



***THE NEW WORLD ORDER OF ECONOMIC
RELATIONS...***

POSITION PAPER

Submitted by

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at the Beaune Meeting of September 27, 2014, on

***“THE NEW WORLD ORDER OF ECONOMIC RELATIONS
IN THE LIGHT OF ARBITRAL JURISPRUDENCE”***

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Any opinions expressed in this Position Paper belong to the authors alone and will not in any circumstances bind the ICC International Court of Arbitration or its Secretariat or the CREDIMI-CNRS.

We submit that in the era of economic globalization markets have established a new world order of economic relations. This new world order is governed by a plurality of transnational legal orders and networks of transnational rules of law and arbitration is often one of their organs of governance and preferred method of dispute resolution.

We further submit that modern arbitral decision making provides evidence of the existence of this new world order as is reflected in arbitral decisions.

We finally submit that such arbitral decisions are legitimate insofar as they are rendered within an appropriate theoretical legal model recognized and accepted as such by the economic operators at the receiving end of such arbitral decisions.

The first objective of the Beaune Meeting is to assess modern arbitral jurisprudence and to identify the elements that may constitute evidence of this new order.

The second objective of the Beaune Meeting is to reflect on a new paradigm or a theoretical legal model that would explain the reality of modern arbitral decisions as we see it nowadays and would enhance their legitimacy towards the future.

While other theories and conclusions may result out of this reflection process, this paper presents a candidate theory to explain this reality that will serve, at least, as a starting point for our debate.

THE REALITY OF THE NEW WORLD ORDER OF ECONOMIC RELATIONS...

The new world order of economic relations emerges as a consequence of the impact of globalization along with the progressive decline of the theoretical models that placed the Nation-State at the center of the economy and the rule of law. This new world order may be ascertained by the observation of three phenomenons: the globalization of the economy, the globalization of contract law and the globalization of arbitration law.

From an International Economy to a Global Economy

Professor Charles-Albert Michalet describes economic globalization as the process of transformation of the economy from an international to a global logic, coupled by the momentary predominance, from time to time, of one of the following three dimensions of globalization: exchanges of goods and services,

flows of foreign direct investments and circulation of capitals. In this regard, Professor Michalet distinguishes three models or phases of globalization: (i) the **International Model** from the advent of capitalism until the 1960s, a model based on the idea of State sovereignty and in the exchange of goods and services between Nation-States, where national territories were at the core of the system (ii) the **Multinational Model**, from the 1960s until the 1980s, a model that was largely based on the emergence of multinationals, the flow of foreign direct investment, the delocalization of economic activities and where the Nation-State and national territories were a mere part of the economic puzzle; and (iii) the **Global or Transnational Model** from the 1980s onwards, characterized by the dominance of the financial dimension, the weakening of the Nation-State, the loss of national champions and the dilution of national territories¹.

The progressive decline of the role of the Nation-State in the world economy had a direct impact on economic science as well as on the law of contracts and arbitration- two major instruments of the globalization of the rule of law. And of course, this impact has had a different degree of intensity depending on the economic model or period. Indeed, while the international and multinational economic models didn't encourage a real internationalization or multinationalization of the law of contracts and arbitration, the global model did favor the emergence of a global model of the law of contracts and arbitration. As a result thereof, today, in the era of economic globalization, the law of contracts and arbitration no longer follows the logic of the State-centered international and multinational models of economy.

Economic globalization has encouraged the emergence of a global law of contracts and arbitration as is reflected in a new language and terminology: we now talk about transnational contracts and transnational arbitration.

From International Contracts to Transnational Contracts

Regarding the evolution of contract law from the International Model to the Global or Transnational Model, it is interesting to note that during the periods of international and multinational economies, contracts were not subject to a rule of law of the same international or multinational nature. Instead, the method

¹ Charles-Albert MICHALET, *Qu'est-ce que la mondialisation ?*, La Découverte, Paris, 2004. – *Mondialisation, la grande rupture*, La Découverte, Paris, 2007. – « Les métamorphoses de la mondialisation, une approche économique, in *La mondialisation du droit* (Dir. Eric Loquin et Catherine Kessedjian), CREDIMI, Volume 19, Université de Bourgogne, Litec, 2000, p. 11.

conceived to regulate contracts in the international or multinational periods of the economy, the conflicts of law method, consisted in the “nationalization” -or incorporation to a national legal order- of international or multinational economic relations, condemning them to the application of a rule designed to govern domestic relations. Even if some minor variations could be observed between the international and multinational periods, the conflict of law method in both economic periods placed the Nation-State at the center of the law of contracts. The idea of the incorporation of “international” contracts in a different legal order gained importance during and in the aftermath of the Libyan petroleum arbitrations of the 1970s which revealed the need of a certain “internationalization” or “delocalization” of the law of contracts and autonomy of the contract itself. As a result of this movement of “internationalization” or “delocalization” of contracts two theoretical models were conceived: (i) the *Contrat sans loi* Model based on the idea that no legal order is fundamental to the contractual relation and (ii) the *Lex Mercatoria* or Transnational Law Model centered on the idea that contracts are incorporated in a transnational legal order.

Regarding the methods of regulation, Professor Eric Loquin made, in its General Course at the Hague Academy of International Law of 2006², an interesting parallel between the transformation of the economy and the transformation or evolution of the principle of party autonomy in the so-called “international” contracts: (i) the ***International Model***, in which the parties to an international contract had the right to choose a national law with a relevant connection with the economic operation at hand, (ii) the ***Multinational Model***, in which the parties to an international contract had the right to choose a national law with or without a relevant connection with the economic operation, and (iii) the ***Global or Transnational Model***, in which the parties have the right to choose that their contracts be governed by “rules of law” without any connection to a national legal system, such as a global or transnational legal systems and rules. This evolution of the law of contracts, however, is not recognized by all systems of law. Some of them still live in the past, as it seems to be the case, for example, of the 1960s mindset prevalent in the European Union’s Rome I Regulation.

If not all systems of law recognize this evolution of contract law, transnational arbitrators are as such sensitive to this reality and arbitral rules all over the world recognize the validity of parties’ choice to govern their contracts by “rules of law” and not necessarily by the law of one Nation-State. No wonder why arbitration is

² Eric LOQUIN, *Les règles matérielles internationales*, Académie de droit international de la Haye, Tome 322, Martinus Nijhoff Publishers, 2007, p. 61 et ss.

often one of the organs of governance and the preferred method of dispute resolution of the new world order of economic relations.

From International Arbitration to Transnational Arbitration

Unsurprisingly, the parallel drawn between the international, multinational and global models of the economy and the law of contracts can also be made in relation to the law of arbitration. As it was exposed by Professor Emmanuel Gaillard in its 2007 General Course at the Hague Academy of International Law³, the evolution of the law of “international” arbitration can also be studied and analyzed through the very same three models: (i) the ***International Model***, based on the conflicts of law method, that centers arbitration exclusively on the law of the seat of arbitration, (ii) the ***Multinational Model***, closer to the *Contrat sans loi* ideology, that focuses entirely on the law of the place of enforcement of the arbitral award, and (iii) the ***Global or Transnational Model***, which is based on the existence of a global or transnational legal order and the incorporation of arbitrations in that legal order. In his presentation, Professor Gaillard endorses the idea of a transnational arbitral legal order, which is one of many theoretical possibilities under the Transnational Law Model. In sum, while the first two models, in line with the international and multinational ideologies and its conflicts of law method, placed the Nation-State at the center of economic relations and arbitrations, the third one conceives arbitrations as part of a global or transnational economy and places world markets, and their methods of transnational regulation and governance, at the center of the whole construct.

We submit that signs of the existence of an arbitral legal order, autonomous from national, international and other transnational legal orders, may be found in modern arbitral jurisprudence. The perception of the existence and autonomy of the arbitral legal order is palpable when arbitrators deal with procedural issues and when determining the applicable substantive rules to the merits of the dispute. For example, it is not unusual for arbitrators to base their orders and decisions on the *règles de l'art de l'arbitrage* without any reference to the law of the seat of arbitration or the law of the enforcement of the arbitral award. Moreover, they are progressively abandoning the methods based on the conflicts of law logic (the application of conflict of laws rules of the seat, the cumulative application of the rules of conflicts of law with substantial connections with the

³ Emmanuel GAILLARD, *Aspects philosophiques du droit de l'arbitrage international*, Académie de droit international de la Haye, Martinus Nijhoff Publishers, 2008.

dispute, the general principles of conflicts of law method, etc) to adopt the more adapted transnational law methods such as the *voie directe* or the transnational rules method, which allow the adoption of rules specially designed to govern transnational economic relations: transnational rules.

The three models of “international” arbitration and the methods applied to determine the applicable rules to procedural issues or to the merits of the dispute coexist to a certain degree and the application of one or the other depends exclusively on the background and arbitral culture of arbitrators, their perception of the reality of world law and economy and their understanding of globalization.

THE THEORY OF THE NEW WORLD ORDER OF ECONOMIC RELATIONS...

The theory of the new world order of economic relations is based on the emergence of a new model of transnational regulation: the Transnational Law Model, which is based on the existence of a plurality of transnational legal orders and networks of transnational rules.

The Emergence of a Transnational Law Model

We submit that a Transnational Law Model has emerged as a consequence of economic globalization and that it is a convenient theoretical model to govern and regulate global markets. We also submit that the Transnational Law Model, also known as the *Lex Mercatoria* Model, founded in the 1960s by the *École de Dijon* and developed ever since by the CREDIMI-CNRS, is convenient as a theoretical model because it satisfies the interests and needs of economic operators and transnational communities worldwide. Using the terms of Professor Thomas Kuhn’s epistemology, the Transnational Law Model is the result of four paradigm shifting scientific revolutions⁴: (i) the shift from an international economy to a global economy, (ii) the shift from traditional short-term contracts to modern long-term relational contracts, (iii) the shift from conflicts of law methods to transnational rules methods, and (iv) the shift from legal state positivism to legal pluralism. Four scientific revolutions that for one of the authors of this paper are embodied in the philosophical concept of the Rhinoceros⁵.

⁴ Thomas KUHN, *La structure des révolutions scientifiques*, Champs sciences, Flammarion, Paris, 2008.

⁵ Alfredo DE JESÚS O., *The Prodigious Story of the Lex Petrolea and the Rhinoceros. Philosophical Aspects of the Transnational Legal Order of the Petroleum Society*, TPLI Series on Transnational Petroleum Law (A. De Jesús O. and J. Cárdenas G. eds), Vol 1, N° 1, Transnational Petroleum Law Institute, Paris, 2012., p. 12, n° 7.

Following the concept of theoretical models described in Professor Stephen Hawking and Physicist Leonard Mlodinow's "Grand Design", the Transnational Law Model can be considered both as an effective theory and as a manifestation of model-dependent realism. As an effective theory because the Transnational Law Model is a framework created to model certain observed phenomena (i.e. the globalization of the economy and the law) without describing in detail all of the underlying processes (i.e. the process of creation of transnational rules)⁶. It is also an expression of model-dependent realism in the sense that it relies on the idea that a theory or world picture is a model and a set of rules that connect the elements of the model to observations. Furthermore, it largely meets the four conditions of a good theoretical model: it is (i) elegant, (ii) contains few arbitrary or adjustable elements, (iii) agrees with and explains all existing observations, and (iv) makes detailed predictions about future observations that can disprove or falsify the model if they are not borne out⁷.

The Emergence of a Plurality of Transnational Legal Orders

The crisis of the Nation-State resulting from globalization, coupled with the lack of a World Government, global markets have reorganized adopting the values of the global economy.

The relevant communities at the core of each transnational market constitute a plurality of transnational legal orders with their own organs, structures and methods of governance and regulation. The characterization of these transnational communities as transnational legal orders is based on the school of legal pluralism of Professors Santi Romano⁸, François Ost and Michel van de Kerchove⁹, among others. According to them, transnational communities or societies constitute "institutions" or social bodies which are forms of organization governed by rules of law and therefore considered as transnational legal orders. Some of these, for example the *Lex Petrolea*, the transnational legal order of the petroleum community, are organized following the Transnational Law Model. This is also the case of the transnational arbitration community at the core of the transnational arbitral legal order or the transnational construction community at the basis of the transnational legal order of the construction sector, the *Lex Constructionis*. These transnational communities largely meet the conditions of

⁶ Stephen HAWKING and Leonard MLODINOW, *The Grand Design*, Bantam Books, New York, 2010, p. 32.

⁷ Stephen HAWKING and Leonard MLODINOW, *The Grand Design*, Bantam Books, New York, 2010, p. 51.

⁸ Santi ROMANO, *L'ordre juridique* (Traduction par L. François et P. Gothot), Réédition de la 2^e édition, Dalloz, Paris, 2002.

⁹ François OST et Michel van de KERCHOVE, *De la pyramide au réseau? Pour une théorie dialectique du droit*, Publications des Facultés universitaires Saint-Louis, Bruxelles, 2002.

autonomy set out by the school of legal pluralism, so that they can be considered as legal orders: (i) social autonomy, meaning that the community is a social manifestation that can be considered by itself and for itself, (ii) organic autonomy, in the sense that the community has the capacity to create its own organs of governance and (iii) organizational autonomy, thus the community's capacity to create its own rules.

Transnational legal orders are autonomous and independent from national and international legal orders and each is free to decide in an autonomous and unilateral manner to what extent they will recognize and interact with national, international, and other transnational legal orders. These legal orders are transnational precisely because they transcend the concept of the Nation-State; they reject the idea of the fragmented economic space of the international and multinational models. These transnational communities believe that economic operations in a globalized world and economy have little to do with the artificial geographic, political, cultural, legal and jurisdictional borders inherited from the fortunes and misfortunes in the process and history of the creation and organization of Nation-States and the international community.

The Emergence of a Network of Transnational Rules

Each transnational legal order has its own rules and methods to create their own rules or to incorporate rules from other legal orders into their own. In other words, they are free and autonomous to decide what constitutes a source of law within their order or not. This is a manifestation of their organizational autonomy. According to the Transnational Law Model, transnational rules of law may come from a plurality of sources. These sources of transnational rules can be national sources, international sources and non-national sources of law. The origin of transnational rules of law is absolutely irrelevant. That is one of the reasons why the Transnational Law Model does not recognize the differences between “hard law” of “soft law” which are in line with the paradigms of the past (international and multinational models and legal state positivism). In the Transnational Law Model, transnational rules are hard and soft at the same time, hard in the way they are applied, soft in the way they are created by -or incorporated into - transnational legal orders. Following Professor Loquin's thesis, what is important is that the transnational rule or the candidate to become a transnational rule has been specially designed to govern transnational economic relations and that it satisfies the need and interests of transnational communities¹⁰.

Due to the lack of a World Government and a World Democracy, the legitimacy of transnational rules is not to be found in the “authority” that issues the rule or the

¹⁰ Eric LOQUIN, *Les règles matérielles internationales*, Académie de droit international de la Haye, Tome 322, Martinus Nijhoff Publishers, 2007, p. 24, n° 11.

“process” that was followed to adopt it. The legitimacy of transnational rules relies entirely on their acceptance and recognition by the members of transnational communities. This is also the reason why there is no hierarchy of norms in the Transnational Law Model, only a network of rules or candidates to become transnational rules. The legitimacy of the transnational rule and its eventual application will largely depend on the capability of such rule to satisfy the needs and interests of the economic operators and its transnational communities. The acceptance of the transnational rule might be recognized by their inclusion in the rules of professional associations, codes of conducts, model contracts and particularly by their use by economic operators and by arbitral tribunals. This one of the reasons why in the Transnational Law Model, arbitration is often considered as the preferred method of dispute resolution and also as one of the organs of governance of transnational legal orders– a statement that would oblige us to work to raise the consciousness of transnational arbitrators about their role and responsibility in this fascinating moment in the history of the rule of law.

Conclusion

The idea of a new world order of economic relations is based on observations on the evolution of economic globalization as well as that of the rule of law as we interpret them from a series of phenomenons: the emergence of new actors, powers and dynamics, the normative production of state and non-state institutions, the practices and usages of economic operators, the organization of transnational communities and markets, the architecture and content of modern transnational contracts and transactions and the intellectual structure and mindset behind modern arbitral decisions.

The Transnational Law Model provides a philosophical, epistemological and theoretical explanation and framework to those observations and we submit that it is a convenient model to explain the New World Order of Economic Relations – one that would enhance certainty of the rule of law and the legitimacy of arbitral awards.