⁶⁵.

32. In the event that the parties failed to choose a Law or set of rules to resolve the substance of their dispute, the arbitrators will apply the proper Law in accordance with the rule of conflict that the arbitrators deem appropriate in the case in question. Art. VII.1 Geneva Convention 1961 follows, therefore, a “conflictual approach”: the arbitrators are to apply the national Law indicated by a rule of conflict, and cannot directly apply a special material rule to resolve the dispute, unlike what is established ³/₄ in the case of Spain³/₄ by art. 34 of the Spanish Arbitration Law 2003. However, this second connecting factor is extremely complex, for several reasons.

33. The provision does not specify whether such “*proper law under the rule of conflict that the arbitrators deem applicable*” should be an existing “national conflict rule”, or they are free to “create” an *ad hoc* conflict rule that seems appropriate for the case in question or for international commercial arbitration in general. The letter of the provision does not prevent the arbitrators from developing an *ad hoc* conflict rule. Now, “speculating” with the Law applicable to the substance of the case is not acceptable. The arbitrators cannot apply a rule of conflict that they have selected at their whim: they must use a conflict rule with quality connecting factors, which lead to the application of a law that is predictable

conflits de juridictions dans le commerce international”, *RCADI*, 2005, t. 315, pp. 265-501; *Id.*, “El rol del Derecho en el arbitraje internacional”, en *Liber amicorum Angelo Davi: La vita giuridica internazionale nell’età della globalizzazione*, vol. III, Napoli, Editoriale Scientifica, 2019, pp. 2003-2013; F. RAGNO, “Norme di applicazione necessaria come limite all’accesso alla giustizia arbitrale internazionale?”, en *Liber amicorum Angelo Davi: La vita giuridica internazionale nell’età della globalizzazione*, vol. III, Napoli, Editoriale Scientifica, 2019, pp. 2015-2036; A. REDFERN / M. HUNTER, *Law and Practice of International Commercial Arbitration*, 2^a ed., London, 1991, pp. 70-128; S. SÁNCHEZ LORENZO, “Derecho aplicable al fondo de la controversia en el arbitraje comercial internacional”, *REDI*, LXI, 1, 2009, pp. 39-74; K.J. SCHIFFER, *Normen ausländischen “öffentlichen” Rechts in internationalen Handelsschiedsverfahren*, Köln, Berlin, Bonn, München, Heymann, 1990; L. SILBERMAN/F. FERRARI, “Getting to the law applicable to the merits in international arbitration and the consequences of getting it wrong”, in F. FERRARI/S. KRÖLL (Eds.), *Conflict of laws in international arbitration*, München, Sellier European Law Publishers, 2011, pp. 257-324; W. TETLEY, “Arbitration and the choice of Law”, *Europ. Transport Law*, 1993, pp. 149-179; A.N. ZHILSOV, “Mandatory and Public Policy Rules in International Commercial Arbitration”, *NILR*, 42, 1, 1995, pp. 81-119.

⁶³ European Convention on International Commercial Arbitration, made in Geneva on 21 April 1961 (BOE [Spanish Official Journal] No. 238 of 4 October 1975). *Vid.*, G. ZEILER/A. SIWY (Eds.), *The European Convention on International Commercial Arbitration: a commentary*, Alphen aan den Rijn, Kluwer Law International B.V., 2019.

⁶⁴ M. GÓMEZ JENE, *Arbitraje comercial internacional*, Madrid, Ed. Civitas, 2018, p. 334.

⁶⁵ J.C. FERNÁNDEZ ROZAS, *Ius Mercatorum (autorregulación y unificación del Derecho de los negocios transnacionales)*, Madrid, Colegios Notariales de España, 2003; *Id.*, “Lex Mercatoria y autonomía conflictual en la contratación internacional”, *AEDIP*, 2004, pp. 35-78; *Id.*, “Alternativa conflictual o material en la búsqueda de un Derecho contractual europeo más coherente”, *La Ley*, 28 febrero 2005, No. 6199.

for the parties; a law whose application to the case leads to reduced conflict costs because it fits with the “legal expectations of the parties” (P. FRANZINA)⁶⁶. Consequently, it seems appropriate to say that the arbitrators should apply, if possible, a national conflict rule, since it is easier for the parties to predict the application of a law designated by a national conflict rule –which can be consulted beforehand– rather than the application of a national Law designated by a conflict rule that does not exist and that the arbitrators must “build” in the arbitration proceedings.

34. Once ascertained that in principle the arbitrators must apply a national conflict rule, but cannot and should not “speculate” with such conflict rule, it must be admitted that the arbitrators cannot resort to “any” rule of conflict: they must apply the one whose application is most predictable for the parties. Among such conflict rules, the following may be mentioned:

First, the national conflict rules of the State in which the arbitral tribunal has its seat, as proposed in art. 11 Resolution IDI Amsterdam session, whenever it is possible to concretize a “seat of arbitration” (P. FOUCHARD, B. GOLDMAN)⁶⁷. This thesis is currently outdated, as P. FRANZINA points out, because there may be another conflict rule more appropriate than that of the country seat of arbitration, especially if two companies based in a country resolve their dispute by arbitration in another country⁶⁸.

Second, in the event of a private international arbitration that results from an international contract, the conflict rule of the country whose material Law has been designated by the parties to govern the contract $\frac{3}{4}$ provided that the parties have chosen the Law or the rules applicable to their contract $\frac{3}{4}$ or the conflict rule of the country whose Law governs the legal relationship that caused the private international arbitration⁶⁹.

Third, the conflict rule of the country of habitual residence or common seat of the parties, provided that such circumstances concur in the specific case.

Fourth, and for the case in which the parties have their habitual residence or establishment in different States, the conflict rule of such countries may apply, provided that they are identical or very similar.

Fifth, in complex cases, the practice often resorts to the well-known technique of “False Conflict”: the arbitrators examine the national laws connected with the case, and if they observe that they give the same or similar solution to the case, they apply both Laws or they provide the solution without indicating which national law they actually applied (H.A. GRIGERA NAÓN)⁷⁰.

35. In cases where it is difficult to identify a single conflict rule whose application in the event of arbitration is predictable for the parties, the arbitrators may resort to the application of a conflict rule created by the arbitrators themselves and extracted from the “general principles of private international law”. Such general principles are those generally accepted by the different state systems of private international law and by the legal instruments of uniform law⁷¹. The famous arbitral award of May 15, 1963, *Cavin*: “*the connecting factors used in doctrine and in case law*”) was rendered applying this method⁷². In this sense, some of the technical mechanisms included in the Rome I Regulation of June 17, 2008

⁶⁶ P. FRANZINA, “I conflitti di leggi davanti agli arbitri del commercio internazionale: note in tema di collegamento obiettivo alla luce del Regolamento Roma I”, *CDT*, 2009-II, pp. 328-338;

⁶⁷ *Annuaire*, 1952, t. 11, p. 484. P. FOUCHARD, “Introduction: spécificité de l'arbitrage international”, *Rev. Arb.*, 1981, pp. 449-468; B. GOLDMAN, “Frontières du droit et lex mercatoria”, *Archives de Philosophie du droit*, vol. 9, 1964, pp. 46-69; *Id.*, “La lex mercatoria dans les contrats et l'arbitrage international: réalités et perspectives”, *JDI Chumet*, 1979, vol. 106, pp. 475-508; *Id.*, “Les conflits de lois dans l'arbitrage international de droit privé”, *RCADI*, 1963, vol. 109, p. 368.

⁶⁸ P. FRANZINA, “I conflitti di leggi davanti agli arbitri del commercio internazionale: note in tema di collegamento obiettivo alla luce del Regolamento Roma I”, *CDT*, 2009-II, pp. 328-338;

⁶⁹ F.E. KLEIN, “La Convention européenne sur l'arbitrage commercial international”, *RCDIP*, 1962, pp. 621-640.

⁷⁰ H.A. GRIGERA NAÓN, *Choice-of-law Problems in International Commercial Arbitration*, Tübingen, Mohr, 1992; H.A. GRIGERA NAÓN, “Choice-of-Law Problems in international commercial arbitration”, *RCADI*, 2001, vol. 289, pp. 9-396.

⁷¹ *Vid.*, *ad ex.*, S.M. CARBONE, “Dalla specialità e prevalenza del diritto uniforme alla sua integrazione nello spazio giudiziario europeo”, in *Liber amicorum Antonio Tizzano: de la Cour CECA à la Cour de l'Union: le long parcours de la justice européenne*, Torino, Giappichelli, 2018, pp. 170-178; P. KAHN, “Les principes généraux du droit devant les arbitres du commerce international”, *JDI Chumet*, 1989, pp. 305-327; F. OSMAN, *Les principes généraux de la lex mercatoria: contribution à l'étude d'un ordre juridique anational*, Paris, Librairie Générale de Droit et de Jurisprudence, 1992.

⁷² *ICLQ*, 1964, p. 1011.

can be considered as instruments that express a general methodological consensus on how to accredit the “centre of gravity of the legal relationship”⁷³. In this perspective, certain provisions of the Rome I Regulation, insofar as they express such general principles of private international law, can serve the arbitrators to construct a conflict rule that determines the law applicable to the substance of the dispute: exception clause, application of the Law of the country of residence of the seller, preference for the Law of habitual residence over the national Law of the parties, etc.

36. It is also true that, as underlined by M. GÓMEZ JENE, said art. VII.1 allows the application of the *New Lex Mercatoria* to the substance of the case in the event that the conflict rules applied by the arbitrator allow him to select the *New Lex Mercatoria* ^{3/4}in any of its approaches or versions^{3/4} as the law governing the dispute⁷⁴.

37. The reference to trade usages made by art. VII.1 Geneva Convention 1961 is imprecise and its scope is confused, undefined and ambiguous. It is doubtful if such reference contemplates “trade usages” as a true “independent legal system”, or as a mere manifestation of “material party autonomy” within a given national Law. Now, it seems reasonable to understand that such reference covers trade usages to which the parties have referred apart from any national legislation (= incorporated by reference to the contract by the parties), as well as the application of trade usages so widespread in the commercial sector in question, that the parties could not ignore them (= objective trade usages whose application cannot be ignored by parties that operate in good faith in an international arbitration).

C) Art. 34.2 of Spanish Arbitration Law 60/2003

a) Open attitude of the legislator toward non-national legal materials

38. In cases not regulated by the aforementioned Geneva Convention of 1961, if the arbitration is carried out in Spain, art. 34.2 of the Spanish Arbitration Law 60/2003, of December 23, applies⁷⁵. The provision provides that: “*without prejudice to the provisions of the previous paragraph, in the event of an international arbitration, the arbitrators shall resolve the dispute in accordance with the legal norms chosen by the parties. It will be understood that any indication of the law or legal system of a given State ^{3/4}unless otherwise stated^{3/4} refers to the substantive law of that State and not to its conflict rules. If the parties do not indicate the applicable legal norms, the arbitrators will apply those that they deem appropriate*”.

Paragraph 3 of art. 34 of Spanish Arbitration Law 60/2003, of December 23, moreover, recites: “*in any case, the arbitrators will decide according to the terms of the contract and will take account of the applicable usages*”. This reference must be object of a “specific reading”: it refers, as M. GÓMEZ JENE indicates again, to those usages that are not part of the *New Lex Mercatoria*, but that have acquired the range of legally binding practices for the key players of international trade⁷⁶. Article 34.2 of Arbitration Law does not specify when a usage is “applicable to a given case”. It must be understood that such usages shall apply when they are widely known within the trade community and commercial sector concerned, so that no merchant can ignore them.

As for the allusion made by art. 34.2 Arbitration Law 60/2003 to the “terms of the contract” it seems paradoxical as well as surprising: it is not easy to find a judge or arbitrator who does not take into account the clauses of a contract object of the dispute about which he is resolving.

⁷³ Regulation (EC) N° 593/2008 of the European Parliament and of the Council of 17 June 2008 on the law applicable to contractual obligations (Rome I), OJ EU 2008 N° L 177, p. 6. *Vid., ad ex.*, A.-L. CALVO CARAVACA/J. CARRASCOSA GONZÁLEZ/C. CAAMIÑA DOMÍNGUEZ, *Litigación internacional en la Unión Europea II. La Ley aplicable a los contratos internacionales. Comentario al Reglamento Roma I*, Cizur Menor, Thomson Reuters Aranzadi, 2017; U. MAGNUS/P. MANKOWSKI (Eds.), *Rome I Regulation*, Köln, Verlag Dr. Otto Schmidt, 2017.

⁷⁴ M. GÓMEZ JENE, *Arbitraje comercial internacional*, Madrid, Ed. Civitas, 2018, p. 334.

⁷⁵ BOE [Spanish Official Journal] no. 309 of 26 December 2003.

⁷⁶ M. GÓMEZ JENE, *Arbitraje comercial internacional*, Madrid, Ed. Civitas, 2018, p. 336.

The preamble (VII) of Law 60/2003, of December 23, explains the scope of these provisions and their leit-motiv: “3.) *Following the trend of the most advanced legal systems, the requirement that the applicable law must be related to the legal relationship or to the controversy is suppressed, since it is a requirement whose boundaries are blurred and that is difficult to control.* 4.) *The law prefers the expression ‘applicable legal rules’ to ‘applicable law’, insofar as the latter seems to encompass the requirement of referral to the legal system of a State, when in some cases the rules to be applied belong to several different legal systems or are common rules of international trade.* 5.) *The law does bind the arbitrators to a system of conflict rules”.*

b) Choice of the New Lex Mercatoria by the parties

39. An analysis of this provision gives rise to several elements of interest to build a metacriticism regarding the shortcomings of the orthodox theory of the *New Lex Mercatoria* as the system governing international contracts in an international arbitration scenario.

40. The legal rules that arbitrators must apply to the substance of the matter at hand in private international arbitration are, first of all, the “*legal rules chosen by the parties*”. Note that the rule does not obligate the parties to choose a national “Law”. It merely refers to “legal rules”. As a consequence, in private international arbitration proceedings the parties can choose the national Law of a State as the Law governing the merits of the dispute, and they can also choose the “conflict of Laws” rules of a given State legal system (P. LAGARDE / A. TENENBAUM)⁷⁷.

41. However, the provision also contemplates that the parties choose non-national legal systems for the arbitrators to resolve the merits of the dispute, such as the *New Lex Mercatoria* itself, or the 2010 Unidroit Principles. Indeed, art. 34 of Spanish Arbitration Law 2003 expressly authorizes the parties to make such a choice. On this possibility, certain observations can be made.

42. A first observation reveals that the parties can choose as the governing law of the substance of the case, a legal system independent of any national law, really international, created and guarded by arbitrators, who keep formulating it in a praetorian manner by means of their arbitral awards. Such legal system revolves around the so-called *New Lex Mercatoria* (*Lex Mercatoria* or *Jus Mercatorum* or *Nundinarum*). The parties may choose, as applicable to the substance of the dispute, certain materials that are not part of any “national legal systems”, but merely sets of rules or patterns of behaviour that are not systematically structured. This group of materials should include the General Principles of Law, international trade usages, the Codes of Conduct, specific international conventions, model Laws or uniform Laws, the *New Lex Mercatoria* itself and other fuzzy materials specific to dispute resolution.

43. A second observation reveals that, in relation to so-called “semi-international” contracts (= contracts made between a State and a foreign company, whose object usually is the lease or concession of a public good or service), the States understandably do not wish to be subject to the Law of another State⁷⁸. It is, therefore, logical and admissible to seek “non-national regulations” such as ^{3/4}for instance^{3/4} the “general principles of Law recognized by civilized Nations”, that arbitrators will apply to resolve the disputes that may be submitted to them.

44. The third observation makes it clear that oftentimes the reference made by the parties in favour of “non-national law” is mere wishful thinking because such “legal systems”, like the *New Lex Mercatoria*, are fragmentary, incomplete, imprecise sets of rules, full of loopholes and made up of doctrines extracted from arbitral awards that more often than not have not been published (M.J. HUNTER, P.

⁷⁷ P. LAGARDE / A. TENENBAUM, “De la Convention de Rome au Règlement Rome I”, *RCDIP*, 2008, pp. 727-780.

⁷⁸ J.-F. LALIVE, “Contrats entre États ou entreprises étatiques et personnes privées. Développements récents”, *RCADI*, 1983-III, vol. 181, pp. 2-284.

SANDERS) or reasoned⁷⁹. In other cases, the arbitrators claim to have based their decision on the *New Lex Mercatoria*, but that is not entirely true: they have made their decision based on the content of various national laws, from which they actually took the applicable rules.

45. Fourth, it might be highlighted that, from a procedural point of view, the achievement of a “de-nationalized arbitration” (= rendered through the application of the *New Lex Mercatoria*) may end up being a Pyrrhic victory due to the so-called “Norsolor syndrome”⁸⁰. This occurs when the courts of the country where it has been rendered consider that the award is not a “national” award, but a “foreign” award precisely because it was rendered pursuant to non-national regulations. In this case, and given that it is a foreign award, the courts may consider inadmissible an appeal that can only be granted against national awards⁸¹.

46. Fifth, it must be recalled that, in principle, under the New York Convention of June 10, 1958, an *exequatur* cannot be denied to a foreign arbitral award merely because the arbitrators applied the *New Lex Mercatoria* instead of a national law to the merits of the controversy.

47. Sixth, certain authors have defended that it is possible for the arbitrators to admit the application of the *New Lex Mercatoria* as a result of the so-called “implied negative choice of the parties”. This phenomenon occurs when the parties have not chosen any specific national Law. This fact is usually interpreted by the arbitral tribunal as a rejection to apply the Law of the country where the parties have their seat and as a mandate that the contract should not be governed by any of the parties’ national law. In this case, certain arbitrators have resorted to the direct application of the *New Lex Mercatoria* (ICC Award n. 7375 / 1996, *Westinghouse*)⁸².

48. Seventh, finally, the tendency in favour of an arbitration whose controversy is decided by the application of “rules of law” that may be non-national is clear, as illustrated by U. DRAETTA in France (*vid.* Judgment Cour de Cassation, October 13, 1981, Judgment Cour de Cassation, France, October 22, 1991), Italy (Judgment Corte di Cassazione, Italy, February 8, 1982), United Kingdom, (Judgment Court of Appeal, England, March 24, 1987, and Switzerland (*vid.* article 187 Private International Law Act 18 December 1987: “*Il tribunale arbitrale decide la controversia secondo il diritto scelto dalle parti o, in subordine, secondo il diritto con cui la fattispecie è più strettamente connessa*”: i.e. “The arbitral tribunal resolves the dispute in accordance with the Law chosen by the parties or, subordinately, in accordance with the Law with which the case is most closely connected”)⁸³.

⁷⁹ P. SANDERS, “Trends in the Field of International Commercial Arbitration”, *RCADI*, 1975, vol.145, pp. 227-235; *Id.*, “L’arbitrage dans les transactions commerciales à long terme”, *Rev. Arb.*, 1975, pp. 83-87; *Id.*, “Aspects de l’arbitrage international”, *RDIDC*, 1976, pp. 133-135; A. REDFERN / M. HUNTER, *Law and Practice of International Commercial Arbitration*, 2nd ed., London, 1991, pp. 70-128.

⁸⁰ Sentencia del Tribunal de apelación de París de 9 diciembre 1980, *Société Aksa vs. société Norsolor*, texto en *RCDIP*, 1981, pp. 545-550, y nota de E. MEZGER; E. GAILLARD, *Aspects philosophiques du droit de l’arbitrage international*, Leiden, Boston, Martinus Nijhoff Publishers, 2008, pp. 191-193; B. GOLDMAN, “Une bataille judiciaire autour de la ‘lex mercatoria’. L’affaire Norsolor”, *Rev.Arb.*, 1983, pp. 379-409.

⁸¹ L. MISTELIS, “Delocalization and its Relevance in Post-Award Review”, in F. BACHAND & F. GÉLINAS (EDS.), *The UNCI-TRAL Model Law after 25 Years: Global Perspectives on International Commercial Arbitration*, Huntington, New York, Juris-Net, LLC, 2013, pp. 167-181; J. PAULSSON, “Delocalisation of International Commercial Arbitration: When and Why It Matters”, *JCLQ*, 32, 1, 1983, pp. 53-61; P. READ, “Delocalization of International Commercial Arbitration: Its Relevance in the New Millennium”, *The American Review of International Arbitration*, 10, 2, 1999, pp. 177-201; Z. SAGHIR/N. CHRISPAS, “Delocalisation in International Commercial Arbitration: A Theory in Need of Practical”, *International Company and Commercial Law Review*, 27, 8, 2016, pp. 269-276.

⁸² *Vid.* the text or, at least, a part of this one in UNILEX (www.unilex.info) and also in *Measley’s International Arbitration Report*, 11, 1996, pp. A-1 to A-69 (original in English) and *Uniform Law Review / Revue de droit uniforme*, 1997, pp. 598-599 (abstract in English and French). *Vid., ad ex.*, J.C. FERNÁNDEZ ROZAS, “Lex Mercatoria y autonomía conflictual en la contratación internacional”, *AEDIP*, 2004, pp. 35-78; *Id.*, “Declive del método de atribución en la determinación por el árbitro del Derecho aplicable al fondo de la controversia”, *Arbitraje*, vol. III, n° 2, 2010, pp. 377-409.

⁸³ U. DRAETTA, “La giurisprudenza francese conferma il carattere di regole di diritto della *lex mercatoria* (Cassation civil, 22 ottobre 1991, n.1354)”, *DCI*, 1992, vol.VI, pp. 214-227.

c) Application of the New Lex Mercatoria in the absence of a choice of law by the parties

49. In the event that the parties have not given any indication on the “applicable legal rules” to resolve the merits of the dispute, the arbitrators will apply the “rules they deem appropriate”. In this sense, the arbitrators are not bound by a specific conflict rule, neither Spanish nor foreign, nor are they bound by a specific substantive Law, neither Spanish nor foreign. The arbitrators are not the “guardians” of the Law of any given State. When selecting the regulations applicable to the merits of the case, the arbitrators are not bound to previously apply a conflict rule that determines which is the law governing the substance of the case, unlike what is established by the European Convention on International Commercial Arbitration, made in Geneva on April 21, 1961 in the cases regulated by said agreement. In fact, in such cases, the aforementioned Convention binds the arbitrators to always apply a conflict rule prior to specifying the substantive regulations applicable to the merits of the case.

50. Consequently, in the context of art. 34.2 of Spanish Arbitration Law, the arbitrators may apply to the substance of the dispute: (a) A national conflict rule, which they deem most appropriate for designating the applicable national Law most easily predictable for the parties; (b) A conflict rule created by the arbitrators themselves due to the complexity of the particular case, which will designate a substantive national Law applicable to the merits of the controversy; (c) A substantive national regulation determined without the need to previously apply a conflict rule. This implies the application of a national law by “*voie directe*”, in the words of Y. DERAÏNS, a Law selected without going through any conflict rule⁸⁴; (d) A non-national regulation that allows the controversy to be adequately resolved, such as the 2010 Unidroit Principles on International Commercial Contracts, specific rules of the *New Lex Mercatoria*, international trade usages, general principles of Law, etc.; (e) A body of rules formed by a combination of legal rules drawn from national legislation and/or non-national regulations. The arbitrators may divide the legal relationship and submit the different parts to different national or non-national laws, which is known as the arbitral *dépeçage* of the contract or the legal relationship in question.

IV. Concluding thoughts. New Lex Mercatoria, regulatory competence and efficiency principle

51. Private international law, both national and European, has established a cardinal principle in the field of international trade in general and international contracts in particular: the free choice of applicable regulations. Such principle proper to litigation in international business shows an undeniable tendency to expand. This leads both the European and Spanish legislator to admit the possibility for the parties of choosing non-national regulations to govern and settle such disputes. This can be observed in art. 34 of the Spanish Arbitration Law and in art. VII.1 of the European Convention on International Commercial Arbitration, made in Geneva on April 21, 1961. Party autonomy taken as a general regulating principle of the international legal relationships between individuals, as A. HELLGARDT points out, leads to admit –under different technical formulas– that the parties can resort to the *New Lex Mercatoria* as a regulation applicable to international trade⁸⁵. It is not necessary, needless to say, that such regulations, including the *New Lex Mercatoria*, operate as *Lex Contractus*. In fact, it is not about admitting a contract without Law and a Law without State; it is about accepting that such materials can be applied to the relationships between individuals involved in international trade and used to resolve the conflicts that may arise.

52. The expansion of the autonomy of individuals, which favours the application of the *New Lex Mercatoria* to international business, operates without restrictions in the relationships between compa-

⁸⁴ Y. DERAÏNS, “Les normes d’application immédiate dans la jurisprudence arbitrale internationale”, *Mélanges B. Goldman*, Paris, Litec, 1983, pp. 29-49. Also P. LALIVE, “Les règles de conflits de lois appliquées au fond du litige par l’arbitre international siégeant en Suisse”, *Revue de l’arbitrage*, 1976, p. 155; S. SÁNCHEZ LORENZO, “Derecho aplicable al fondo de la controversia en el arbitraje comercial internacional”, *REDI*, LXI, 1, 2009, pp. 39-74, esp. p. 55.

⁸⁵ A. HELLGARDT, “Das Verbot der kollisionsrechtlichen Wahl nichtstaatlichen Rechts und das Unionsgrundrecht der Privatautonomie”, *RabelsZ*, 2018-3, pp. 654-696.

nies. As P. MANKOWSKI remarks, commercial relationships is the only one sector in which the choice of applicable regulations really is free⁸⁶. In this context, normative autonomy of the companies helps to build ³/₄ in a way parallel to Public International Law³/₄ a regulating structure for the efficient organization of international business. And efficiency is a global value that contributes to the welfare progress of companies and societies, as V. RUIZ ABOU-NIGM / K. MCCALL-SMITH / D. FRENCH have observed⁸⁷. This leads to demystifying the value of uniform law. Given the multipolar structure of the world, T. KONO points out, uniform Law may be inefficient whereas the application of the *New Lex Mercatoria* may be efficient⁸⁸. The *New Lex Mercatoria* may allow the application of a regulation more in accordance with the needs of the parties or the dispute.

53. The limiting factors that affect national courts, which are tied to rigid, closed and self-contained normative systems, do not affect arbitrators. In international cases, connected with several States and sectors, arbitrators can operate with multiple regulations that make up a pool of rules that allow extracting the best of each regulation. As indicated by E.A. POSNER / J.C. YOO, the orthodox thesis (= “*the conventional wisdom*”), which considers that state courts are “independent” and therefore decide with more justice while arbitrators are “partial” and therefore decide with less justice, should be reviewed⁸⁹. In this line, it can be argued that the arbitrators defend justice with greater emphasis in international trade relationships. The arbitrators operate in a market of adjudicators and must earn their own prestige, on which their future selection as arbitrator depends. Thus, arbitrators do not hesitate to seek and select the best rules to resolve the dispute, and do not falter if such rules have to be extracted from the *New Lex Mercatoria*. As indicated by the authors cited above, “*the most successful tribunals are dependent*”.

54. On the other hand it is fair to admit, with L. DE ALMEIDA, that the lack of a universal model of Private Law leads to recognize that a worldwide market tends to create rules that are independent of the States⁹⁰. It is the “*transnationalization, Globalization and europianization of private Law*”. The fall of the codified private law myth corresponds to the rise of the *New Lex Mercatoria* as a conflict-solving method between companies. In this approach, the *New Lex Mercatoria*, along the lines suggested by P. ELEFTHERIADIS, contributes to the achievement of truly international and cosmopolitan objectives distant from the interests of the States, which notoriously tend to regulate selfishly, favouring their national and state interests⁹¹. The *New Lex Mercatoria* places companies on a level of equal value and only the arbitrators are in the best position to apply a neutral law that does not benefit one party or another only because it belongs to one State or another.

55. At present, the international society of economic operators is a global society in which everyone takes part. This post-national society, lacking an authority capable of elaborating and promulgating a post-national law regulating international business, does have a set of adjudicators that operate in accordance with rules of variable geometry. They are the arbitrators, the creative players of international business law. The arbitrators, as F. GALGANO underlines, can use the *New Lex Mercatoria* not as an alternative system to the Law of the States, but as a method for the prevention and solution of international conflicts between companies⁹². Arbitrators, thus, can create a crucible of “reasonable rules of behaviour”

⁸⁶ P. MANKOWSKI, “Just how free is a free choice of law in contract in the EU?”, *Journal of Private International Law*, vol. 13, 2017, pp. 231-258.

⁸⁷ V. RUIZ ABOU-NIGM / K. MCCALL-SMITH / D. FRENCH, *Linkages and Boundaries in Private and Public International Law*, Oxford, London, Hart Publishing, 2018, pp. 12-19.

⁸⁸ T. KONO, “Efficiency in Private International Law”, *RCADI*, vol. 369, 2014, pp. 361-502.

⁸⁹ E.A. POSNER / J.C. YOO, “A Theory of International Adjudication”, John M. Olin Law & Economics Research Paper Series Working Paper No. 206 / Public Law and Legal Theory Research Paper Series Research Paper No. 146, 2018, available in: <http://www.law.uchicago.edu/Lawecon/index.html>.

⁹⁰ L. DE ALMEIDA, “Rise and fall of the classic concept of private law: lessons from the legal consciousness of European private law”, *DESC - Direito, Economia e Sociedade Contemporânea*, vol. 1, n. 1, pp. 95-128, and Jul/Dez 2018, pp. 96-128.

⁹¹ P. ELEFTHERIADIS, “The moral distinctiveness of the European Union”, *International Journal of Constitutional Law*, vol. 9, no. 3-4, 2011, pp. 695-713.

⁹² F. GALGANO, “Globalizzazione dei mercati e universalità del diritto”, *Politica del diritto*, 2009-2, pp. 177-192.

that stimulate trade and exchange, the source of welfare of the world. Through the use of the *New Lex Mercatoria* as a method of selecting the applicable rules, they can generate a set of efficient rules. The *New Lex Mercatoria* is presented, just as in the past good old Roman Law, which was rediscovered in the late Middle Ages, as an “independent law of the political constitution”, as U. MANTHE illustrates⁹³.

56. The *New Lex Mercatoria* as a method of selection of the regulatory rules in international trade is thus an expression of the self-regulation of traders on a planetary level. Multiform and multi-polar, the *New Lex Mercatoria* method in the hands of the arbitrators can operate as an instrument for the selection of the best legal rules and therefore, contribute to the progress of law. In this scenario, it must be kept in mind that there is an unquestionable principle in the regulation of international legal relationships between companies and traders: respect for the common will of the parties in a specific legal relationship. In this sense, as highlighted above, the arbitrator must apply the legal materials that the parties have chosen. In the absence of such choice, the will of the parties must also be respected. The contract constitutes the highest expression of the agreement of the parties. The arbitrator operates within such legal boundaries. Therefore, when the parties have indicated that the arbitrator must apply the *New Lex Mercatoria* to resolve the dispute or have not indicated anything at all, the arbitrator must carry out his work of identification and selection of the materials that constitute the *New Lex Mercatoria* with maximum compliance with the will of the parties. In this sense, the arbitrator must estimate that the *New Lex Mercatoria* is made up of the usages, practices, principles and other legal materials that constitute undoubted, habitual, real and manifest usages of the commercial sector in question. These undoubted usages are objective rules on whose existence and practical application there is an indisputable, true, incontrovertible, manifest, obvious and safe commercial consensus.

In this way, S. SÁNCHEZ LORENZO explains, these materials become a normative set with a flexible composition that reflects the tacit will of the parties. They constitute the objective crystallization of the will of the merchants who operate in a specific economic sector⁹⁴. This allows distilling a commercial justice of quality, far from the Cadies Courts or Praetorian Law, which were merely the will of a particular arbitrator. An efficient trade justice, because the established rules that have been translated into indisputable legal usage constitute, by definition, the best possible rules, that is, the most efficient solutions that regulate the legal relationships proper to international trade.

Rome, May 8, 2019

⁹³ U. MANTHE, *Storia del diritto romano*, Bologna, Il Mulino, 2010, pp. 133-139.

⁹⁴ S. SÁNCHEZ LORENZO, “Derecho aplicable al fondo de la controversia en el arbitraje comercial internacional”, *REDI*, LXI, 1, 2009, pp. 39-74.