

## United Nations Commission on International Trade Law (UNCITRAL)

**Completed Paper Submission for the UNCITRAL Congress on “*Modernizing International Trade Law to Support Innovation and Sustainable Development*”, Vienna, 4-6 July 2017.**

**“International Commercial Contracts Law in the Evolving Landscape of Trade Regulation”<sup>1</sup>**

**Abstract:** Thanks to the tremendous efforts of the Institute UNIDROIT, the Hague Conference on Private International Law and the United Nations Commission on International Trade Law, the principle of parties’ autonomy to make the law applicable to their international commercial contracts has significantly prevailed in international trade today. Yet, those parties have a very limited knowledge and impact of that autonomy in private law making, also referred to as the *lex mercatoria*, and there are difficulties related to the applicable law. However, the real right question is whether or not parties to an international commercial contract can fully exercise that freedom in the sense of creating their own law and having it be given effect by all means. In fact, States, as the builders of the global economy, are eager to regulate international trade and so, public regulations impact significantly parties’ private law making.

This aim of this research is to explore the limits of parties’ private law making within the framework of international commercial contracts. Specifically, the research seeks to demonstrate that the notion that parties negotiating international commercial contracts are in position to make their own law has been shaped extensively by public law making, which results in a more predictable business climate.

**Key words:** Commercial Contracts, International Law, Trade Regulation.

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<sup>1</sup> I wish to acknowledge the broad perspective of my late mom Rita Yêhouéno and my dad Pierre A. Gloglo for showing me hard work, determination and hope. I wish to thank everyone who has empowered my quest to pave the way, especially in the times of uncertainty, and the Faculty of Law at Université Laval for the opportunities given to me to develop and strengthen my research-skills in the times of my Doctoral Research. Finally, I wish to mention that by accepting this research-paper, the United Nations Commission on International Trade Law has not become an endorser of the views I have expressed herein.

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« Le commerce a fait que la connaissance des mœurs de toutes les nations a pénétré partout : on les a comparées entre elles, et il en a sorti de grands biens. » [Commerce has made the manners of all nations penetrate everywhere: compared to each other, great deeds result therein], Charles-Louis de Secondat, *alias* Montesquieu, *De l'esprit des lois*, II, présentation par Victor Goldschmidt, Paris, GF Flammarion, 1979, 4<sup>ème</sup> Partie, Livre XX, Chap. 1<sup>er</sup>.

## Introduction

“International [commercial] contracts are often written without regard to the governing law – on the assumption that the terms of the contract are sufficiently clear to exclude the necessity of having to consult the governing law, and with the awareness that there is a risk that some of the clauses may not be enforceable under the governing law”<sup>2</sup>. However, there is a risk in concluding such contracts without any knowledge of that governing law, which “sources include the national laws of each party and international contract law or the *lex mercatoria*”<sup>3</sup>.

According to the Hague Conference on Private International Law, international commercial contracts cover all trade agreements that are connected to a foreign business party or market, except those relating to consumer and employment contracts, because of the presumptively weakness of one party in these specific contracts, namely the consumer and the employee<sup>4</sup>. Admittedly, international commercial parties are individuals or business entities, excluding governmental institutions and public organizations acting as such in the realm of their traditional mandate, which shall not be trading. Yet, the point of contention is that many public organizations are today engaged in international business, especially public funded research centers when transferring, for instance, intellectual property related outcomes of their Research-

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<sup>2</sup> Giuditta Cordero-Moss, *International Contracts: Applicable Sources and Enforceability*, Cambridge, Cambridge University Press, 2014 at p 80.

<sup>3</sup> Larry A. Dimatteo, *International Contracting: Law and Practice*, 3<sup>rd</sup> edition, Alphen aan den Rijn, Klumer Law International BV, 2013 at p 13 [Dimatteo].

<sup>4</sup> Hague Conference on Private International Law, *Principles on Choice of Law in International Commercial Contracts*, as approved on March 19<sup>th</sup> 2015, Art. 1(1).

Development activities through commercial contracts<sup>5</sup>.

Although the trading system is today highly globalized, the impact of this globalization on legal systems is, somewhat, limited. In fact, the global trading system relies, to a large extent, on local laws and domestic enforcement mechanisms. Every country has its own legal system to regulate business within its territory, and so, parties engaged in international commercial contracts may face different domestic laws concurrently applicable to their contracts, what can result from many difficulties, especially identifying the real right applicable law. In fact, “the rationale for competition among national legal systems (or rather among national legislatures) is well known. If differences exist among various laws, mobile private actors will move to the jurisdiction that best satisfies their preferences”<sup>6</sup>. In searching for their preferences, or to be more specific their best interests, international business parties tend to avoid a specific law that the conflict may indicate. Yet,

In a highly integrated world economy, politically organized in a diversity of more or less autonomous legal systems, the function of conflict rules is to select, interpret and apply in each case the particular local law that will best promote suitable conditions of interstate and international commerce, or, in other words, to mediate in the questions arising from such commerce in the application of the local laws<sup>7</sup>.

So, in order to bring and maintain harmony regarding the applicable law to international commercial contracts, two organizations emerged, with a specific mission. For one, the Hague Conference on Private International Law acting on behalf of its current eighty States and Regional Economic Integration Organization Members, is entrusted with the mission to work for the progressive unification of private international law rules by finding, for example, the internationally-agreed approaches to issues like applicable law to international commercial matters<sup>8</sup>. For another, the International Institute for the Unification of Private International Law (UNIDROIT), a Rome-based independent inter-governmental institution has the mandate to

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<sup>5</sup> For an example, see 35 U.S.C. §202-203. Although preferences are given to United States of America’s industries in the transfer of public-funded research leading to Intellectual Property Rights (U35 U.S.C. §204), the evolving landscape of business players, which have their establishments in many countries at the same time may, under certain circumstances, turn into international a contract signed by parties located in the territory of the same country.

<sup>6</sup> Jan M. Smits, “Party Choice and the Common European Sales Law, or: How to Prevent the CESL from Becoming a Lemon on the Law” (2013) 50 *Common Market Law Review* 50 at p 52 [Smits].

<sup>7</sup> Hessel E. Yntema, “The Objectives of Private International Law” (1957) 35 *Can. Bar Rev.* 721 at p 741.

<sup>8</sup> The Hague Conference on Private International Law. [http://www.hcch.net/index\\_en.php?act=text.display&tid=26](http://www.hcch.net/index_en.php?act=text.display&tid=26).

examine proper and efficient ways to harmonize and coordinate the private law of States and groups of States in preparation for the application of uniform private law<sup>9</sup>. To be brief, these two organizations pursue the same goal, though they don't have the same degree of success<sup>10</sup>, but their efforts toward harmonization of private international law related issues are more legitimized by the endorsement of the United Nations Commission on International Trade Law, which, as the core legal body of the United Nations for any matter regarding international trade law<sup>11</sup>, is entrusted by the international community to develop and harmonize modern rules of law that sustain and promote a co-operative prosperous international trade.

The need to develop consistent rules of private international law led to urging States to consider and strengthen business parties' freedom of choice of law in international commercial contracts. This freedom is now embodied in the Hague "Principles on Choice of Law in International Commercial Contracts", which are the results of a long and tremendous quest for harmonization effort. Semantically considered, the Hague principles reaffirm the historical concept of the *lex mercatoria*. Strengthening the notion of the *lex mercatoria* looks great because only the contracting business parties have a better understanding of what they expect from their contract, and it is important to free international commercial contracts from unnecessary constraints so that the parties may be very well aware of which law applies to their contract. In fact, "party autonomy is considered to be the most practical solution for conflict of laws in international contracts and reigns, or ought to reign, subject to certain clearly defined limits"<sup>12</sup>. At the heart of the ideology of merchant law, lies the *will theory*, which has its roots in the works of authors like Hugo Grotius and Samuel von Pufendorf on the binding force of contracts under natural justice, though other authors such as David Hume, Jeremy Bentham or Adam Smith took issue with this doctrine<sup>13</sup>. Contemporary renowned legal scholars like Michael Trebilcock and Niva Elkin-

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<sup>9</sup> David Oser, *The Unidroit Principles of International Commercial Contracts: A Governing Law?*, Leiden, Koninklijke Brill NY, 2008 at p 1.

<sup>10</sup> Bradeley Crawford, "Some Recent Developments in the Financing of International Trade" in Department of Justice of Canada, *Second International Trade Law Seminar: Proceedings*, Ottawa, Oct. 1984, 7 at p 14.

<sup>11</sup> For details, see United Nations General Assembly resolution 2205 (XXI), Establishment of the United Nations Commission on International Trade Law, December 17<sup>th</sup>, 1966.

<sup>12</sup> Marta Pertegás and Brooke Adele Marshallt, "Party Autonomy and its Limits: Convergence through the New Hague Principles on Choice of Law in International Commercial Contracts" (2014) 39:3 *Brooklyn Journal of International Law* 975 at 976.

<sup>13</sup> Patrick S. Atiyah, *The Rise and Fall of Freedom of Contract*, Oxford, Clarendon Press, 1979 at p 406.

Koren have now shown the limits of the will theory, from a law and economics perspective<sup>14</sup>. The law and economics is a methodological approach that uses economic theory – primarily microeconomics and the basic concepts of welfare economics – to examine the formation, structure, processes and economic impact of law and legal institutions<sup>15</sup>. In this regard, Michael Tribelcock has comprehensively demonstrated how the law of contract stands for the benefits of contracting parties by maximizing their joint welfare<sup>16</sup>. In other words, a contract is more justified by the needs of the contracting parties than merely their will, a position, which in the sphere of international trade law, is referred to as ‘the profitable needs or interests of international trade’<sup>17</sup>.

In any case, “the proper sphere of choice of law may be viewed as presenting ‘false problems’ [because] all cases except those in which the application of either forum or foreign law, while advancing the interest of the State whose law would be applied, would impair the other State's interest in having effect given to its own policy”<sup>18</sup>. So, the autonomy business parties have to make the applicable law to their international commercial contracts is delineated by so many restrictions that the question may arise as whether they really have an entire freedom in that private law making. To be very specific, does parties’ autonomy fully shape the content of the *lex mercatoria*, within the framework of an international commercial contract? In fact,

the modern *lex mercatoria* represents a veritable legal order different from and independent of the various domestic laws on the one side and public international law on the other, [and] what ultimately matters is the extent to which States nowadays permit parties to an international commercial contract, by referring to the

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<sup>14</sup> Michael J. Tribelcock, *The Limits of Freedom of Contract*, Cambridge, Massachusetts and London, Harvard University Press, 1997 [Tribelcock]; Niva Elkin-Koren, “Copyright Policy and the Limits of Freedom of Contract” (1997) 12: 1 *Berkeley Technology Law Journal* 93.

<sup>15</sup> Maximiliano Marzetti, “Law, Economics and Politics of University-Industry Technology Transfer in Argentina” in WIPO and WTO, *Research Papers from the WIPO-WTO Colloquium for Teachers of Intellectual Property*, Geneva, Compilation of the WIPO Academy and the WTO Intellectual Property Division, 2011, 1 at p 6.

<sup>16</sup> Tribelcock, *supra* footnote n° 14 at pp 16-17.

<sup>17</sup> Emmanuel Sidibi Darankoum, “La protection du contrat dans l’avant-projet d’Acte uniforme OHADA sur le droit des contrats: conclusion, exécution et remèdes en cas d’inexécution” [The Protection of Contracts in the Drafted Uniform Act of OHADA on the Law of Contract: Conclusion, Performance and Remedies for non-Performance] (2008) 1-2 *Uniform Law Review* 229 at p 246 [Darankoum]. See also, Henri Battifol, “La loi appropriée au contrat” [The Appropriate Applicable Law to Contracts], in *Le droit des relations économiques internationales. Études offertes à Berthold Goldman*, Paris, Librairies techniques, 1982, 1 at p 15.

<sup>18</sup> Albert A. Erheinzweig, “Choice of Law: Current Doctrine and True Rules” (1961) 49:2 *California Law Review* 240 at pp 240-241.

*lex mercatoria*, to escape the application of any domestic law<sup>19</sup>.

The importance of the question lies in the fact that international commercial contracts do not suddenly and miraculously spring out, regardless of the interests of governments and of the immutable rules and public regulatory power of States. Notwithstanding, this research is just aimed at finding out if the public regulatory framework of international business (II) really allows business parties' private law making in essence (I).

### **I. The Essence of the *lex mercatoria***

The Hague Principles on Choice of Law are not binding principles, though they may guide countries in reforming their domestic law on choice of law or implementing existing international instruments thereof. The nonbinding force of these Principles shall avoid any conflict with other international legal instruments, which have the same harmonization goal. However, it is unprecedented within the framework of the Hague Conference on Private International Law that nonbinding instrument be negotiated, and one may wonder if the Hague Conference is testing the ground. Undoubtedly the Hague Principles can be referred to as soft law, and one may expect changes over time. In fact, “soft legal obligations are those international obligations that, while not legally binding themselves, are created with the expectation that they will be given some indirect legal effect through related binding obligations under either international or domestic law”<sup>20</sup>. Specifically, “Soft international law pervades the international regulatory landscape, establishing international standards in areas such as banking, trade, arms control, the environment, and human rights”<sup>21</sup>, yet the role of soft law in international law and the international regulatory landscape is under-theorized<sup>22</sup> and the non-binding force of the current Hague Principles shows that “the field of international commercial contracts [...] is no longer a monopoly of national legal systems but, rather, a formal and informal unification of laws, which has made remarkable progress”<sup>23</sup>. Generally, progresses regarding international

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<sup>19</sup> Michael Joachim Bonell, “The UNIDROIT Principles and Transnational Law” (2000) 2 *Uniform Law Review* 199 at p 199.

<sup>20</sup> Timothy Meyer, “Soft Law as Delegation” (2009) 32:3 *Fordham International Law Journal* 888 at p 890 [Meyer].

<sup>21</sup> *Ibid.*, at p 889.

<sup>22</sup> *Ibid* at pp 889-890.

<sup>23</sup> Oliver Remien, “Public Law and Public Policy in International Commercial Contracts and the UNIDROIT Principles of International Commercial Contracts 2010: A Brief Outline” (2013) 18:2 *Uniform Law Review* 262 at p

commercial contracts are meant to protect the interests of business parties engaged in such contracts.

### **A. The Interest of International Business Parties in the *lex mercatoria***

At the beginning of business parties' private law making option in the framework of international contracts, lies a binding agreement between those parties, that is to say a promise or a set of promises, which performance the law may enforce or provides for remedies when those promises are not fulfilled<sup>24</sup>. For this reason, "legal practitioners speak in terms of particular doctrines, or more generally about morality and obligation, or consent and freedom of contract, law-and-economics theories frequently refer only, or primarily, to efficiency"<sup>25</sup>. In fact, economic theories tend to focus on the outcomes of the contract, whereas deontological theories focus on doctrine<sup>26</sup>. The reference to the notion of "efficiency" means the law encourages the contracting parties to perform their obligations, and if a party fails to comply with its obligations, that party must compensate the other one for loss of lawful expectations. However, "a deeper understanding of the nature of contract has emerged as the legal-rule emphasis associated with the study of discrete contracting has given way to a more general concern with the contractual purposes to be served"<sup>27</sup>. In fact, a contract is generally viewed as the best way to protect some major interests. On one hand, and from a market perspective, the contracting parties very often set out efficient clauses, because they are in the best position to determine their own interests<sup>28</sup>, what, to a large extent, allows courts to "enforce contract clauses that explicitly provide for specific performance in the event of breach"<sup>29</sup>. In other words, contracting contributes to social

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<sup>24</sup> Charles Fried, "The Convergence of Contract and Promise" (2007) 120:1 *Harvard Law Review Forum* 1 at pp 1-9.

<sup>25</sup> Mark D. White, *Theoretical Foundations of Law and Economics*, Cambridge, Cambridge University Press, 2009 at p 205.

<sup>26</sup> Jody S. Kraus, "Philosophy of Contract Law" in Jules Coleman and Scott Shapiro, eds, *The Oxford Handbook of Jurisprudence and Philosophy of Law*, Oxford, Oxford University Press, 2002 at pp 694-696.

<sup>27</sup> Paul Burrows and Cento G. Veljanovski, *The Economic Approach to Law*, London, Butterworth & Co Ltd, 1981 at p 42.

<sup>28</sup> Denis Mazeaud, "Le droit des obligations et l'efficacité économique" in Sylvain Bollée, Yves-Marie Laithier and Cécile Pérès, *L'efficacité économique en droit*, Paris, Economica, 2010, 67 at p 78.

<sup>29</sup> Alan Schwartz, "The Case for Specific Performance" in Richard A. Posner and Francesco Parisi, eds, *Economic Foundations of Private Law*, Cheltenham, Edward Elgar Publishing Ltd, 2002, 271 at p 271.

co-ordination, in that a “contract is ‘one of the great liberating ideas in human history’ enabling persons ‘to interact in a mutually advantageous and therefore voluntarily acceptable manner’”<sup>30</sup>. On the other hand, a contract defends the interest of a specific domestic law. Whereas the contracting parties’ interests are based on the outcomes of their agreement, it is the interest of a country, which has a strong connection with either of the contracting parties or the place of the performance of that contract that its law be applicable. In this respect, the parties’ agreement shall always comply with a specific domestic law, even in case of conflict of laws<sup>31</sup>. As a matter of fact, contracting parties have the right to choose an applicable law to their contract, where the case relates to international sale of goods<sup>32</sup>. In other words, “a contract is binding upon the parties and has not only the legal effects intended by the parties, but also the effects based on statute, usage or the demands of good faith taking into account [its] nature”<sup>33</sup>. For example,

the statutory or regulatory provisions of the Member States [of the European Community] which directly or indirectly determine the terms of consumer contracts are presumed not to contain unfair terms. This explanation underscores the rationale behind the judicial review of standard contract terms: Since such terms are drafted and imposed by one of the parties in view of a multitude of similar transactions, whereas the other party, seeking a single bargain, usually has no sufficient incentive to understand or to negotiate the terms, there is a stark risk of one-sidedness which judicial review is intended to cure<sup>34</sup>.

The business parties’ freedom to choose the applicable law to their international contract may occur at any time during the process of contracting, the whole promise behind that freedom being the need to facilitate the flow of wealth, skills and people across State lines in a fair and orderly manner. In fact in international commercial contracts, “the parties are seeking to create a business relationship, a complex set of interactions characterized by cooperation and a maximum degree of

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<sup>30</sup> Roger Brownsword, “Contract Law, Co-operation, and Good Faith: The Movement from Static to Dynamic Market-Individualism” in Simon Deakin and Jonathan Michie, *Contracts, Co-operation, and Competition: Studies in Economics Management, and Law*, Oxford / New York, Oxford University Press, 1997, 255 at p 255.

<sup>31</sup> *United Nations Convention on the Contracts for the International Sale of Goods*, Vienna, 11 April 1980, Art. (1) b).

<sup>32</sup> *Convention on the Law Applicable to International Sales of Goods*, 15 June 1955, Art. 2.

<sup>33</sup> Geoffrey Samuel and Jac Rinker, *Law of Obligations and Legal Remedies*, London, Cavendish Publishing Ltd, 1996 at p 204.

<sup>34</sup> Jürgen Basedow, “The Optional Instrument of European Contract Law: Opting-in Through Standard Terms – A Reply to Simon Whittaker” (2012) 8:1 *European Review of Contract Law* 82 at 83.

trust”<sup>35</sup>. This flexibility, which is at stake in the creation of that complex business relationship, is however weakened by the inexistence of a fully specific international contract law.

## **B. Inexistence of the *lex mercatoria* in the form of Fully-Defined Legal Rules**

A contract, whether national or international, is generally viewed as its parties’ law, insofar as they freely enter into and are bound by it<sup>36</sup>. Consequently, where those parties have the option to create their own law, the *lex mercatoria*, in the framework of an international commercial contract, that law ought to be given full consideration, as it reflects the parties’ freedom. Unfortunately, any search for the *lex mercatoria* falls within what Ole Lando, years ago, meant by its fragmented sources listed as follow:

- The rules of public international law on treaties [applicable] to contracts between a government enterprise and a private party. Several of the provisions of the Vienna Convention on Treaties of 13 May 1969;
- The uniform laws which have been adopted for international trade, an example is the Uniform Law on the Sale of Goods of 1964 which has been ratified by some European countries; the Convention on Contract for the International Sale of Goods of 1980;
- The general principles of law recognised by the commercial nations, *inter alia*, the *pacta sunt servanda* rule and the principle that a party may terminate a contract in the case of a substantial breach by the other party;
- Adopted resolutions, recommendations and codes of conduct, by the UN, UNCTAD, the OECD, on matters relating to contracts;
- The customs and usages of international trade applicable both to domestic and to international contracts, the ‘codified’ customs, for instance the INCOTERMS, the Uniform Customs and Practices for Documentary Credits and the newly adopted force majeure and hardship clauses issued by the ICC;
- The General Conditions for the Supply of Plant and Machinery for Export issued by the Economic Commission for Europe in 1953;
- Reporting of arbitral awards, which unfortunately are kept secret even from the members of the trade<sup>37</sup>.

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<sup>35</sup> Jeswald W. Salacuse, *The Three Laws of International Investment: National, Contractual, and International Frameworks for Foreign Capital*, Oxford, Oxford University Press, 2013 at p 198 [Salacuse].

<sup>36</sup> Hans Wehberg, “Pacta Sunt Servanda” (1959) 53:4 *American Journal of International Law* 775.

<sup>37</sup> Ole Lando, “The *Lex Mercatoria* in International Commercial Arbitration” (1985) 34:4 *International and*

Considering the principle of multiplicity of its sources, there is a tendency to not ascertain the *lex mercatoria* as law<sup>38</sup>, a position, which seems to ignore that the *lex mercatoria* has always been and will certainly continue to be under construction. In other words, the *lex mercatoria* “is still a diffuse and fragmented body of law [and] will grow with the growth of uniform laws, international trade customs and usages, and with the increasing number of reported awards, but it will never reach the level of the copious and well-organised national legal systems”<sup>39</sup>. Hence, States are constantly in search of ways and means to make the merchant law those ‘copious and well-organised legal systems’, and that search requires public regulations.

## **II. Public Law Making to Regulate the *lex mercatoria***

International commercial contracts are dependent on the supreme and independent authority of the nation State within its own territory, and, consequently a State has exclusive jurisdiction to prescribe, enforce and adjudicate laws for its territory and population, including business doers<sup>40</sup>. The problem of public regulation of international commercial contracts may be grounded on interest groups seeking for perfectly drafted legislations and not just scattered measures to eliminate some evasive proposed laws or to prevent slippage regulatory frameworks. At times, regulations forbid or mandate certain contractual terms. For example, in a well-argued decision, the French Court of Cassation ruled that to avoid solutions that might be irreconcilable, two different actions brought by the same claimant against a defendant, that raise the same question can and must be heard at the same time by the same Court, regardless of the fact that different domestic laws may apply to each case<sup>41</sup>. In other words, the aim of regulations is to come to a perfectly harmonized solution. Additionally, “the rules governing the private international law order [...] cover a broad range of interrelated topics, including the jurisdiction of the court and

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*Comparative Law Quarterly* 747 at pp 749-751 [Lando].

<sup>38</sup> Louis Marquis, *International Uniform Commercial Law: Toward a Progressive Consciousness*, Hampshire, Ashgate Publishing Limited, 2005 at p 98.

<sup>39</sup> Lando, *supra*, footnote n° 37 at p 752.

<sup>40</sup> Salacuse *supra*, footnote n° 35 at p 76.

<sup>41</sup> Cass Civ. 1<sup>ère</sup>, *La société Banque privée Edmond de Rothschild Europe v. Mme X*, Case n° 983 of 26 Sept. 2012.

the discretionary powers of the court to eliminate inappropriate fora”<sup>42</sup>.

### **A. Public Limitations to a Full Enforcement of the *lex mercatoria***

First of all, it must be well understood that the ability business parties have to choose a law that applies to their international commercial contract is restricted to the substantive law. However, the question of whether business parties may expressly choose that substantive law depends on how much autonomy their domestic law provides for regarding the choice of that substantive law<sup>43</sup>. In fact, the fundamental promise that patterns business parties’ freedom to make their own law is to seek a high degree of legal certainty, and it is essential that courts give full weight to the desirability of holding contracting parties to their agreements<sup>44</sup>. In this respect, the unfruitful proposal for a Common European Sale Law (CESL), which was meant to allow “Traders [...] to apply the Common European Sales Law in all their cross-border dealings within the European Union instead of having to adapt to different national contract laws, provided that the other party to the contract agrees”<sup>45</sup> might have been of great interest. However, that argument put forward in the proposal was said not sufficient enough, because

the scope of the CESL is limited to certain parties (only consumers and SMEs), to certain relationships (only cross-border sales contracts) and certain topics (legal personality, lack of capacity, illegality, non-discrimination, representation, assignment and transfer of ownership) are still completely governed by the applicable national law<sup>46</sup>.

The main limits to business parties engaged in an international commercial contract are their contractual ability and other conditions required for the validity of the contract, which are matters generally governed by their domestic law. For example, in Canada “every patent issued for an invention is assignable in law, either as to the whole interest or as to any part thereof, by

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<sup>42</sup> *Spar Aerospace Ltd. v. American Mobile Satellite Corp.*, [2002] 4 S.C.R. 205, 2002 SCC 78 at p 207.

<sup>43</sup> Ingeborg Schwenzer, Christiana Fountoulakis and Mariel Dimsey, eds, *International Sale Law*, New York, Routledge, 2007 at p 33.

<sup>44</sup> *Z.I. Pompey Industrie v. ECU-Line N.V.*, [2003] 1 S.C.R. 450, 2003 SCC 27 at p 463.

<sup>45</sup> European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final, Brussels, 2011 at p 4. On December 16<sup>th</sup>, 2014, when presenting its Work Programme for 2015, the EU Commission listed the Proposal as withdrawn item on the ground that a “Modified proposal in order to fully unleash the potential of e-commerce in the Digital Single Market” will follow.

<sup>46</sup> Smits, *supra* footnote n° 6 at p 61. See also European Commission, *Proposal for a Regulation of the European Parliament and of the Council on a Common European Sales Law*, COM (2011) 635 final, Consideration 27.

an instrument in writing”<sup>47</sup> and so, the assignment of a patent is void where it is not made in writing. In general, the *lex protectionis* principle, which is a specific case underlying the *lex situs* rule, applies to the protection and exploitation of intellectual property rights<sup>48</sup>, what, somehow limits business parties’ freedom to choose a different applicable law. Similarly, in France, the law governing the transfer of real property is dependent upon and varies with the *lex rei sitae*<sup>49</sup>, what also restricts business parties’ autonomy to choose a different law. Clearly, parties to an international business contract must be very careful when choosing the applicable law to their deal. Sometimes, the chosen law may not cover certain aspects of the international commercial contract and, therefore, the binding force of that chosen law is strewn with pitfalls. In this regard, the *Convention on International Sale of Goods* (CISG), which is primarily meant to apply to international commercial contracts, provides that it does not regulate the validity of sale of goods except otherwise clearly mentioned<sup>50</sup>. On this basis, an American court’s ruling stated: “under the CISG, the validity of an alleged contract is decided under domestic law. By validity, CISG refers to any issue by which the ‘domestic law would render the contract void, voidable, unenforceable’”<sup>51</sup>. In other words, when choosing the CISG as a governing law, parties must think of gap filling.

Above all, though contracting parties may agree on any law to compromise, sometimes, because of the importance of the deal at issue, a dispute arising over international commercial contracts shows another limit to parties’ law. In fact, courts and arbitral tribunals have only enforced contracting parties’ law on the condition that that law be significantly or reasonably connected to, either the parties, or their contract<sup>52</sup>. Generally, determining criteria of the connectedness of contracting parties’ law include the location of the parties’ business residence, the place where the contract is concluded (what may be difficult with electronic contracts), and the place of

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<sup>47</sup> *Patent Act* (R.S.C., 1985, c. P-4), Art. 50 (1).

<sup>48</sup> Catherine Walsh, “Mobilisation of Intellectual Property in Secured Financing: Managing the Intersection between Territorialism and Globalism”, Communication at the *UNCITRAL Second International Colloquium on Secured Transactions Security Interests in Intellectual Property Rights*, Vienna International Center, January, 18-19<sup>th</sup>, 2007 at p 7.

<sup>49</sup> *Code civil of France*, 1804 as amended and in force in 2016, Art. 3.

<sup>50</sup> *CISG*, Art. 4.

<sup>51</sup> *Geneva Pharmaceuticals Technology Corp. v. Barr Laboratories, Inc.*, 201 F.Supp.2d S.D.N.Y. (2002) at p 282, reversed on other grounds, 386 F.3d 485 (2004).

<sup>52</sup> Dimatteo, *supra* footnote n° 3 at p 68.

performance of its fundamental obligations<sup>53</sup>. At times, the concept of “the interest of justice”<sup>54</sup>, which is the primarily responsibility of courts, may lead to reject the contracting parties’ law. In the United States of America,

Courts do not always enforce choice of law clauses. For example, contrary to the new trend in other countries, American courts continue to require some ‘significant connection’ between the contract and the chosen state. Although in the vast majority of cases this requirement is easily met, sometimes it is not. *Contour Design, Inc. v. Chance Mold Steel Co., Ltd.*<sup>55</sup>, is one of those rare cases. The court refused to apply the chosen law of Colorado because ‘the only alleged connection with Colorado is that the lawyer who drafted the [contract] was in Colorado’.

Moreover, and not as infrequently, Section 187 of the Restatement (Second), which is followed in most states, a choice-of-law clause will not be enforced if the chosen law contravenes a fundamental policy of a state that has a greater interest in applying its law and whose law would have been applicable in the absence of the clause<sup>56</sup>.

In fact, the Section 187 of that Restatement provides that:

(1) The law of the State chosen by the parties to govern their contractual rights and duties will be applied if the particular issue is one which the parties could have resolved by an explicit provision in their agreement directed to that issue.

(2) The law of the state chosen by the parties to govern their contractual rights and duties will be applied, even if the particular issue is one which the parties could not have resolved by an explicit provision in their agreement directed to that issue, unless either

(a) The chosen state has no substantial relationship to the parties or the transaction and there is no other reasonable basis for the parties choice, or

(b) Application of the law of the chosen state would be contrary to a fundamental policy of a state which has a materially greater interest than the chosen state in the determination of the particular issue and which, under the rule of § 188, would be the

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<sup>53</sup> Dimatteo, *supra* footnote n° 3 at p 70.

<sup>54</sup> The concept has not been given a full definition, neither in scholarly literature, nor in legislation, and yet Courts refer to it. For example, see *Miramichi Pulp & Paper Inc. v. Cdn. Pacific Bulk Ship Services Ltd.* (1992), 58 F.T.R. 81 (T.D.) “In adopting Article 8 of the *Commercial Arbitration Act* [of Canada], Parliament imposed a mandatory duty on the Court to stay judicial proceedings and refer parties to arbitration where their agreement so provides. Art. 8 should be given a strict interpretation. However, it does not deprive the Court of discretion to stay proceedings pursuant to Art. 50 of the *Federal Court Act* where it is in **the interest of justice** to do so”.

<sup>55</sup> 693 F.3d 102 (1st Cir. 2012).

<sup>56</sup> Symeon C, Symeonides, “Choice of Law in the American Courts in 2012: Twenty-Six Annual Survey” (2013) *American Journal of Comparative Law* 217 at p 242.

state of the applicable law in the absence of an effective choice of law by the parties.

(3) In the absence of a contrary indication of intention, the reference is to the local law of the state of the chosen law<sup>57</sup>.

In brief, “in all jurisdictions [...], the application of a [choice of] law can be rejected if it is in conflict with some important provisions that the forum has to validate”<sup>58</sup>. To comply with some of these important provisions of the forum, States have joined in efforts to help shaping, indirectly, the content of *lex mercatoria*.

## **B. Public Law Making to Shape the Content of the *lex mercatoria***

The international trading system is very dynamic; so are its players in finding ways to create a secured and sustained business climate. In fact, globalization, in enhancing the role of regulation, has, somewhat, changed the paradigm of business parties’ freedom to make their own law, yet without marginalizing it.

The public law making to regulate the *lex mercatoria* is aimed at “preventing contracting parties from avoiding statutory compliance with a choice of law clause [because] when no precedent controls, applicable judicial standards leave resolution of [a case] considerably uncertain”<sup>59</sup>. The situation may harden in the case of an existing international trade convention that business parties choose as applying to their international commercial contract, especially in a country that requires the implementation of international conventions by a specific legislation before their enforceability, when that implementation legislation is not sufficiently clear to allow courts to apply the convention at issue to the parties’ contract<sup>60</sup>. Such a situation may lead to a grievous legal vacuum, while it is highly recommended that litigations regarding international commercial contracts be predictable for the sake of parties’ interests.

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<sup>57</sup> *Restatement (Second) of Conflict of Laws*, Section 187. See in the same way U.C.C. § 1–301.

<sup>58</sup> Tamás Dezső Czigler, “Choice-of-Law in the Internet Age—US and European Rules” (2012) 53:3 *Acta Juridica Hungarica* 192 at p 196.

<sup>59</sup> Erin Ann O’Hara, “Opting out of Regulation: A Public Choice Analysis of Contractual Choice of Law” (2000) 53 *Vanderbilt Law Review* 1551 at p 1556.

<sup>60</sup> Céline Lévesque, “Les rôles et responsabilités des Provinces canadiennes dans le cadre de procédures d’arbitrage entre investisseurs et États fondées sur des traités économiques” [The Roles and Responsibilities of Canadian Provinces in Economic Treaties Based on Arbitral Procedures between Investors and States] (2015) 18 :1 *Quebec Journal of International Law* 107 at pp 112-113.

In trying to shape international business parties' ability to make their law, States are bound by their statutory rules, what, in turn contributes to manage the risks associated to the parties' private law making. Furthermore, those parties and their lawyers can be aware of the applicable law in foreign countries. For example, it has been pointed out a perpetual uncertainty about Brazilian conflict of laws because of lack of communication between Brazilian legal professionals and their colleagues in the United States of America and, because lawyers at both sides close their eyes on the legal landscape in either country, while exports from the United States of America to Brazil, and vice-versa, amounted, in 2004, respectively US\$14 billion and US\$20billion, with Brazil being the eleventh destination for the United States' exports<sup>61</sup>. Similarly, bilateral trade between Canada and Chile has been increasing over the past few years, as shown in this report:

**Bilateral Product Trade<sup>62</sup>**  
**Canada – Chile (amounts in Can \$)**

<b>Year</b>	<b>Exports</b>	<b>Imports</b>
<b>2010</b>	\$587,467,124	\$1,872,339,204
<b>2011</b>	\$818,770,832	\$1,911,384,912
<b>2012</b>	\$789,366,286	\$1,677,180,940
<b>2013</b>	\$799,770,517	\$1,757,012,405
<b>2014</b>	\$1,135,855,250	\$1,724,319,218

Yet, very few are Canadian business doers and even lawyers who know Chilean conflict of laws, and vice-versa. In any case,

Whether working for global or local organizations, lawyers today are increasingly faced with the prospect of working with colleagues and competitors who are diverse in terms of nationality, education and training, and with clients whose problems may

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<sup>61</sup> Dana Stringer, "Choice of Law and Choice of Forum in Brazilian International Commercial Contracts: Party Autonomy, International Jurisdiction, and the Emerging Third Way – Note" (2006) 44:3 *Columbia Journal of Transnational Law* 959 at p 962.

<sup>62</sup>Government of Canada, Embassy of Canada in Chile, *Factsheet: Chile*. Accessible at [http://www.canadainternational.gc.ca/chile-chili/bilateral\\_relations\\_bilaterales/fs-chile-chili-fd.aspx?lang=eng](http://www.canadainternational.gc.ca/chile-chili/bilateral_relations_bilaterales/fs-chile-chili-fd.aspx?lang=eng).

be as locally-focused as a Chicago zoning matter or as distant as the acquisition of one non-U.S. company by another<sup>63</sup>.

For this reason, public law making is necessary to shape the content of the *lex mercatoria*, in order to secure business and prosperity. In fact, there are too many nuances from a national law to one another, and to ensure their sovereignty in regulating economic activities within their territory, States have vastly reduced business parties' freedom in law making, and so there is "a shift from private ordering to public ordering"<sup>64</sup> of the *lex mercatoria*, in many ways. First, the *United Nations Convention on International Sale of Goods* has widely delineated some abilities of business parties to international commercial contracts in making their own law and, secondly, some alternatives under way can help shape those parties' freedom.

### **1. The CISG as Delineating the Scope of the *lex mercatoria***

In the late 1960, the growth in international trade between nations, in a relatively scattered international legal framework, led to negotiate and conclude the *United Nations Convention on International Sale of Goods* under the auspices of the United Nations Commission on International Trade. The promise, then, was to work for the harmonisation of different nations' self-regulatory policy of international commercial contracts with the aim of shifting that harmonisation effort from the capacity of UNIDROIT. So, having many United Nations member States parties to the *CISG* shall help overcome legal fragmentation and, hence, avoid the recourse to rules of private international law for contracts falling under its scope. However, the literature, generally suggests that: "In principle, a Convention decides itself to which questions it applies, by delimiting its subject and by the contents of its various provisions. [...] On what questions will the Convention prevail, and on what subjects can or should national law be applied?"<sup>65</sup>. As a matter of fact, the *CISG* does not apply just because the commercial contracts at issue are international. The *Convention* expressly provides two ways in which it may apply to such contracts. Either, the business doers have their business places in different States that are States

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<sup>63</sup> Carole Silver, David Van Zandt and Nicole De Bruin, "Globalization and the Business of the Law: Lessons for Legal Education" (2007-2008) 28 *Northwestern Journal of International Law & Business* 399 at p 399.

<sup>64</sup> Salacuse *supra* footnote n° 35 at p 64.

<sup>65</sup> Jan Hellner, "The Law of Sales and the Law of Contract: Some Remarks on the United Nations Convention on International Sales" in Francis Rose, *Lex Mercatoria: Essays on International Commercial Law in Honour of Francis Reynolds*, London, LLP Professional Publishing, 2000, 173 at p 174.

parties to the *Convention*<sup>66</sup>, or the rules of private international law of a contracting State indicates the application of the *Convention*, when one of the business parties does not have his/her place of business in a contracting State of the *CISG*<sup>67</sup>. In this latter case, however, the applicability of the *CISG* can be denied, when the business party of the contracting State to the *CISG* has made a reservation of non-applicability of the convention in a situation of that kind<sup>68</sup>. Whichever the case may be, the business parties are still free to choose, in whole or in part, or exclude that the *CISG* applies to their international commercial contract.

The uncertainty in the applicability of the *CISG* may complicate the ruling of a case, when a dispute arises from an international commercial contract, and “albeit the current dominance of economic approaches to law, [...], the concept of uniform law continues to be connected with more general normative goals”<sup>69</sup>. Notwithstanding, outside the *CISG* framework, which is aimed at facilitating the global trading system, new public regulations are under way to shape the merchant law.

## **2. New Public Law Alternatives to Shape the Content of the *lex mercatoria***

Over the past few years, significant initiatives have been taken, or are under way, to modernize the regime of international commercial contracts in different locations. For example, France has recently amended its law of obligations in order for it to meet legal certainty and be applicable to commercial contracts that fall within the sphere of international law<sup>70</sup>. With the World Bank’s report on *Doing Business*<sup>71</sup> as guidelines, the amendment has significantly modernized the French law of contract and made it economically attractive to international trade<sup>72</sup>. Similarly, the

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<sup>66</sup> *CISG*, Art. 1(1) (a).

<sup>67</sup> *CISG*, Art. 1(1) (b).

<sup>68</sup> *CISG*, Art. 95.

<sup>69</sup> Graf-Peter Calliess and Insa Buchmann, “Global Commercial Law between Unity, Pluralism, and Competition: the Case of the *CISG*” (2016) 63 *Zentra Working Papers in Transnational Studies* 1 at p 5.

<sup>70</sup> See the objectives put forward in the Ordonnance n° 2016-131 portant réforme du droit des contrats, du régime général et de la preuve des obligations of February 10<sup>th</sup>, 2016, entered into force on October 1<sup>st</sup> 2016.

<sup>71</sup> World Bank, *Doing Business: Understanding Regulations for Small and Medium-Size Enterprises - Comparing Business Regulations for Domestic Firms in 189 Economies*, 11<sup>th</sup> edition, Washington, DC, World Bank Group, 2014.

<sup>72</sup> See for some examples, *Civil Code* of France as the results of the Ordonnance n° 2016-131, Arts. 1102, 1103 and 1104; Arts. 1120, 1123, 1132, 1133, 1136, 1138, 1139 and 1141; Art. 1169; Art. 1230.

prospective Uniform Act on contract law of the OHADA<sup>73</sup> is of remarkable interest. Essentially based on the UNIDROIT Principles, the OHADA Uniform Act on contract law<sup>74</sup> may offer a more predictable framework in the realm of international commercial contracts within the territories of the Organization. According to some well-known scholars, the OHADA Uniform Act on contract law “constitutes common law of contracts and the parties to a contract of sale coming from the States Parties to OHADA can invoke it, if there are some shortcomings at the time of negotiation, conclusion or execution of the contract of sale”<sup>75</sup>. More generally, it is believed that the OHADA legal framework offers interesting flexibilities with regard to sale contracts as, for example, it offers to any contracting party the option to terminate the contract where the other party fails to perform his/her duty<sup>76</sup>; the scholarly literature refers this option to as the doctrine of ‘unnecessary need’<sup>77</sup>. The doctrine has its origin in a Roman Law adage that says: ‘*exceptio non adimpleti contractus*’, which means, in a reciprocal contract, ‘no performance is due to one who has not himself performed’. Actually, the ‘*exceptio non adimpleti contractus*’ is a defensive exception that just permits to suspend performance of a contractual obligation. The newly amended French law of obligations, which allows any contracting party facing a grievous non-performance to suspend execution of their obligation<sup>78</sup>, provides an example of that exception. However, that newly amended French law of obligations seems to have created a questionable wiggle room by allowing any party not-yet facing a grievous non-

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<sup>73</sup> OHADA (Organization for the Harmonization of Business Law in Africa) is an integrated transnational juridical experience conceived and created by the Treaty of Port-Louis (Mauritius) on October 17<sup>th</sup>, 1993 and revised in Quebec City (Canada) on October 17<sup>th</sup> 2008. According to Art. 53 of that Treaty of Port-Louis, OHADA is opened for adhesion to African Union and non African Union States alike. The Treaty has made the Government of Senegal its Depositary Government, which has the responsibility to register the Treaty with the African Union and with the United Nations in accordance with Art. 102 of the Charter of the United Nations. To-date, the OHADA is made up of the following seventeen African States: Benin, Burkina Faso, Cameroon, Central African Republic, Chad, Comoros, Côte d’Ivoire, Democratic Republic of Congo, Equatorial Guinea, Gabon, Guinea, Guinea-Bissau, Mali, Niger, Republic of Congo, Senegal and Togo.

<sup>74</sup> See for example, Arts. 1/2 to 1/11; Arts. 3/1 to 3/22; Arts. 6/1 to 6/24 and Arts. 7/1 to 7/31 of the OHADA Uniform Act on Contract Law as preliminarily drafted and submitted to the OHADA Permanent Secretariat, September 2004.

<sup>75</sup> Anca Lazar and Petru Dan Joandrea Moga, *Rules Applicable to the International Sale of Goods Developed in the OHADA*, accessible at <http://www.internationallawreview.eu/fisiere/pdf/rules-Ancapdf.pdf> at p 5.

<sup>76</sup> Rodrigue Ebata, *La résolution du contrat de vente en droit OHADA: d’une réforme à une autre*, Master of Laws’ Thesis, Université de Montreal, Faculty of Law, Montreal, 2012.

<sup>77</sup> Stephan Eberhard, *Les sanctions de l’inexécution du contrat et les Principes UNIDROIT [Penalties for Non-Performance of Contracts and the UNIDROIT Principles]* Lausanne, CEDIDAC, 2005 at p 140.

<sup>78</sup> *Civil Code of France*, Art. 1219.

performance to suspend execution of their obligation and give a notice to the other party, if it is certain that the latter will not be able to perform on time<sup>79</sup>. This specific exception to not perform may be interpreted as denying the notion of good faith, which is the cornerstone of contracting<sup>80</sup>. In fact, a twofold misunderstanding lies in this exception. For one, it seems to ignore the reality of unforeseen circumstances that may lead to not perform in due time, what does not render the performance impossible. For another, the exception may lead to a never-ending circle, which enables, legally, both contracting parties to await the performance of the other before performing themselves. As a recall, contracting parties, more than anyone else, even the legislator, have a better understanding of their interests<sup>81</sup>. Therefore, they must not lightly rescue to that legal wiggle room and faithfully perform their obligations. In other words, an unsatisfied contracting party shall exercise his/her right to such a hard exception only where evidence shows a definite inability of the other to perform and, similarly, when deciding to terminate the contract.

Apart from these significant States' endeavours, scholars have been on verge to call for the modernization of international trade legal framework. In this respect and having extensively researched the similarities between the UNIDROIT Principles and several national laws, Eckart Brödermann concludes:

the UNIDROIT Principles are often helpful in overcoming legal barriers in contract negotiations. They are truly neutral and give no advantage to either party. Their choice avoids the – often costly – research of a State law, which could be chosen as a neutral law. The choice of the UNIDROIT Principles is more reasoned than the choice of a neutral State law chosen by happenstance because such choice of random national law always carries the risk of unexpected consequences. Furthermore, in the majority of cases the parties will find rules of conduct as well as terms in the UNIDROIT Principles with which they are familiar from their national laws<sup>82</sup>.

In other words, the UNIDROIT Principles can usefully serve as guides for States in designing or reforming their legislation to regulate international trade and business parties may interestingly abide by those principles.

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<sup>79</sup> *Civil Code* of France, Art. 1220.

<sup>80</sup> Steven J. Burton, “Good Faith Performance of a Contract within Article 2 of the Uniform Commercial Code” (1981-1982) *67 Iowa Law Review* 1.

<sup>81</sup> See arguments developed above and referenced under footnotes n° 15 and 16.

<sup>82</sup> Eckart Brödermann, “The Impact of the UNIDROIT Principles on International Contract and Arbitration Practice – the Experience of a German Lawyer” (2011) *Uniform Law Review* 589 at p 592 [Brödermann].

## Conclusion

The problem posed by globalization on private international law has been at the heart of the literature<sup>83</sup> for many years, and it is still of great interest in terms of ways to properly shape and harmonize the different States' way to regulate international trade, especially business parties' contractual private law making. In the absence of an international legislator entrusted with the responsibility to enact a law applicable to international commercial contracts, it is suggested, with good reason that the applicable law to international commercial contracts shall be freely chosen by the contracting business parties, that is to say the *lex mercatoria* must prevail.

However, the business parties' autonomy is far from being an entire freedom to design and create a Stateless law. Should such an entire freedom be at stake, it would undermine the ability of States to regulate the international trading system. In fact, in this ever-regulatory era of international trade, public law making is truly rolling back business parties' private law making. As a result, the legal framework of international commercial contacts is fair and its litigations more predictable. In this regard, "the UNIDROIT Principles provide a common ground between different national legal orders, they provide a good reference point (*tertium comparationis*) for dialogue between lawyers from different jurisdictions"<sup>84</sup>. In fact, those principles represent a new approach in the field of international commercial contract law and are a great attempt to remedy many of the deficiencies arising from the law applicable to such contracts; unfortunately they are not intended as contractual model clauses for any particular international commercial contract.

In any case, the efforts of both the Institute UNIDROIT and the Hague Conference on Private International Law in tending to harmonize private international law, and the coordination of the United Nations Commission on International Trade Law in "preparing and promoting the use and adoption of legislative and non-legislative instruments in [...] key areas of commercial

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<sup>83</sup> See for example: Michael Jochim Bonell, "The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?"(1996) *Uniform Law Review* 229; Michael Jochim Bonell, "The UNIDROIT Principles of International Commercial Contracts? Towards a new *lex mercatoria*?" (1997) *Revue de droit des affaires internationales*145; Jürgen Basedow, "Worldwide Harmonisation of Private Law and Regional Economic Integration: General Report" (2003) 1-2 *Uniform Law Review* 32; Spiros V. Bazinas, "Harmonisation of International and Regional Trade Law: the UNCITRAL Experience" (2003) 1-2 *Uniform Law Review* 53; Camilla Baasch-Andersen, "Defining Uniformity in Law" (2007) XII: 1 *Uniform Law Review* 5.

<sup>84</sup> Brödermann *supra* footnote n° 82 at p 611.

law”<sup>85</sup> cannot replace the entire responsibility of States to stabilize and facilitate international trade by securing commercial transactions. When there are guidelines to be had somewhere it is important to take them on board. In other words, States, unlike their membership status to these organizations, have a lot to gain by taking on board the works of the said organizations when enacting or amending their legislation. Like Emmanuel Darankoum has suggested, there are some legal categories, such as contract law, which universal scope is indisputable regardless of differences in theory or practice dictated by the times, by the legal system in force, or indeed by necessity<sup>86</sup>. As a vehicle of meanings, each legal system is aimed to maintain some connectivity with other legal systems, support economic growth while strengthening the power of its State of fabric.

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<sup>85</sup> UNCITRAL, *A Guide to UNCITRAL: Basic Facts about the United Nations Commission on International Trade Law*, Vienna, United Nations Publication, 2013 at p 1.

<sup>86</sup> Darankoum, *supra* footnote n° 17 at p 229.