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The Prodigious Story  
of the Lex Petrolea  
and the Rhinoceros  
Philosophical Aspects  
of the Transnational  
Legal Order  
of the Petroleum Society

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TRANSNATIONAL  
PETROLEUM LAW  
INSTITUTE

# and the Rhinoceros

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ORDER OF THE PETROLEUM SOCIETY**

**SUMMARY**

**I. THE REALITY OF THE *LEX PETROLEA***

**A. THE SOURCES OF THE *LEX PETROLEA***

- 1. The emergence of a new law for transnational petroleum contracts*
- 2. The acceptance of a new legal paradigm*

**B. THE NEEDS OF THE *LEX PETROLEA***

- 1. The need for an effective system of contractual regulation*
- 2. The need for an effective system of transnational regulation*

**II. THE THEORY OF THE *LEX PETROLEA***

**A. THE AUTONOMY OF THE *LEX PETROLEA***

- 1. The existence of the transnational petroleum society*
- 2. The structure of the transnational petroleum order*

**B. THE RULES OF THE *LEX PETROLEA***

- 1. The transnational nature of the rules of the petroleum society*
- 2. The methodological aspects of the rules of the petroleum society*



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*Alfredo De Jesús O., Ph.D.\**

1. **The Idea of a Transnational *Lex Petrolea*.** In the mid-1970s Egyptian Professor Ahmed Sadek El-Kosheri delivered a groundbreaking lecture at The Hague Academy of International Law on the transnational law of petroleum contracts. This lecture, offered and published in the French language, was entitled «*Le régime juridique créé par les accords de participation dans le domaine pétrolier*»<sup>1</sup> (the legal regime created by petroleum participation agreements). It was intended to reveal the evolution from traditional oil and gas concession agreements and, essentially, to build a general theory of oil and gas participation agreements based on their “reality” and practice. To put forward his theory Professor El-Kosheri,

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The conclusions of this paper were presented by the author as a Guest Lecturer at the Centre for Energy, Petroleum and Mineral Law and Policy – CEPMLP – of the University of Dundee, Scotland, in February 2012, under the title of “*The Epistemology of the Lex Petrolea: Globalization, Arbitration and the Applicable to Transnational Petroleum Contracts*”.

The title “*The Prodigious Story of the Lex Petrolea and the Rhinoceros*” is inspired in Robert Descharnes’ movie “*The Prodigious Adventure of the Lacemaker and the Rhinoceros*”, about Salvador Dalí’s obsession with the morphology of the logarithmic spiral, Vermeer’s *Lacemaker* and the rhinoceroses.

<sup>1</sup> A. S. EL-KOSHERI, *Le régime juridique créé par les accords de participation dans le domaine pétrolier*, in *Recueil des cours, Collected courses of the Hague Academy of International Law*, 1975 IV, Tome 174, Sijthoff & Noordhoff, The Hague, 1978, p. 217 - 405.

following the Cartesian method cherished by French scholars, presented his arguments in two parts. Part one was devoted to the elaboration of the concept of participation. Part two was dedicated to the enforcement (« *mise en application* ») of the participation agreement. This second part was divided in two chapters. The first chapter was aimed at the study of “*the internal mechanisms of contractual self-regulation*” (« *Les mécanismes internes d'autorégulation à base contractuelle* »), the characteristics of the joint venture regime and the need for their flexibility and adaptability. The second chapter was intended to analyze “*the mechanisms of recourse to an external juridical order*” (« *Les mécanismes de recours à un ordre juridique externe* ») which allowed, among others things, the “*denationalization*” or “*transnationalization*” of the participation agreement.

The two hundred page lecture is followed by a short two page conclusion. One paragraph of the « *Conclusion générale* » summarizes the position of Professor El-Kosheri in relation to the possible transnationalization of petroleum participation agreements: “*Nevertheless, despite the amplitude of the movable reality created by the lex contractus, it remains attached to the legal order that grants its binding force and the source of its protection. Whether it is chosen by the parties or determined by the judge or the arbitrator, the legal order in which the participation agreement is incorporated allows above all a certain ‘transnationalization’ in accordance with the appropriate legal techniques which are essentially created by the practice and the arbitral jurisprudence. In this manner, we can notice the frequent recourse to ‘general principles’ and the gradual elaboration of a real lex petroleum of a ‘transnational’ nature*”<sup>2</sup>.

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<sup>2</sup> « Toutefois, quelle que soit l'ampleur de cette réalité mouvante créée par la lex contractus, elle reste tributaire du régime juridique qui lui confère sa force obligatoire et la source de sa protection. Qu'il soit choisi par les parties ou déterminé par le juge ou l'arbitre saisi, le cadre légal auquel l'accord de participation est ancré permet surtout une certaine « transnationalisation » en fonction de techniques juridiques appropriées élaborées essentiellement par la pratique et la jurisprudence arbitrale. Ainsi, on peut constater, à la fois, le recours fréquent aux « principes généraux » et l'élaboration graduelle d'une véritable lex petroleum de nature « transnationale ». A. S. EL-KOSHERI, *Le régime juridique créé par les accords de participation dans le domaine pétrolier*, in *Recueil des cours, Collected courses of the Hague Academy of International Law*, 1975 IV, Tome 174, Sijthoff & Noordhoff, The Hague, 1978, p. 337.

## 2. The Idea of a Transnational Legal Order for Petroleum Contracts.

This concluding paragraph is particularly interesting for the purpose of this paper for three separate but related reasons. First, because it adheres to the theory that a contract, transnational or not, is always attached to an external legal order and that it is this legal or juridical order that grants the contract its binding force and source of validity. Second, because it affirms that the legal order in which the participation agreement is incorporated is, or should be, of a transnational nature. Third, and most importantly, that the parties to participation agreements and arbitral tribunals were inclined to use “general principles”, as opposed to the traditional rules of State legal orders (national or international); all of which led to the gradual elaboration of a real *lex petroleum* of a transnational nature.

It is interesting to note that while Professor El-Kosheri delivered his 1975 Hague lecture defending his thesis on the transnational nature of the oil and gas participation agreements, the transnational nature of the legal order in which such contracts are incorporated, and thus the transnational nature of the *Lex Petrolea*, two different sole arbitrators were confronted to these very same theoretical enigmas in *Libyan American Oil Company - LIAMCO vs Libya* (1977) and *Texaco Overseas and California Asiatic - TOPCO vs Libya* (1977). Of the three famous Libyan nationalization arbitrations, only the award in *British Petroleum - BP vs Libya* (1973), was rendered before Professor El-Kosheri’s Hague lecture. Interestingly enough, none of the three sole arbitrators involved in these cases decided in favor of the existence of a transnational legal order or a transnational *Lex Petrolea* as the fundamental legal order of the concession agreements. The truth is that when confronted with the questions as to the nature of the contracts and the legal order in which they were incorporated, the three sole arbitrators dealt with them in three different ways, which logically led them to decide in three different directions. In sum - and evoking the title of a famous article on the Libyan petroleum arbitrations- the result was somewhat disappointing: three arbitrations, one same problem, three solutions!<sup>3</sup>

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<sup>3</sup> B. STERN, « Trois arbitrages, un même problème, trois solutions. Les nationalisation pétrolières libyennes devant l’arbitrage international », in *Revue de l’arbitrage*, Litec, Paris, 1980, p. 3.



**3. The Idea of a Transnational Legal Order: The *Lex Mercatoria* Model.** The Libyan arbitrations were very important for the development of transnational law because they all dealt with a subject of international law, Libya, and a subject of national law, a private investor, at a moment when the questions regarding the qualification and the nature of the relations of subjects of different legal orders were on the minds of many scholars, theorists and practitioners. The problem with the Libyan cases is that the arbitrators had to address the complex question of the nature of the concession agreements in order to decide which law to apply to the merits of the dispute. In other words, they had (or at least they thought they had) to determine the legal order in which these contracts were incorporated and in which they found their binding force and their source of validity. For Professor Stern, the notion of “incorporation” of the contract is fundamental because, even if it contains a governing law clause, and before such a clause could be even examined, the contract has to be legally qualified and be referred to a norm or a legal system (an external legal system) in which it finds the source of its validity<sup>4</sup>. In these particular cases, it was difficult to accept that the concession agreements were incorporated in a system of national law (for example, in the Libyan legal order), because Libya is a subject of international law, not of national law. On the other hand, it was also difficult to accept that the concession agreements were incorporated in the international legal system because of the fact that the private investor is a subject of national law, not of international law.

So what to do with contracts entered into between subjects of different legal systems? Today, more than three decades after the Libyan arbitrations, there seems to be, to the author of these lines, two possible theoretical answers to this question that make sense. Either these contracts are considered as transnational contracts that are completely autonomous from national and international legal orders and, as such, create a legal order of their own (The *contrat sans loi* model) or as transnational contracts that are incorporated in a transnational legal order which is itself autonomous from the national and international legal orders (for example, the *Lex Mercatoria*

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<sup>4</sup> B. STERN, « Trois arbitrages, un même problème, trois solutions. Les nationalisation pétrolières libyennes devant l’arbitrage international », in *Revue de l’arbitrage*, Litec, Paris, 1980, p. 12.

model)<sup>5</sup>. For reasons that will be explained later on, we defend the second solution, the *Lex Mercatoria* model. And this is the theoretical model that we have in mind when we refer to the transnational and autonomous legal order of the *Lex Petrolea*: the legal order of the transnational petroleum society. In any case, none of these two theoretical solutions were adopted by any of the arbitrators in the Libyan cases although the theories existed and were available at the time. In the first case, the sole arbitrator decided to incorporate the contract in a system of national law; in the second, the contract was incorporated in the international legal order; and, in the third case, the arbitrator declined to incorporate the contract in any legal system and decided to guide himself by using general principles of law.

**4. The *Lex Mercatoria* Model at the heart of the *Lex Petrolea*.** It is not by mere coincidence that Professor El-Kosheri came up with the idea of a transnational *Lex Petrolea*. After concluding his studies at the Law School of the Cairo University in the mid-1950s, Professor El-Kosheri continued his legal studies in France, first in Comparative Law, followed by Roman Law and History of Law and then completed by a Ph.D. thesis on “*The Notion of International Contract*”, defended at the *Université de Rennes* in 1962<sup>6</sup>. The 1960s was a special decade for the transnational law movement. It was during this decade that French Professors Berthold Goldman, Philippe Kahn and Philippe Fouchard wrote the founding papers and Ph.D. theses of the school of legal thinking which is universally known in the arbitration and international business law circles as the *École de Dijon* (named after the Law School of the *Université de Bourgogne* in Dijon), which defends the existence of a specific and autonomous legal order of the transnational business community: the *Lex Mercatoria*.

<sup>5</sup> A. DE JESÚS O., *La cession du contrat international. Contribution à l'étude du droit transnational des contrats*, sous la direction de Denis Mazeaud, présentée et soutenue publiquement le 6 septembre 2010 devant le jury composé par Eric Loquin (Président), Denis Mazeaud (Directeur), Thomas Clay et Rozen Noguellou (Rapporteurs), Christian Larroumet et Jean-Baptiste Racine (Suffragants), Université de Paris II (Sorbonne Universités – Panthéon-Assas, à paraître, 2013) – A. DE JESÚS O., “La contribución del árbitro a la autorregulación y unificación del derecho de los contratos del comercio internacional”, in *Anuario Español de Derecho Internacional*, Tomo VIII – 2008, Iprolex, Madrid, 2009, p. 313.

<sup>6</sup> A. S. EL-KOSHERI, *Le régime juridique créé par les accords de participation dans le domaine pétrolier*, in *Collected courses of the Hague Academy of International Law*, 1975 IV, Tome 174, Sijthoff & Noordhoff, The Hague, 1978, p. 226.

The influence of the *École de Dijon* in El-Kosheri's 1975 Hague lecture can be appreciated in its structure, methodology and conclusions. It was the first attempt to approach the legal system of the transnational oil and gas industry, a sectorial work implementing the lines of legal reasoning created by the founders of the school of the *Lex Mercatoria* and which has been perpetuated in the works and publications of the University of Burgundy's own *CREDIMI – Centre de recherche sur le droit des marchés et des investissements*, founded by Philippe Kahn, maintained by Professor Eric Loquin, the current guardian of the *Lex Mercatoria*, and more recently in the hands of Professor Laurence Ravillon<sup>7</sup>. The relationship between Professor El-Kosheri and the *École de Dijon* was acknowledged and celebrated in 2010 when he was granted the Degree of *Doctor Honoris causa* by the University of Burgundy for his expertise in International Law. It was, quoting Professor El-Kosheri, "*the official consecration of an intimate relation that unites me with the 'maîtres de pensée' in the area of international business law and transnational relations that started almost half a century ago*"<sup>8</sup>.

**5. The *Lex Mercatoria* Model at the heart of the Government of Kuwait's argument in the AMINOIL Arbitration.** The relation between Professor El-Kosheri, his 1975 Hague lecture and the *École de Dijon* is essential to understanding the exact meaning and the philosophical background of the argument that the Government Kuwait put forward in the famous AMINOIL arbitration. The AMINOIL arbitral award states that "*On behalf of the Government, it was maintained that the only compensation Aminoil was entitled to claim must be determined by precedents resulting from a series of transnational negotiations and agreements about compensation. These precedents, so it was said, had instituted a particular rule, of an international and customary character, specific to the oil industry. Attention was called to the fact that a number of nationalizations of oil concessions had occurred in the Middle East, and elsewhere in the world,*

<sup>7</sup> L. RAVILLON, *Les télécommunications par satellite. Aspects juridiques*, Thèse Dijon, sous la direction de Eric Loquin, Travaux du CREDIMI, vol. 17, Paris, Litec, 1997. – L. RAVILLON, *Droit des activités spatiales. Adaptation aux phénomènes de commercialisation et de privatisation*, Travaux du CREDIMI, vol. 22, Paris, Litec, 2004. – L. RAVILLON (Dir), *Le droit des activités spatiales à l'aube du XXI<sup>e</sup> siècle*, Travaux du CREDIMI, vol. 25, Paris, Litec, 2005.

<sup>8</sup> [http://www.dailymotion.com/video/xfbstk\\_docteur-honoris-causa-a-s-el-kosheri-universite-bourgogne\\_school](http://www.dailymotion.com/video/xfbstk_docteur-honoris-causa-a-s-el-kosheri-universite-bourgogne_school)

*in the years 1971-77. However, the solutions adopted in the case of these precedents were not identical but had certain common features: the compensation granted, it was claimed, had generated a customary rule valid for the oil industry – a lex petrolea that was in some sort a particular branch of a general universal lex mercatoria. That was why Kuwait, in the course of 1977 discussions, had offered no more than the net book value of the redeemable assets as compensation for expropriation”*<sup>9</sup>.

To our knowledge, the AMINOIL award is the first publicly available international arbitral award that makes explicit reference to the “*Lex Petrolea*” and it is widely known for it. One interesting aspect of the Government of Kuwait’s argument is the suggestion that there was “*a particular rule, of an international and customary character, specific to the oil industry*”, “*a customary rule valid for the oil industry*”, “*a lex petrolea that was in some sort a particular branch of a general universal lex mercatoria*”. Moreover, that this rule resulted from a series of transnational negotiations and agreements is important as it reveals the methodology and the legal reasoning of the *École de Dijon*. Needless to say, it was absolutely unsurprising to find out, a couple years after reading the award for the first time and by pure luck, that Professor El-Kosheri was counsel to the Government of Kuwait in the AMINOIL arbitration<sup>10</sup>. Suddenly, all the pieces came together: the idea of a transnational *Lex Petrolea* is at least forty years old and was conceived in the French legal tradition and Dijon’s *terroir*.

**6. The *Lex Mercatoria* Model: Overcoming Criticism and Scientific Crises.** Over the last decades the *Lex Mercatoria* and other sectorial transnational autonomous legal orders, such as the *Lex Petrolea*, have grown strong at a firm and sound pace both on the theoretical and practical fronts. There are still a number of important focuses of resistance and criticism to the movement of the transnationalisation or globalization of the law, but none of them has been able to offer an adequate model of regulation for contracts in a global or transnational legal and economic environment. Quite the contrary, these criticisms are deeply anchored in the past and thus, precisely in the old paradigms that globalization has forced into change.

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<sup>9</sup> Award in the matter of the Government of the State of Kuwait and the American Independent Oil Company (Aminoil) of March 24, 1982, Paul Reuter (President), Hamed Sultan and Gerald Fitzmaurice (Arbitrators), 21 ILM 976.

<sup>10</sup> Short Profile of Kosheri, Rashael & Riad Law Firm (Oil & Gas), p. 3. (<http://www.krr-law.com>).

In this regard, the most serious criticism comes from the supporters of traditional state positivism and conflicts of law. For these scholars and practitioners it is simply unacceptable to admit that a rule of law can have a private origin and not necessarily stem from a state or inter-state legal order. They also believe that the only way to deal with international relationships is by applying conflicts of law methods, thereby “nationalizing” international relations and condemning them to the application of a rule of national law designed to govern domestic relations. However, a vast number of sectors of the economy, particularly the oil and gas sector, have been witnessing an extraordinary proliferation of non-state rules of law contained in new practices, codes of conduct, new contracts, model contracts, doctrinal codifications and in arbitral jurisprudence.

Over the past decades, scholars, arbitrators, counsel and other members of the legal community related to the oil and gas industry have been confronted, in one way or another, with the impact of globalization of the economy on the law of transnational petroleum contracts. This impact can be illustrated by two recurrent queries. First, and leaving aside the complex questions related to the determination of the fundamental legal order to a transnational petroleum agreement, is the question of whether a petroleum contract may be governed by a specific system of law autonomous from national or international legal systems. Second, is the question of whether a transnational arbitrator may apply non-state or transnational rules to settle disputes arising from transnational petroleum contracts. Our contention is that the *Lex Petrolea*, like the general *Lex Mercatoria*, has been progressively evolving into a transnational legal order completely autonomous from national and international legal orders. That is why we believe that the parties to transnational petroleum contracts may choose the rules of the *Lex Petrolea* as the governing law and that arbitrators are allowed to apply them to solve transnational petroleum disputes.

**7. The *Lex Mercatoria* and the *Lex Petrolea*: Two Creatures of a New Legal Paradigm.** The *Lex Petrolea*, as the more general *Lex Mercatoria*, is the result of the progress of legal science over four paradigm shifting crises: (i) the crisis of the paradigm of international economy, (ii) the crisis of the paradigm of traditional contract law, (iii) the crisis of the paradigm of traditional international private law, and (iv) the crisis of the paradigm of legal state positivism. If the traditional belief of the world economy was

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

based on the paradigm of international economy it has now shifted to the paradigm of global economy, which rejects the idea of a world economy fragmented by national geographic, political and legal borders. If traditional contract law was based on the archetype of short-term discreet contracts it has now changed to the new paradigm of long-term relational contracts which have a different approach to the principle of *pacta sunt servanda* and the idea of the intangibility of contracts. If traditional international private law has been based on the paradigm of international economy and the method of conflicts of law, it has now shifted to the method of transnational rules which rejects the idea of the existence of borders and the application of domestic rules to transnational relations. If legal theory has been dominated by the paradigm of legal state positivism, particularly by Hans Kelsen's legal positivism, it has now shifted to the new paradigm of legal pluralism which rejects the idea that a rule of law can only come from a State and that is open to recognize the validity of the rules created by non-state institutions, such as, for example, the transnational petroleum society.

Each one of these four crises has gone through what in Kuhnian terminology constitutes a scientific revolution leading to the imposition of a new paradigm. For Professor Thomas Kuhn a paradigm "*is the universally recognized scientific achievements that for a time provide model problems and solutions to a community of practitioners*"<sup>11</sup>, and which embodies the values that nourish the periods of "*normal science*". By "*normal science*" the author refers to "*research firmly based upon one or more past scientific achievements, achievements that some particular scientific community acknowledges for a time as supplying the foundation for its further practice*"<sup>12</sup>. According to Kuhn, scientific progress is only achieved by the substitution of one paradigm with another one by way of a scientific revolution<sup>13</sup>, eliminating and replacing most of the beliefs and procedures of the old paradigm<sup>14</sup>. Therefore, "*the decision to reject one paradigm is*

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<sup>11</sup> Th. KUHN, *La structure des révolutions scientifiques* (Traduction de Laure Meyer), Champs sciences, Flammarion, Paris, 2008, p. 11.

<sup>12</sup> Th. KUHN, *La structure des révolutions scientifiques* (Traduction de Laure Meyer), Champs sciences, Flammarion, Paris, 2008, p. 30.

<sup>13</sup> Th. KUHN, *La structure des révolutions scientifiques* (Traduction de Laure Meyer), Champs sciences, Flammarion, Paris, 2008, p. 32.

<sup>14</sup> Th. KUHN, *La structure des révolutions scientifiques* (Traduction de Laure Meyer), Champs sciences, Flammarion, Paris, 2008, p. 101.

*always simultaneously the decision to accept another one*"<sup>15</sup>. Each of the abovementioned scientific crises has gone through the normal process that is witnessed in the progress of all sciences: a period of "*normal science*", followed by the emergence of "*anomalies*" and scientific discoveries, then the emergence of "*new theories*" and *guerres d'école* between competing schools of scientific thought, and, finally the imposition of a "*new paradigm*". We believe that the *Lex Mercatoria* and the *Lex Petrolea* are two creatures of a new legal paradigm: Transnational Law, a law that transcends the concept of Nation-State.

8. **The *Lex Mercatoria*: A Rhinoceros.** The theory of the *Lex Mercatoria* as a transnational legal order has gone through this very same process of scientific evolution. Throughout discussions on Transnational Law by the *Groupe de Beaune* we often refer to transnational legal orders as rhinoceroses and the process of evolution of the *Lex Mercatoria* from a pre-paradigm theory to a new paradigm has been inspired by two of them, both imagined and sculpted by Salvador Dalí: the *Cosmic Rhinoceros* and the *Rhinoceros Dressed in Lace*. In our minds, the Cosmic Rhinoceros symbolizes the *Lex Mercatoria* pre-paradigm theory of the 1960 and 1970s and the *Rhinoceros Dressed in Lace* characterizes the modern paradigm of the *Lex Mercatoria* that has been developing since the 1980s. The Cosmic Rhinoceros represents the then "new theory" of the 1960s that emerged from the anomalies detected in the way the old paradigms interacted with the new reality, the progressive globalization of economic transactions, and the scientific discoveries of the founding members of the *École de Dijon*: Professors Berthold Goldman, Philippe Kahn and Philippe Fouchard. In particular, the emergence of new sources of law, private or non-state sources of law, and the progressive development of new and autonomous non-national or transnational forms of regulation. In the beginning, Goldman focused on the ways these anomalies constituted a revolution to the traditional theory of the sources of law, dominated then by the traditional Kelsenian state positivism that only recognizes the validity of a rule if it has its origin in a State<sup>16</sup>. His disciples, Kahn and Fouchard, devoted their Ph.D.

<sup>15</sup> Th. KUHN, *La structure des révolutions scientifiques* (Traduction de Laure Meyer), Champs sciences, Flammarion, Paris, 2008, p. 115.

<sup>16</sup> B. GOLDMAN, *Les conflits de lois dans l'arbitrage international de droit privé*, in *Recueil des Cours*, Académie de droit international de la Haye, Tome 109, Martinus Nijhoff Publishers, 1964. p. 17. – B. GOLDMAN, « Frontières du droit et *lex mercatoria* », in

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

theses and further works to develop this pre-paradigm theory. Kahn's work focused on the study of the sociological and legal aspects of these autonomous and transnational self-regulated societies<sup>17</sup>, while Fouchard concentrated on the methods used by these societies to settle their disputes<sup>18</sup>. These works have been further continued in the Ph.D. theses and further works of the disciples to Professors Kahn and Fouchard: Professors Eric Loquin<sup>19</sup>, Thomas Clay<sup>20</sup>, Jean-Baptiste Racine<sup>21</sup> and Sébastien Manciaux<sup>22</sup> to name a few.

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*Archives de philosophie du droit - Le droit subjectif en question*, Tome 9, Sirey, Paris, 1964, p. 177. – B. GOLDMAN, « La *lex mercatoria* dans les contrats et l'arbitrage internationaux : réalité et perspectives », in *Journal de droit international (Clunet)*, Paris, 1979, p. 475. – B. GOLDMAN, « Nouvelles réflexions sur la *lex mercatoria* », in *Études de droit international en l'honneur de Pierre Lalive*, Editions Helbing & Lichtenhahn, Bâle, 1993, p. 241.

<sup>17</sup> Ph. KAHN, *La vente commerciale internationale*, Préf de Berthold Goldman, Sirey, Paris, 1961. – Ph. KAHN, « Droit international économique, droit du développement, *lex mercatoria* : concept unique ou pluralisme des ordres juridiques ? » in *Le droit des relations économiques internationales, Études offertes à Berthold Goldman*, Litec, Paris, 1982, p. 97. – Ph. KAHN, « La *lex mercatoria* et son destin », in *L'actualité de la pensée de Berthold Goldman, Droit commercial, international et européen*, (Dir. Philippe Fouchard et Louis Vogel), Editions Panthéon Assas, Paris, 2004, p. 25.

<sup>18</sup> Ph. FOUCHARD, *L'arbitrage commercial international*, Préf de Berthold Goldman, Dalloz, Paris, 1965. – Ph. FOUCHARD, « L'arbitrage et la mondialisation de l'économie », in *Ecrits*, Comité français de l'arbitrage, Paris, 2007, p. 482, n° 35. – Ph. FOUCHARD, « La conception d'une nouvelle discipline », *L'actualité de la pensée de Berthold Goldman, Droit commercial international et européen* (Dir. Philippe Fouchard et Louis Vogel), Editions Panthéon-Assas, 2004, Paris, p. 21.

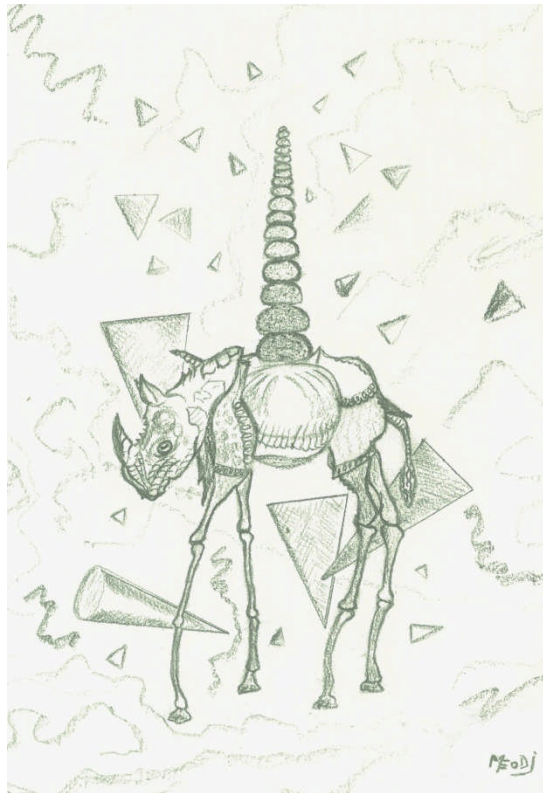
<sup>19</sup> E. LOQUIN, *L'amiable composition en droit comparé et international. Contribution à l'étude du non-droit dans l'arbitrage commercial*, Paris Litec, 1980. – E. LOQUIN, « L'application des règles nationales dans l'arbitrage commercial international », in *L'apport de la jurisprudence arbitrale, Dossier de l'Institut du droit et pratiques des affaires internationales*, CCI, N° 440/1, Paris, 1986, p. 112. – E. LOQUIN, « Où en est la *lex mercatoria* ? », in *Souveraineté étatique et marchés internationaux à la fin du 20ème siècle, A propos de 30 ans de recherche du CREDIMI, Mélanges en l'honneur de Philippe Kahn*, CREDIMI, Litec, Paris, 2000, p. 23. – E. LOQUIN, « La volonté des opérateurs vecteur d'un droit mondialisé », in *La mondialisation du droit* (Dir. E. Loquin et C. Kessedjian), Université de Bourgogne, Litec, Paris, 2000, p. 91. – E. LOQUIN, « Les règles matérielles du commerce international », in *Revue de l'arbitrage*, N° 2, Litec, Paris, 2005, p. 443. – E. LOQUIN, *Les règles matérielles internationales*, in *Recueil des Cours*, Académie de droit international de la Haye, Tome 322, Martinus Nijhoff Publishers, 2007, p. 9.

<sup>20</sup> Th. CLAY, *L'arbitre*, Préf de Ph. Fouchard, Nouvelle bibliothèque des thèses, Dalloz, Paris, 2001. – Th. CLAY, « Qui sont les arbitres internationaux ? Approche sociologique », in *Les arbitres internationaux* (Coord. José Rosell), Centre français de droit comparé, Vol 8, Société de législation comparée, Paris, 2005, p. 13.

<sup>21</sup> J.-B. RACINE, *L'arbitrage commercial international et l'ordre public*, Préf de Ph. Fouchard, LGDJ, 1999, p. 317. – J.-B. RACINE, « Réflexions sur l'autonomie de l'arbitrage commercial international » in *Revue de l'arbitrage*, Litec, Paris, 2005, p. 317.



In the Groupe de Beaune's parodies of the Dalinean rhinoceroses, the pre-paradigm theory of the *Lex Mercatoria* of the 1960 and 1970s is symbolized by the Cosmic Rhinoceros for two particular reasons: instead of rhinocerontic legs, the Cosmic Rhinoceros has the legs of a giraffe and it is carrying an enormous pyramid of sea urchins on its back. One might also imagine this pre-paradigmatic rhinoceros surrounded by the chaotic legal environment of that time which is represented by pyramids of norms flying in all directions.



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<sup>22</sup> S. MANCIAUX, *Investissements étrangers et arbitrage entre États et ressortissants d'autres États. Trente années d'activité du CIRDI*, Préf de Ph. Kahn, Université de Bourgogne – CNRS – CREDIMI, Litec, 2004. – S. MANCIAUX, « The relationships between States and their instrumentalities in investment arbitration », in *State Entities in International Arbitration* (Eds Emmanuel Gaillard and Jennifer Younan), IAI series on international arbitration, N° 4, Juris, 2008, p. 195.

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

The founding papers of the *École de Dijon* were prepared and published in the 1960s, at a moment in which the economy was passing from an international configuration to a multinational model not yet global<sup>23</sup>. The long giraffe legs of the Cosmic Rhinoceros represent its extraordinary ability both to look at things from a different perspective, from above, and to glance into the future. The pyramid of sea urchins that it is carrying on its back symbolizes the heavy weight of tradition and conservatism: Kelsen's pyramid and state positivism!

But the Cosmic Rhinoceros, the *Lex Mercatorian* pre-paradigmatic rhinoceros, is the rhinoceros of the past. The new paradigm, the *Lex Mercatoria* is represented by another Dalinean rhinoceros: the Rhinoceros Dressed in Lace. A massive and solid strong-box of wisdom with sound, stable and well-founded rhinocerotonic legs - standing on the books of the *École de Dijon* - and two sea urchins, one on its back and the other one on the floor.



<sup>23</sup> According to economists, globalization didn't start until the 1980s. Ch.-A. MICHALET, *Qu'est-ce que la mondialisation ?*, La Découverte, Paris, 2004. – Ch.-A. MICHALET, *Mondialisation, la grande rupture*, La Découverte, Paris, 2007. – Ch.-A. MICHALET, « 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.

The *Lex Mercatorian Rhinoceros*, has rhinocerontic legs to symbolize a steady path with a firm and solid pace through the more difficult, chaotic, horizontal, reticular, globalized and complex (but more civilized) world in which economic transactions are made. One sea urchin on its back (where there once was a pyramid of sea urchins) represents the traces of tradition but also the remembrance that legal systems are not predominantly built following a pyramidal hierarchized model. Another sea urchin, this time on the floor, symbolizes the dismantlement of the pyramidal model. The new paradigm of transnational regulation is not a bunch of pyramids and rules, but networks of transnational societies and rules<sup>24</sup>.

9. **The *Lex Petrolea*: Another Rhinoceros.** In the minds of the members of the *Groupe de Beaune*, the *Lex Petrolea*, the legal order of the transnational petroleum society, is also represented by a rhinoceros and it has passed through similar paths as the more general *Lex Mercatorian Rhinoceros*: shifting old paradigms that no longer served its needs and interests and recognizing the validity of its own autonomous and specific rules.



<sup>24</sup> F. OST, M. VAN DE KERCHOVE, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Publications des Facultés universitaires Saint-Louis, Bruxelles, 2002.

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

The *Lex Mercatoria* and the *Lex Petrolea* share many fundamental aspects. That is why we conceive them as two Dalinean rhinoceroses of the same species: two Rhinoceroses Dressed in Lace. As Dalí would say: two massive strong-boxes of wisdom, more sculpted and worked than a bronze plaque! The most important reason is that both rhinoceroses or transnational legal orders, have overcome the same above-mentioned four scientific crises. In fact, some of the features of the oil and gas industry are that: (i) it is globalized, (ii) transnational petroleum contracts are predominantly long-term relational contracts, (iii) it rejects the idea of applying rules of national law to transnational petroleum contracts through a system of conflicts of law and (iv) that by the practices and the progressive construction of specific types of contracts (the standardization and modelization of such contracts and clauses) and the arbitral jurisprudence, the members of the transnational oil and gas industry have created a number of rules that are specially designed and conceived to govern transnational petroleum contracts that simply transcend the concept of the Nation-State.

Notwithstanding their similarity, the evolutionary process for the recognition of the existence of a transnational legal order of the petroleum society, the *Lex Petrolea*, has gone through a different process as the one experienced by the general and universal *Lex Mercatoria*. Until now scholars and practitioners speaking, writing and publishing about it maintain that the *Lex Petrolea* exists – never criticizing it. For better or for worse, the expression “*Lex Petrolea*” is very commonly used. An example of the popularization of the expression can be illustrated by the number of panels and roundtables devoted to the *Lex Petrolea* that have been organized in the past months by professional associations such as the *International Chamber of Commerce* (ICC) or the *Association for International Petroleum Negotiators* (AIPN), as well as the increasing number of papers devoted to it<sup>25</sup>.

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<sup>25</sup> D. BISHOP, “International Arbitration of Petroleum Disputes: The Development of a *Lex petrolea*”, in *Transnational Dispute Management* (Ed. Thomas W. Wälde), 2004. – C. CARVALHO CARDOSO ALVES, C. MENEZES MARINHO, J. DA HORA VASSALLO, “*Lex Petrolea*: O direito internacional privado na indústria do petróleo”, in *PDPETRO*, São Paulo, 2007. – M. ROSALDO DE SA RIBEIRO, “Direito dos Investimentos e o Petróleo”, in *Revista da Faculdade de Direito da Universidade do Estado do Rio de Janeiro*, Vol. 1, 2010. – Th. CHILDS, “Update of *Lex Petrolea*: The continuing development of customary law relating to international oil and gas exploration and production”, in *Journal of World Energy Law and Business*, Vol 4, No 3, 2011, p. 214. – K. TALUS, S. LOOPER, S. OTILLAR, “*Lex*

#### 10. The New Debate on the Plurality of Transnational Legal Orders.

For some time, particularly in 1980s, the debate regarding the existence of a transnational legal order, in particular the *Lex Mercatoria*, was seen by many as an intellectual construct for scholars and academics having no contact with reality and that would not be understood by lawyers or their clients. At best, it consisted in a list of some twenty general rules that could be extracted from international arbitral awards<sup>26</sup>. In the period of time that separate us from that kind of criticism the discussion of the existence of the *Lex Mercatoria* has evolved considerably, both at the academic and practical levels. In this period, the discussion has been focused chronologically on its existence, its content and its methodological aspects. We believe that the 21<sup>st</sup> century has witnessed a consolidation of this new paradigm and its evolution not only on the academic front but also in practice. On the academic front, among many others, one could mention Professor Eric Loquin's 2006 general lecture at The Hague Academy of International Law, entitled « *Les règles matérielles internationales* », which may be considered as the most complete work to date on the *Lex Mercatoria* and the scientific principles, values and methodology of the *École de Dijon*.

On the practical side, it is impossible not to recognize the extraordinary expansion of this phenomenon to other specific and autonomous legal orders (*Lex Petrolea*, *Lex Constructionis*, *Lex Sportiva*, *Lex Numerica*...) and its increasing institutionalization (by organizations such as UNIDROIT and UNCITRAL), thus creating both a common and a special law of transnational contracts<sup>27</sup>. Unsurprisingly, an important example of this increasing interest on the *Lex Mercatoria* and transnational law can be found in the area of “international arbitration” – more appropriately referred to as “transnational arbitration”. In this regard it is particularly interesting to observe that the heads of the international arbitration practice groups of what

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*Petrolea* and Internationalization of Petroleum Agreements: Focus on Host Government Contracts”, in *Journal of World Energy Law and Business*, 2012, p. 181. – N. BONNEFOY, “Moving Towards an African *Lex Petrolea*”, in *AIPN Advisor*, September, 2012, p. 24. – T. MARTIN, “*Lex Petrolea* in international law”, in *Dispute Resolution in the Energy Sector: a practitioner's handbook*, 2012. – C. OTERO GARCIA CASTRILLON, “Reflections on the law applicable to international oil contracts” (unpublished).

<sup>26</sup> L. MUSTILL, “The New *Lex Mercatoria*: The First Twenty-five Years”, in *Arbitration International*, Vol. 4, Issue 2, Kluwer Law International, 1988, p. 86.

<sup>27</sup> E. LOQUIN, *Les règles matérielles internationales*, in *Recueil des Cours*, Académie de droit international de la Haye, Tome 322, Martinus Nijhoff Publishers, 2007. p. 34.

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

most members of the transnational arbitration society would agree are four of the most active practices (three of which are also professors of law and serve at the University of Paris XII, the University of Miami and the University of New York), believe in some form of transnational law autonomous from national and international legal systems. Some called it transnational law, some *Lex Mercatoria*, others simply refuse to assign it a particular name. For example, while Shearman & Sterling's Emmanuel Gaillard seems to reject the *École de Dijon's Lex Mercatoria* to defend his own "transnational positivism"<sup>28</sup>, Freshfields' Jan Paulsson defends a multinational and "three dimensional" version of transnational law<sup>29</sup>. Debevoise's Donald F. Donovan defends that transnational law is autonomous from national and international legal orders but for some reason explicitly refuses to call it *Lex Mercatoria*<sup>30</sup> and King & Spalding's Doak Bishop believes that arbitral awards involving petroleum issues have developed the beginnings of a *Lex Petrolea* that serves to instruct and regulate the international petroleum industry<sup>31</sup>. In our opinion, the debate on transnational legal orders is no longer focused on whether or not they exist, but on their plurality and their content and methodology.

**11. The Purposes of this Paper.** This paper serves two main purposes. Firstly, it intends to furnish a general overview and explanation of the philosophical and theoretical aspects behind the *Lex Petrolea*. Secondly, it is intended to provide the general epistemological and scientific principles that will guide forthcoming works of the *Transnational Petroleum Law Institute*. In this regard, this paper is one of two founding papers<sup>32</sup> of this

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<sup>28</sup> E. GAILLARD, *Aspects philosophiques du droit de l'arbitrage international*, Académie de droit international de la Haye, Martinus Nijhoff Publishers, Leiden, 2008.

<sup>29</sup> J. PAULSSON, "Arbitration in Three Dimensions", in *LSE Law, Society and Economy Working Papers*, London School of Economics and Political Science, London, 2010.

<sup>30</sup> D. F. DONOVAN, "The Transnational Advocate", in *Arbitration in Changing Times* (ed. Albert Jan van den Berg), ICCA Congress Series, 2010 Rio, Vol 15., Kluwer Law International, 2011, p. 2011.

<sup>31</sup> D. BISHOP, "International Arbitration of Petroleum Disputes: The Development of a *Lex petrolea*", in *Transnational Dispute Management* (Ed. Thomas W. Wälde), 2004, p. 64.

<sup>32</sup> The second founding paper is authored by Julian Cárdenas García, Visiting Professor and Energy Law Scholar at the University of Houston Law Center and Doctoral Fellow at the CREDIMI – J. CÁRDENAS GARCÍA, "Best Industry Practices and Environmental Regulation for Offshore Petroleum Operations - A Contribution to the Study of the *Lex Petrolea*". This study was first presented in the conference "*Law and Boundaries / Droit et Limites*", organized by the Doctoral School of the *Institut d'études politiques de Paris* (Sciences Po) in March, 2012.

private and non-profit scientific initiative created by the *Groupe de Beaune* and founded by two scholars and practitioners that consider themselves as members - or at the very least, enthusiasts - of the same school of legal reasoning: the *École de Dijon*.

We believe that the *Lex Petrolea* exists and the idea roots date back to at least the 1970s since Professor El-Kosheri delivered his 1975 Hague lecture. We also believe that it has continued to develop ever since. In our theoretical framework, the *Lex Petrolea* is not reduced to a bunch of rules designed to govern transnational petroleum contracts or the ones that can be extracted from the analysis of the international arbitral awards related to the oil and gas industry, nor the principles that can be inferred from the model contracts made by professional associations of the petroleum world, etc. Those aspects are mere parts of larger and more complex phenomenon. For us the *Lex Petrolea*, as the *Lex Mercatoria*, is a system of law, more precisely a transnational legal order that is autonomous from both national and international legal orders as well as from other transnational legal orders: a rhinoceros. The abovementioned transnational rules merely constitute the normative aspect of the whole construct.

Following the tradition and the methodology of the *École de Dijon*, this paper is structured in two parts and addresses both the reality and the theory of the *Lex Petrolea*.

## **I. THE REALITY OF THE *LEX PETROLEA***

12. The reality of the *Lex Petrolea* can be appreciated by the renewal of the sources in the law of transnational petroleum contracts and, more specifically, by its particular needs.

### **A. THE SOURCES OF THE *LEX PETROLEA***

13. Traditionally, the theory of the sources of law has been dominated by the dogmas and principles of traditional legal positivism; recognizing the validity of a rule of law if such rule has its origins in a State or inter-state legal order. In the last decade, however, the transnational petroleum community has witnessed the progressive emergence of new rules of a private origin, specifically designed to govern petroleum contracts. These new rules, which in practice compete with traditional state rules, are not only governing the relations of the transnational petroleum society but are often

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

enforced by arbitral tribunals. These new rules aspire to (in fact they are being treated as rules of law) be as valid and binding as traditional state rules. This phenomenon is completely comprehensible and logical. These new set of rules are the ones that better satisfy the needs and interests of the ever changing transnational petroleum industry. Nevertheless, it is essential to bear in mind that the acceptance of the legal nature of these new rules governing transnational petroleum contracts is at the same time the acceptance of a new legal paradigm.

### *1. The emergence of a new law for petroleum contracts*

14. Over the past few decades, in addition to the traditional sources of petroleum law, national petroleum codes or statutes, exploration and production regulations, and the overall legal, fiscal and regulatory texts applicable to petroleum operations, the transnational petroleum society has also witnessed the emergence of a new set of rules of a different nature. These new rules are created rather spontaneously by the transnational petroleum society itself. Besides the creation of the ever evolving series of *best oilfield practices* at the origin of much of the transnational rules of the petroleum society, one could mention the rules arising from (i) the new contracts and clauses that have emerged from the evolution of transnational petroleum contracts, (ii) the standardization and institutionalization of some of those contracts and clauses by the practice and the works of professional associations, (iii) the publication of doctrinal codifications of rules potentially applicable to oil and gas contracts and (iv) the works and reflections of both contract and investment treaty arbitral tribunals.

There seems to be a consensus in the oil and gas industry that transnational petroleum contracts have evolved from traditional concession agreements derived from contracts used in the mining sector, into three types of contracts: profit sharing agreements, modern concessions and risk service agreements<sup>33</sup>. For some authors, at least 80% of the contents of most transnational petroleum contracts include the same clauses<sup>34</sup>. Similarly to the

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<sup>33</sup> C. DUVAL, H. LE LEUCH, A. PERTUZZIO, J. WEAVER, *International Petroleum Exploration and Exploitation Agreements: Legal, Economics & Policy Aspects*, Second Edition, Barrows Company, New York, 2009, p. 53.

<sup>34</sup> “One should not be misled by the various labels affixed to IPAs, since they all share many basic features and can be made to achieve the same economic results. In fact, at least 80% of the contents of most IPAs consist of the same clauses, irrespective of their label. The real



work carried by the *International Chamber of Commerce* (ICC) or the *Fédération internationale des ingénieurs-conseils* (FIDIC), the transnational petroleum industry has a number of professional organizations engaged in the creation and drafting of model and standardized contracts for the petroleum sector<sup>35</sup>. The model contracts of the *International Association of Petroleum Negotiators* (AIPN), which are recognized as the standard in international energy transactions include, by way of example, contracts in the oil and gas business such as the newly revised Joint Operating Agreement of 2012, the Farmout Agreement of 2004, the Unitization and Unit Operating Agreement of 2006.

15. In addition to the emergence of new contracts and their progressive standardization by the work of private professional organizations, a new source of transnational law has emerged in the past few decades that could potentially influence the transnational law of petroleum contracts: institutional codifications of contractual principles such as the UNIDROIT Principles of International Commercial Contracts and the Lando Principles of European Contract Law. Both doctrinal codifications state that they may be used to govern transnational contracts when this has been agreed by the parties, when the parties have agreed their contract to be governed by general principles of law, the *Lex Mercatoria* or the like and also when the parties have not chosen any rules to govern their contracts<sup>36</sup>. There has been

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issue is how production, profits and the control of operations will be split between the risk-taking investor and the State owner of the subsoil... All IPAs still aim, just as in Colonel Drake's days, at the same goal: to make petroleum exploration and exploitation possible". C. DUVAL, H. LE LEUCH, A. PERTUZZIO, J. WEAVER, *International Petroleum Exploration and Exploitation Agreements: Legal, Economics & Policy Aspects*, Second Edition, Barrows Company, New York, 2009, p. 54.

<sup>35</sup> For a presentation of the standardization of transnational petroleum contracts and the works of the different professional organizations: T. MARTIN and J. PARK, "Global petroleum industry model contracts revisited: higher, faster, stronger", in *Journal of World Energy Law & Business*, Vol. 3, n° 1, Oxford University Press, 2010.

<sup>36</sup> In this regard, the Preamble of the Unidroit Principles state that "*These Principles set forth general rules for international commercial contracts/ They shall be applied when the parties have agreed that their contract is governed by them / They may be applied when the parties have agreed that their contract be governed by general principles of law, the lex mercatoria or the like...*". Likewise, Article 1:101 of the Lando Principles state that "*(1) These Principles are intended to be applied as general rules of contract law in the European Union / (2) These Principles will apply when the parties have agreed to incorporate them into their contract or that their contract is to be governed by them / (3) These Principles may be applied when the parties a) have agreed that their contract is to be governed by "general principles of law", or the "lex mercatoria" or the like; or...*"

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

a lot of debate regarding the nature of these codifications, as to whether they can be considered as a part of the *Lex Mercatoria* or as a new expression of the *Lex Mercatoria*<sup>37</sup>. Although we believe that these codifications are extremely useful (and we recognize their role as an exceptional source of transnational rules) we don't systematically recognize them as being part of the *Lex Mercatoria*, the *Lex Petrolea* or any other transnational legal order. Only the rules of these codifications that really satisfy the needs and interests of a particular transnational industry will be considered as part of its transnational legal order. The process of incorporation of the rules of these codifications, or at least some of them, into the *Lex Mercatoria*, the *Lex Petrolea* or any other legal order depends exclusively on the choice of their members. A choice that can be ascertained by industry practices, by agreement of the parties to transnational contracts or, alternatively, by the application of these rules by arbitral tribunals.

It follows that arbitral jurisprudence is another crucial source of rules for the transnational petroleum industry. Formerly, the paradigm maintained that international arbitration was confidential but the reality embodied in new trends points towards transparency (particularly in investment treaty cases) and the impact of the communication technologies in this hyper-connected world demonstrates that arbitral awards, even awards that are supposed to remain confidential, are easily accessible in the petroleum society<sup>38</sup>. These arbitral awards or relevant extracts are also published in law reviews of some of the foremost arbitral institutions like the *ICC International Arbitration*

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<sup>37</sup> M. J. BONELL, "Unidroit Principles and The *Lex Mercatoria*", in *Lex Mercatoria and Arbitration* (Editor, Thomas E. Carbonneau), Kluwer Law International, 1998, p. 249. – D. MAZEAUD, « A propos du droit virtuel des contrats : réflexions sur les principes d'Unidroit et de la Commission Lando », in *Mélanges Michel Cabrillac*, Dalloz/Litec, Paris, 1999, p. 205. – Ph. KAHN, « Vers l'institutionnalisation de la *lex mercatoria*. A propos des principes Unidroit relatifs aux contrats du commerce international », in *Liber Amicorum Commission Droit et Vie des Affaires*, Bruylant, Bruxelles, 1998, p. 132. – C. KESSEDJIAN, « Un exercice de rénovation des sources du droit des contrats du commerce international : Les Principes proposés par l'Unidroit », in *Revue critique de droit international privé*, Tome 84, N° 4 Paris, 1995, p. 641. – K. P. BERGER, *The Creeping Codification of the Lex Mercatoria*, Kluwer Law International, 1999.

<sup>38</sup> For an example of this trend, one could mention the almost immediate publication on the internet of the ICC arbitral awards in *Mobil Cerro Negro, LTD vs Petróleos de Venezuela and PDVSA Cerro Negro, S.A.*, of 23 December 2011 (ICC Case No 15416/JRF/CA) and in *Phillips Petroleum Company Venezuela Limited and ConocoPhillips Petrozuata B.V. vs Petróleos de Venezuela, S.A.*, of 17 September 2012 (ICC Case No 16848/JRF/CA and 16849/JRF).

*Court Bulletin*, the *ICSID Review – Foreign Investment Law Journal*, as well as the *Journal de droit international (Clunet)*. In general, most arbitral awards can be construed as a source of inspiration for the transnational petroleum industry, but without any doubt the arbitral awards rendered in the field of petroleum resources constitute a privileged source of the *Lex Petrolea*. In recent years, a number of papers have been published concerning arbitral jurisprudence related to the petroleum industry, some analyzing the different phases of its evolution<sup>39</sup>, others identifying and categorizing the issues decided in these awards<sup>40</sup>. These different studies include arbitral awards starting with the interpretation of the first generation of concession agreements (the *Abu Dhabi* award of 1951 the *Qatar* award of 1953 and the *Aramco* award of 1953), passing through the arbitral awards of the “confrontation period” (the *Sapphire* award against Iran of 1963 and the three awards against Libya, the *BP* award of 1973, the *Texaco* award of 1977 and the *Liamco* award of 1977), to the awards dealing with modern transnational petroleum agreements and the new generation of commercial and investment arbitral awards.

As was stated earlier, the recognition of the legal nature of these new rules, so convenient to the transnational petroleum industry also implies the acceptance of a new legal paradigm.

## 2. The acceptance of a new legal paradigm

16. The recognition of the legal nature of these new transnational rules for petroleum contracts entails simultaneously the acceptance of a new legal paradigm. As it has already been mentioned the dogmas of the old paradigm of legal state positivism contend that the State is the unique source of law and therefore the totality of the legal phenomenon is reduced to national and international law. Without any doubt, today, the concept of the Nation-State still plays a central role in the concept and systems of law. Nevertheless, the

<sup>39</sup> A. EL-KOSHERI, The changing roles in the arbitration process (with regard to the applicable law governing the new generation of the petroleum agreements), in *Arab L.Q.* 475, 1985-1986. – A. EL-KOSHERI, “International arbitration and petroleum contracts”, in *Encyclopedia of Hydrocarbons*, 2009, p. 879.

<sup>40</sup> D. BISHOP, “International Arbitration of Petroleum Disputes: The Development of a *Lex Petrolea*”, in *Transnational Dispute Management*, 2003. – Th. CHILDS, “Update of *Lex Petrolea* : The continuing development of customary law relating to international oil and gas exploration and production”, in *Journal of World Energy Law and Business*, Vol 4, No 3, 2011, p. 214.

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

progressive production of rules of law by private entities or non-state institutions has forced the dominant paradigm of legal state positivism to shift into the new paradigm of legal pluralism. Legal pluralism consists in the acceptance of the simple fact that several legal orders of the same or different nature coexist at the same time and recognizes the legal nature of the rules of each of these different systems or orders regardless of their origin<sup>41</sup>.

According to the founding scholars of the *Lex Mercatoria*, the advent of the concept of Nation-State resulted in a form of “*confiscation*” or “*nationalization*” of the production of legal rules, particularly in the area of commercial law, depriving the law of commerce and economic transactions of its inherent universal and transnational nature<sup>42</sup>. The Nation-State normative production was reinforced during the 20<sup>th</sup> century thanks to the extraordinary development and acceptance of the theory of legal state positivism and its concept of law, “*that particular concept of the law that links the legal phenomenon to the constitution of a central and sovereign power capable of imposing it by coercion: the State*”<sup>43</sup>. Italian Professor Norberto Bobbio was of the belief that, historically the theory of legal positivism “*is the manifestation or the acknowledgement by jurists of that complex phenomenon of the formation of the modern State that is the monopolization of the power to produce legal rules*”<sup>44</sup>. This theory enjoyed extraordinary success under the minds of thinkers such as Austrian theorist Hans Kelsen<sup>45</sup>.

17. Nevertheless, nowadays Kelsen’s legal positivism is in frank decadence. As it is pointed out by Belgian Professors François Ost and Michel van de Kerchove, Kelsen and other famous positivists like H. L. A. Hart and Alf Ross, wrote the essential part of their contributions in

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<sup>41</sup> F. OST, M. VAN DE KERCHOVE, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Publications des Facultés universitaires de Saint-Louis, Bruxelles, 2002, p. 184.

<sup>42</sup> E. LOQUIN, *Les règles matérielles internationales*, in *Recueil des Cours*, Académie de droit international de la Haye, Tome 322, Martinus Nijhoff Publishers, 2007, p. 22, n° 3.

<sup>43</sup> N. BOBBIO, « Sur le positivisme juridique » in *Essais de théorie du droit* (Trad. Michel Guéret et Christophe Agostini), La pensée juridique, LGDJ, Paris, 1998, p. 24, n° 2.

<sup>44</sup> N. BOBBIO, « Sur le positivisme juridique » in *Essais de théorie du droit* (Trad. Michel Guéret et Christophe Agostini), La pensée juridique, LGDJ, Paris, 1998, p. 24, n° 2.

<sup>45</sup> H. KELSEN, *Théorie pure du droit* (Trad. Charles Eisenmann), La pensée juridique, LGDJ, Paris, 1999.

the midst of the 20<sup>th</sup> century, at a time in which the prevailing vision of the world was characterized by the idea of order and stability: political order centered in the concept of Nation-State, “*supreme power for the internal order, sovereign figure for international relations*”; legal order based on the rule of state law “*the imperative and unilateral commandment imposed by the menace of coercion*”; and an international order based on the Westphalian model “*that guaranteed the equality in sovereignty*”<sup>46</sup>. This vision of the world and the legal universe was characterized by its fragmentation in geographical, political and legal territories with clearly defined borders and hierarchized systems of rules. But, as they contend, “*in the interval that separate us from Kelsen, Hart and Ross the world changed: the globalization of financial markets, the accrued interdependence of the economies and cultures, the progress of the numeric technologies given birth to an information society, the weakening of the capability of action of the States (both in their role of Nation-State and of Welfare State), the emergence of influential private powers (transnational companies and non-governmental organizations), the rise of the power of judges and the cult of human rights, multiculturalism even in the core of the Nation-States, the multiplication of individualists initiatives...*”<sup>47</sup>.

Legal pluralism is the new paradigm capable of dealing with the legal aspects of business law in the 21<sup>st</sup> century’s global and transnational environment. For Italian theorist Santi Romano, autonomous societies or social communities, which he refers to as “*institutions*”, are the basis of any legal system or order and each time that a social community can be individualized it constitutes a different legal order<sup>48</sup>. If traditional legal positivism is based in the “*norm*”, legal pluralism concentrates in the “*institution*”. This is why legal pluralism theories are also commonly known as institutional representations of the legal order. Legal pluralism does not reduce the legal phenomenon to the “*norm*”; it considers it only as a part of the broader and much more complex notion of what a legal order is. According to Ost and van de Kerchove, legal pluralism provoked a paradigm

<sup>46</sup> F. OST, M. VAN DE KERCHOVE, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Publications des Facultés universitaires de Saint-Louis, Bruxelles, 2002, p. 11.

<sup>47</sup> F. OST, M. VAN DE KERCHOVE, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Publications des Facultés universitaires de Saint-Louis, Bruxelles, 2002, p. 12.

<sup>48</sup> S. ROMANO, *L’ordre juridique* (Traduction par L. François et P. Gothot), Réédition de la 2e éd., Dalloz, Paris, 2002. p. 25, n° 12.

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

shift, from the paradigm of centralized and hierarchized law to a decentralized law, organized and responding to other values. If the old paradigm was represented by a pyramid (a pyramid of norms), the new paradigm is represented by a *network*, a network in which the pluralities of legal orders interact<sup>49</sup>.

That is also why we do not recognize the expressions of the old paradigm that distinguished “*hard law*” from “*soft law*”, hard law being somehow the “*real law*”, the law that finds its origin in a national or international legal order, soft law representing a form of weak law because of its lack of State legitimacy. The *Lex Mercatorian Rhinoceros* as the *Lex Petrolean Rhinoceros*, both legal pluralists, are simultaneously hard and soft, hard on the outside, soft on the inside, hard in the way they the rules are applied (as the most imperative rule a of national or international legal system), soft in the manner in which they are created.

But the reality of the *Lex Petrolea* is not circumscribed to the renovation of its rules and its sources, it is also appreciated in the way that this approach serves and satisfies its needs.

### B. THE NEEDS OF THE *LEX PETROLEA*

18. The nature and characteristics of the transnational petroleum society demand that its rules meet the needs for both an effective system of contractual regulation and an effective system of transnational regulation.

#### *1. The need for an effective system of contractual regulation*

19. The rules of traditional contract law, both in civil law and common law systems, are based on the contract model of the 18<sup>th</sup> century. In other words, a short-term contract designed to allow the exchanges of goods and services. This model of exchange contracts perfectly suited the needs of the business community during the industrial revolution. The problem with this contractual model, which to some extent continues to serve the needs of short-term transactions is that it is not designed to deal with the perverse effects of time on contractual relations. The effect of time is the single most

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<sup>49</sup> F. OST, M. VAN DE KERCHOVE, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Publications des Facultés universitaires de Saint-Louis, Bruxelles, 2002, p. 14.

important factor that has completely altered the structure and values of the traditional paradigm of exchange contracts. If the paradigm of exchange contracts is based mostly on a strict interpretation of the principles of freedom of contracts, party autonomy, and particularly the sanctity of promises, the effects of time has altered the entire system of beliefs. The problem of time is that it is simply uncontrollable and irreverent; the only thing that it accepts is to be manageable. The sensation of certainty and stability offered by the old contractual paradigm of exchange contracts gives into the effect of time in modern long-term relational contracts. Of course, time, and all that comes with it, changes of the economic, political, monetary and technical circumstances, wars, revolutions, financial bubbles and crises, natural and environmental disasters - all of which are very familiar to the petroleum industry. The only certainty that a party to a modern long-term contract has when it is negotiating it is that over time something will happen that will transform its previous false sense of certainty and stability into a world of contractual uncertainty and chaos. As French Professor Laurent Aynès points out, time has put contractual legal theory in an extraordinary paradox. If nowadays, “*the progress in the technical and experimental sciences allows us to grasp and manage with a certain degree of certitude the elements of the future, we progress with the certitude that it is uncertain and that it surpasses the power of will*”<sup>50</sup>.

One of the particularities of transnational petroleum contracts is that they are long-term contracts<sup>51</sup>. Moreover, “*petroleum agreements are considered a prototype of long-term agreements*”<sup>52</sup>. They respond to different values as those set out by the traditional exchange contract model, which is what the

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<sup>50</sup> « *Le progrès de la technique et des sciences expérimentales permettent d’appréhender et de traiter plus sûrement les données dont l’avenir sera fait, nous progressons dans la certitude qu’il est incertain et échappe à la puissance de la volonté* ». L. AYNES, « Cession de contrat », in *Revue de jurisprudence commerciale (Ancien Journal des agrées)*, N° 43, Paris, 1999, p. 194, n° 4.

<sup>51</sup> A.Z. EL CHIATI, *Protection of Investments in the Context of Petroleum Agreements*, in *Recueil des Cours, Académie de droit international de la Haye*, Tome 204, Martinus Nijhoff Publishers, 1988, p. 4, n° 22. – C. DUVAL, H. LE LEUCH, A. PERTUZZIO, J. WEAVER, *International Petroleum Exploration and Exploitation Agreements: Legal, Economics & Policy Aspects*, Second Edition, Barrows Company, New York, 2009, p. 32.

<sup>52</sup> A.Z. EL CHIATI, *Protection of Investments in the Context of Petroleum Agreements*, in *Recueil des Cours, Académie de droit international de la Haye*, Tome 204, Martinus Nijhoff Publishers, 1988, p. 43, n° 23.

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

national and international legal orders have to offer<sup>53</sup>. For example, the binding force and the sanctity of contract cannot be viewed in the same manner in an instantaneous discreet short-term contract as in a 5, 10 or 30 year contract. The effect of time, together with the increasing complexity and sophistication of economic activities, has provoked another paradigm shift: this time, from exchange contracts to relational contracts. The approach of this new paradigm of the contractual phenomenon is not limited to the particular business transaction that the contract is supposed to regulate, it goes beyond it and takes into account the business relation between the parties<sup>54</sup>. It is somehow based on the idea that parties to long-term contracts do not enter contracts just for a particular business but also to create or preserve a relationship that will allow them to benefit from, and preserve over time, current business transactions at the same time it allows to develop new ones. Moreover, it is perceived in the industry that the different players of the oil and gas industry “*value maintaining a long-term relationship built on cooperation*”<sup>55</sup>, particularly with oil producers. Business relationships are built over time and the new paradigm of relational contracts responds to that logic. While the old paradigm was characterized by the rigid and strict interpretation of the principles of the binding force and sanctity of contracts, the new paradigm introduces the ideas of flexibility and adaptation. Transnational long-term petroleum contracts are like Dalí’s soft and melting watches. They perfectly represent the deformation of the traditional model of exchange contracts by the effect of time and the new paradigm of relational contracts.

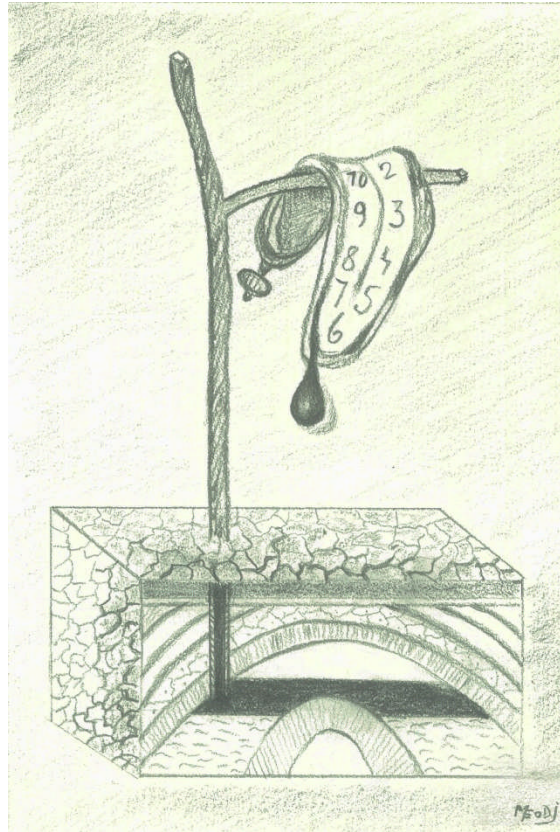
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<sup>53</sup> On the idea of long term contracts an international business law, Ph. KAHN, « Force majeure et contrats internationaux de longue durée », in *Journal de droit international (Clunet)*, Paris, 1975, p. 467. – B. OPPETIT, « L’arbitrage et les contrats commerciaux à long terme », in *Revue de l’arbitrage*, Paris, 1976, p. 91. – M. FONTAINE, « Les contrats internationaux à long terme », in *Etudes en l’honneur de Roger Houin*, Sirey, Paris, 1985, p. 263.

<sup>54</sup> The notion of relational contracts was developed by Professor Ian R. Macneil in the United States of America since in 1970s. C. BOISMAIN, *Les contrats relationnels*, préf. M. Fabre-Magnan, Presses Universitaires d’Aix-Marseille, 2005. – H. MUIR WATT, « Du contrat « relationnel » Réponse à François Ost », in *La relativité du contrat*, LGDJ, 1999, p. 173.

<sup>55</sup> C. DUVAL, H. LE LEUCH, A. PERTUZZIO, J. WEAVER, *International Petroleum Exploration and Exploitation Agreements: Legal, Economics & Policy Aspects*, Second Edition, Barrows Company, New York, 2009, p. 34.





As Dalí's melting watches, long-term petroleum contracts are also soft in the sense that in order for them to be effective they have to be flexible and be able to adapt to the circumstances, particularly in these times of price volatility and instability of international energy markets.

20. Dalí said about his melting watches that “*hard or soft, the principal thing is that the watch gives the exact time*”<sup>56</sup> and that same logic applies to the new paradigm of relational long-term contracts. Hard or soft, rigid at times, flexible at others, fragile as a whole, the principal thing is that the contract serves its purpose. The purpose of transnational petroleum contracts can be summarized in the idea revealed in El-Kosheri's 1975 Hague lecture: the perpetual elaboration and adaptation of a contractual microcosm. The idea that a contract constitutes a microcosm is not new. This particular idea

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<sup>56</sup> R. & N. DESCHARNES, *Dalí. The Hard and the Soft, Spells for the Magic of Form*, Eccart, Paris, 2004, p. 246.

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

was previously suggested by French Professor René Demogue in the 1930s and, along with the *École de Dijon*, has been developed by a group of French professors, such as French Professor Denis Mazeaud, that dared to think about contracts differently and proposed a “*new contractual order*”<sup>57</sup> on the basis of contractual solidarism<sup>58</sup>. At first, this notion of contractual solidarism may come as a complete surprise to some members of the transnational petroleum community. They might be tempted to say that when someone in the oil and gas business enters into a contract, it is to do business and nothing else, as the contract is nothing more than the confrontation of two individual interests. There is some truth to that, but if history and the evolution of transnational petroleum contracts and disputes have taught us anything, it is that long-term contracts will fail in their purpose if they are too rigid and seen exclusively as a confrontation of individual interests. If the contract is too rigid, even with the best sealed economic or legal stabilization clauses, the petroleum business will fail. Be it by way of unlawful breach or revocation, nationalization or expropriation, the petroleum operation will fail. The petroleum industry knows this all too well as it has lived through it in the three major energy crises. Of course, there is often the possibility of submitting the dispute to contractual arbitration or to investment treaty arbitration, but until now we don’t share the perception that being compensated by an arbitral tribunal after years of expensive and time consuming litigation is the core business objective of the petroleum industry.

The new paradigm of relational long-term contracts follows a different logic. It no longer approaches the contract exclusively as a confrontation of individual interests but rather as the union of two different types of interests creating a new mutual interest: making the contractual project work. In the particular case of transnational petroleum contracts, this new mutual interest is no other than to make oil and gas exploration and production possible. This mutual interest is what explains that beyond the natural competition

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<sup>57</sup> D. MAZEAUD, « Le nouvel ordre contractuel », in *Revue des contrats*, LGDJ, Paris, 2003, p. 295.

<sup>58</sup> D. MAZEAUD, « Loyauté, solidarité, fraternité : la nouvelle devise contractuelle ? », in *L’avenir du droit - Mélanges en hommage à François Terré*, Dalloz, Paris, 1999, p. 603. – D. MAZEAUD, « Solidarisme contractuel et réalisation du contrat », in *Le solidarisme contractuel* (Dir. Luc Grynbaum et Marc Nicod), Études juridiques. Economica, Paris, 2004, p. 59.

between the members of the petroleum society “*oil and gas producing companies frequently negotiate contracts between each other with a view to mutual benefit. Joint ventures, farmouts, unitizations...*”<sup>59</sup>. The belief in this mutual type of interest suggests the certain type of contractual solidarism that was previously mentioned. The spirit of contractual solidarism is also perceived, for example, in a renegotiation clause calling for new arrangements in the event of change in the price structure of crude oil or in tax regulations and providing that “*such arrangements shall ensure that neither Party shall profit at the expense of the other when compared with the present arrangement*”<sup>60</sup>. In a certain manner, this embodies the rule to take into consideration the interest of the other contracting party<sup>61</sup>. The spirit of this provision might be easily viewed as part of the content of the general principle of good faith and fair dealing that is proclaimed as a transnational rule of contracts and that is included in codifications for transnational contracts such as the Unidroit Principles and multiple arbitral awards. This general principle of good faith and fair dealing is complemented by other sources of transnational rules such as the Lando Principles which impose a duty of collaboration or cooperation fitting very well the logic of long-term petroleum contracts. After all, “*success in the industry has always required cooperation with other parties, whether they be contractors or competitors*”<sup>62</sup>, particularly when it comes to upstream operations.

The success of transnational petroleum projects depends in great part on the terms of the contract, but also, to a great extent, on the characteristics of the legal environment in which those contracts function. We believe that transnational contracts may only function in a legal order of its same transnational nature; thus the need for an effective system for transnational regulation for petroleum contracts.

<sup>59</sup> T. MARTIN and J. PARK, “Global petroleum industry model contracts revisited: higher, faster, stronger”, in *Journal of World Energy Law & Business*, Vol. 3, n° 1, Oxford University Press, 2010, p. 4

<sup>60</sup> C. DUVAL, H. LE LEUCH, A. PERTUZZIO, J. WEAVER, *International Petroleum Exploration and Exploitation Agreements: Legal, Economics & Policy Aspects*, Second Edition, Barrows Company, New York, 2009, p. 33.

<sup>61</sup> A.-S. COURDIER-CUISINIER, *Le solidarisme contractuel*, Préf de Eric Loquin, Université de Bourgogne – CNRS – Travaux du Centre de recherche sur le droit des marchés et des investissements internationaux – CREDIMI, Vol. 27, Litec, Paris, 2006.

<sup>62</sup> T. MARTIN and J. PARK, “Global petroleum industry model contracts revisited: higher, faster, stronger”, in *Journal of World Energy Law & Business*, Vol. 3, n° 1, Oxford University Press, 2010, p. 4.

## 2. *The need for an effective system of transnational regulation*

21. The transnational petroleum society also needs an effective model of transnational regulation that goes beyond the particular contractual legal order or microcosm created by transnational petroleum contracts. We believe that long-term petroleum contracts create a contractual legal order of their own and that this legal order is autonomous from national and international legal orders. But we also believe that the contractual legal orders created by transnational petroleum contracts also need a transnational frame of reference to serve as a fundamental legal order that effectively serves the needs and interests of the oil and gas industry. Certainly not only by eliminating the legal obstacles that hinder the purpose of making oil and gas exploration and production possible and profitable, but by creating and imposing new rules that guarantee the survival of the business, and writ large, the survival and development of the transnational petroleum industry. In other words, we believe that the contractual legal order created by transnational petroleum contracts should be incorporated in the *Lex Petrolea*, a system of self-organization and transnational regulation that goes beyond the particular contracts entered by some of its members.

The idea of a “fundamental legal order” or an *ordre juridique de base* to a transnational contract is not new and has been widely debated, before and after the Libyan petroleum arbitrations<sup>63</sup>. There are a number of theoretical models that may be used to approach the phenomenon of transnational regulation, but for the purposes of this paper we will only make reference to two of them: the *contrat sans loi* model and the *Lex Mercatoria* model. In the first model, the transnational community at the basis of the legal order comprises the parties and the different organs of the contract, and; in the second, the transnational community at the basis of the legal order is the transnational business community as a whole.

According to the theory of legal pluralism, wherever there is a social body that meets a certain degree of autonomy and organization there is manifestation of the law. For the moment, we will avoid details of the degree

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<sup>63</sup> P. MAYER, « Le mythe de l’« ordre juridique de base » (ou Grundlegung) », in *Le droit des relations économiques internationales, Études offertes à Berthold Goldman*, Litec, Paris, 1982, p. 202, n° 5. – B. STERN, « Trois arbitrages, un même problème, trois solutions. Les nationalisations pétrolières libyennes devant l’arbitrage international », in *Revue de l’arbitrage*, Litec, Paris, 1980, p. 19.

of autonomy and organization that such social body must have. Instead, we will work under two assumptions: that both the persons participating in a long term petroleum contract (parties, management committees, operating committees, arbitrators, etc) and the transnational business community as a whole, create social bodies that meet the requirements of autonomy and organization to be qualified as transnational legal orders. We also believe, as it was said before, that these legal orders are autonomous from national and international legal orders. The two models we mentioned (the *contrat sans loi* model and the *Lex Mercatoria* model) will allow us to explain and justify theoretically the autonomy of the contractual legal order created by transnational petroleum contracts and the need of a system of transnational regulation for the transnational petroleum society: the *Lex Petrolea*.

22. The *contrat sans loi* model contends that no foreign or fundamental legal order is necessary for creating an autonomous and self-sufficient contractual legal order in the sense that its validity is to be found in the contract itself without the need to seek it elsewhere. Autonomy from national, international and transnational legal orders is nothing more than a natural consequence of its self-sufficiency. The *Lex Mercatoria* model suggest that the contractual legal order created by a petroleum contract is autonomous from national and international legal orders because it belongs to and is incorporated in a larger transnational legal order (the *Lex Mercatoria*, the legal order of the transnational business community) which is itself autonomous and independent from national and international legal orders. The validity of the contractual legal order in the *Lex Mercatoria* model, is to be found in the other transnational legal order in which it is contained: the *Lex Mercatoria*. Accordingly, the autonomy of the contractual legal order *vis-à-vis* other legal orders will depend on the degree of autonomy of the *Lex Mercatoria*. Both models are perfectly valid and coherent from a theoretical and pluralist legal perspective. We believe that the *Lex Mercatoria* model, is transposable to the *Lex Petrolea* and that it is the only one that effectively serves the needs and interests of the petroleum industry at a transnational level.

The *contrat sans loi* model, while appealing, fails to take into consideration the needs and interests of the petroleum society as a whole. In this model, the only frame of reference is the contractual legal order itself which is for all intents and purposes self-sufficient and impervious to

#### THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

outside influence as it does not respond to any rule or value that is not created by or found within the contract itself. The second model, takes into account the needs and interests of the larger transnational community in which it is incorporated.

The distinction between both models, can be crystalized by observing the role of the arbitral tribunal in each theoretical scenario. This can be demonstrated by answering to a classic question: is the arbitrator the judge of the contract or of the contract and something else as well? The perception of the arbitrator exclusively as the judge of the contract follows the line of reasoning of the *contrat sans loi* model. The arbitrator is perceived as a product of the contract that belongs exclusively to the contractual legal order. Hence, it cannot do anything different from what is required by the parties. In this model, the arbitrator does not have an heteronomous power *vis-à-vis* the parties and therefore it does not have the power, for example, to apply a rule that does not belong to the contract or that is not authorized by the parties.

In the *Lex Mercatoria* model, the arbitrator is at the same time the judge of the contract but also the judge of something else. When we refer to the oil and gas industry, that “something else” is the transnational legal order of the petroleum society: the *Lex Petrolea*. Therefore, in this case, although the arbitrator is there to solve the dispute within the terms established by the parties to the petroleum contract, he does have an heteronomous power *vis-à-vis* the parties that grants him the authority to impose the application of certain rules that might not belong to the contract itself but that belong (or that he may incorporate) to the *Lex Petrolea*. The reason why we believe in the fitness of this second model or approach is because we believe it is the only model that takes into consideration the needs and interests of the transnational petroleum society. We believe that this approach will encourage the continuous creation or incorporation of transnational rules in the *Lex Petrolea*, through new model contracts or by the establishment of best oilfield practices and the work of truly specialized arbitral tribunals. This transnational normative production will also determine its own limits and the construction of the *transnational public order of the Lex Petrolea* that will also create mechanisms to limit individualistic initiatives that threaten the industry and the society as a whole.

## II. THE THEORY OF THE *LEX PETROLEA*

23. The theory of the *Lex Petrolea* may be channeled through the notion of autonomy: autonomy of the *Lex Petrolea* itself and autonomy of its rules.

### A. THE AUTONOMY OF THE *LEX PETROLEA*

24. The autonomy of the *Lex Petrolea* relies entirely on the very existence of the transnational petroleum society and the structure of the transnational petroleum order.

#### 1. *The existence of the transnational petroleum society*

25. According to principles of legal pluralism, the proclamation of the existence of a legal order, such as the *Lex Petrolea*, is simultaneously the proclamation of the existence of an autonomous social entity: an institution. In other words, in order to affirm that the *Lex Petrolea* actually exists as a transnational legal order it is necessary to determine the transnational institution at its foundation. According to Santi Romano, an institution is a “*social body*” and for him “*there are as many legal orders as there are institutions*”. For Santi Romano an institution has an “*objective existence*” in the sense that it can be individualized, it is a “*social manifestation*” and not the mere reunion of individuals. It is also a “*close entity, that can be considered by itself and for itself*” in the sense that it has its own individuality which separates it from other social communities and legal orders. It also forms a “*stable and permanent entity*” in the sense that the institution does not lose its identity due to the mutations of some of its elements, for example the changes in the persons (i.e., IOCs, States, NOCs) that make part of it.

Santi Romano’s four conditions for considering an institution to exist are echoed by Ost and van de Kerchove through the notion of autonomy. They affirm that an institution exists if three degrees of autonomy are more or less met: social autonomy, organic autonomy and organizational autonomy. The idea of social autonomy is very close to Romano’s idea of the objective existence of a social manifestation or body that may be considered by itself and for itself. The idea of an organic autonomy refers to the capability of that social body to create their own organs as they see fit. Lastly, the idea of an organizational autonomy is close to the notion of self-organization or regulation. Following Santi Romano, it is clear that if we

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

want to define a legal order as a whole, one cannot look into what we believe are parts of it (its rules for example) and then say that the legal order is the aggregate of those parts. On the contrary, it is indispensable to understand the very nature of the whole and its characteristics<sup>64</sup>. That is why we will never characterize the *Lex Petrolea* as the rules or the bunch of rules of the transnational petroleum society. That purely normativist approach is reductive and thus limits the observation of the whole: the society at the basis of the legal order, its organization, its values, and its needs and interests.

26. We believe that the transnational petroleum society, the *Societas Petroleatorum*<sup>65</sup>, exists, that it is autonomous and that it largely meets the requirements set by the school of legal pluralism to be considered as an autonomous and transnational legal order. It is composed mainly of oil producers, national and international oil companies, and to some extent, also some corporations engaging in parapetroleum activities. It is very common to hear that the petroleum industry is divided in two camps, having IOCs on one side and oil producers and NOCs on the other and even if they could be considered separately they could not form a community because they are governed by the laws of the market and a fierce competition that will make this impossible. Nevertheless, while there might be some or a lot of truth in those arguments, the reality is that all of these players have a very specific and common purpose: to make petroleum exploration and exploitation possible and profitable. We believe that the pursuit of this common goal creates a special bond or connection, solidarity if you will, between the different players within the industry that goes beyond their individual interests. This *Petroleum Solidarism* is at the heart of the *Lex Petrolea*.

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<sup>64</sup> S. ROMANO, *L'ordre juridique* (Traduction par L. François et P. Gothot), Réédition de la 2e édition, Dalloz, Paris, 2002, p. 7 n° 3.

<sup>65</sup> The expression of “*Societas Petroleatorum*” inspired in Philippe Kahn’s “*Societas Mercatorum*”, was adapted to Latin by Medieval Historian Armando Torres, Ph.D. Research Scholar at the University of Burgundy, at the request of the *Groupe de Beaune*. According to Mr. Torres, the word “petroleum” is a neologism of the 20<sup>th</sup> century that mixes two Latin words “*petra*” and “*oleum*” which means: oil of rocks. In Medieval Latin, a person who works with oil is an “*oleator*”, so if it is constructed as a neologism, the person who works with petroleum would be a “*petroleator*”. Therefore the correct expression would be “*societas petroleatorum*”, the society of persons that work with petroleum.



The existence and autonomy of the transnational petroleum society is also confirmed by the fact that its own members recognize themselves as active players of the industry, knowing who belongs to the community and who does not. This is a very important aspect and is what gives the impression that a different entity actually exists beyond the sum its different members. This is also important because it is this feeling of belonging to something larger that drives the efforts of the members of the society to create their own rules as a group. This is done in a manner that satisfies not only their own and individualistic needs, but also those of the industry. That is why some authors affirm that “*the upstream petroleum industry is unique*” for example, in terms of how competitors deal with each other<sup>66</sup>. Because, “*while these companies do compete in the traditional sense in many areas of the petroleum business, when it comes to upstream operations, they frequently find cooperation to be mutually beneficial*”<sup>67</sup>. This driving force, which we have characterized as *petroleum solidarism*, is also at the heart of the self-organization and regulation in the transnational petroleum industry. This can be exemplified by the normative power of the petroleum society, that as a result has led to professional organizations offering standardized and model contracts and clauses, to members of the community constantly seeking to determine the best oilfield practices that over time will become industry standards leading to the creation of new transnational rules. One might also add the contribution of arbitral jurisprudence. Is not in vain that arbitrators involved in petroleum disputes are to some extent considered as organs of the transnational petroleum industry, a simple manifestation of the organic autonomy of the society.

The existence of the transnational community of the oil and gas industry, the *Societas Petroleatorum*, is the basis of the transnational legal order. In order to fully understand its features it is necessary to understand its structure.

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<sup>66</sup> T. MARTIN and J. PARK, “Global petroleum industry model contracts revisited: higher, faster, stronger”, in *Journal of World Energy Law & Business*, Vol. 3, n° 1, Oxford University Press, 2010, p 4.

<sup>67</sup> T. MARTIN and J. PARK, “Global petroleum industry model contracts revisited: higher, faster, stronger”, in *Journal of World Energy Law & Business*, Vol. 3, n° 1, Oxford University Press, 2010, p 4.

## 2. *The structure of the transnational petroleum order*

27. In order to proclaim and fully understand the structure of the *Lex Petrolea*, the transnational legal order of the petroleum society, it is necessary to address the way in which this autonomous legal order interacts with other legal orders; such as national, international and the other transnational legal orders. Legal pluralists, following Santi Romano, study these interactions through the concept of relevance, more precisely through the concept of “*relation of relevance*”. The idea behind Santi Romano’s relevance is that each legal order decides in a unilateral and sovereign manner the way in which it is going to recognize the existence, content and efficacy of another legal order and the way in which it is going to interact with it. One of the basic principles of legal pluralism is recognizing “*the simple fact that different legal orders coexist at the same moment*”<sup>68</sup> and that in order for a relation of relevance to exist between two legal orders it is necessary that “*the existence, content and efficacy of a legal order meets the conditions established by the other*”<sup>69</sup>.

Relevance in Santi Romano’s legal pluralism may be of several types. For the purposes of addressing the autonomy and possible relevance of the *Lex Petrolea* with other legal orders, we will mention only four of the different theoretical models: (i) relevance between original and derivative legal orders, one being completely independent in its source and origin from any other legal order, and the other being established by or being incorporated into the other legal order<sup>70</sup>, (ii) relevance between legal orders of general scope and legal orders of particular purposes, (iii) relevance between independent or dependent legal orders, in which both legal orders are reciprocally independent from one another or where one declares its dependence on the other and (iv) relevance between coordinated or subordinated legal orders, in the sense that both legal orders are coordinated on the basis of equality or placed respectively in a position of supremacy or subordination *vis-à-vis* the other one.

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<sup>68</sup> F. OST, M. VAN DE KERCHOVE, *De la pyramide au réseau ? Pour une théorie dialectique du droit*, Publications des Facultés universitaires de Saint-Louis, Bruxelles, 2002, p. 186.

<sup>69</sup> S. ROMANO, *L’ordre juridique* (Traduction par L. François et P. Gothot), Réédition de la 2e édition, Dalloz, Paris, 2002, p. 106 n° 34.

<sup>70</sup> S. ROMANO, *L’ordre juridique* (Traduction par L. François et P. Gothot), Réédition de la 2e édition, Dalloz, Paris, 2002, p. 103 n° 33.

28. Relevance between the *Lex Petrolea*, a transnational legal order, and national and international legal orders, may be explained by reference to the third model, the relations between independent legal orders. We believe that the *Lex Petrolea* is completely independent and autonomous from national and international legal orders. While the basis of national and international legal orders is the concept of nationality, the *Lex Petrolea* responds to other values. The *Lex Petrolea* goes far beyond the illusion of nationality; it is based on a different value: to make petroleum exploration and production possible and profitable. The *Lex Petrolea*, as all the other transnational legal orders, transcends the concept of nationality - that is why the terminology used is “transnational” and not “international” or “truly international”. A transnational community or society such as the *Societas Petroleatorum* – as many other transnational societies – believes that economic transactions in a globalized world and economy have little to do with the geographic, political, cultural and juridical borders inherited from the fortunes or misfortunes in the process and history of the organization of Nation-States and the international society<sup>71</sup>. But the fact that the *Lex Petrolea* is independent and autonomous from the national and international legal orders, does not mean that there is no interaction between them. They do interact, and each legal order decides to what extent it will acknowledge the existence, content and efficacy of the other.

If the autonomy and independence of the *Lex Petrolea vis-à-vis* national and international legal orders is perfectly clear, this not the case when we analyze the relations between the *Lex Petrolea vis-à-vis* other transnational legal orders. In the first case, the idea of autonomy and independence is very perceptible because nowadays a large number of national or multinational companies are no longer national or multinational; they are now global companies. The core issue is that to a great extent, “national champions” are progressively disappearing – all that is left is an illusion of nationality and maybe a little nostalgia of the old paradigm of the international and multinational economy. Nowadays most “national champions” belong to “foreign” capital, structure their investments and operations through third

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<sup>71</sup> On this aspect of the transnational world: C. KESSEDJIAN, *Codification du droit commercial international et droit international privé – De la gouvernance normative pour les relations économiques transnationales*, in *Recueil des Cours*, Académie de droit international de la Haye, Tome 300, Martinus Nijhoff Publishers, 2002, p. 121.

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

countries in order to benefit from the status of being a “national” of such third country – even “national” oil companies invest outside their home countries and function as the other members of the transnational petroleum community. The new paradigm of global economy, where capital (which does not have a nationality) circulate in a worldwide economic arena has provoked a number of fundamental changes in traditional economic and legal theory. The *Lex Petrolea* is a child of this movement.

The real challenge of modern legal theory is to find new balances between the new and emerging transnational legal orders. For example, to find the relation between the *Lex Petrolea* and the *Lex Mercatoria*, a discussion that has inspired the most intense debates of the *Groupe de Beaune*, as well as the birth of the *Transnational Petroleum Law Institute*. This discussion is best caricaturized by two of our rhinoceroses horn-fighting to defend social and legal boundaries. Following Santi Romano’s models, relevance between the *Lex Petrolea* and the *Lex Mercatoria* may be one of an original (*Lex Mercatoria*) and a derivative (*Lex Petrolea*) legal order, one of a legal order of general scope (*Lex Mercatoria*) and a legal order of particular purposes (*Lex Petrolea*), or one of coordination or subordination.

Having analyzed the autonomy of the *Lex Petrolea*, it is now time to study its transnational rules.

### B. THE RULES OF THE *LEX PETROLEA*

29. To fully understand the rules of the *Lex Petrolea* and their dynamics it is convenient to study their transnational nature, as well as some of their methodological features.

#### 1. *The transnational nature of the rules of the petroleum society*

30. Transnational petroleum contracts like other contracts should be governed by rules that are adequate to the reality of the economic environment in which they exist. Therefore in a transnational and global economic environment transnational petroleum contracts should be governed by rules that are adequate to that transnational and global reality, e.g. a set of rules that responds and serves the needs and interests of the transnational petroleum society. The internationalization and the multinational configurations of the economy did not encourage the internationalization or the multinationalization of the law of contracts. Quite the contrary, economic

transactions in the international and multinational economic periods were condemned to the application of the rules of national legal systems. During these periods, the regulation of the applicable law to contracts was dominated by the paradigm of conflicts of law; which in essence incorporated the international or multinational relation in the national legal orders. That is to say, it was a method that “nationalized” international or multinational relationships and doomed them to the application of national rules that were conceived to govern domestic relations.

Globalization, however, has encouraged and promoted the emergence of global or transnational rules of law that share the nature of the contracts that they are designed to govern. The theory of transnational rules has been developed by the *École de Dijon* for a number of decades and was crowned by Professor Loquin’s 2006 general lecture at The Hague Academy of International Law entitled « *Les règles matérielles internationales* ». In the terms of Professor Loquin, “*the fading of national markets in favour of a global market in which merchandises, services and capitals flow freely renders inadequate the desire to submit an economic transaction made in such an environment to the laws of one State for the limits of those markets are no longer determined by the territorial limits of States. The global market calls for globalized rules of law and an unprecedented vanishing of national particularisms*”<sup>72</sup>.

31. According to Professor Loquin, these transnational rules have two particularities: their specialty and their supremacy. Specialty, because they are specially made and conceived to govern transnational relations<sup>73</sup>. These rules present the advantage that they are conceived to satisfy the needs and interests of the transnational community<sup>74</sup>. Professor Loquin’s general theory of

<sup>72</sup> « *L’effacement des marchés nationaux au profit d’un marché global, dans lequel les marchandises, les services, les capitaux peuvent librement circuler, rend inadéquate la prétention de soumettre une opération économique se réalisant dans un tel espace à la loi d’un Etat plutôt qu’à un autre, dès lors que les limites du marché ne sont plus déterminées par les limites territoriales des Etats. Le marché global appelle nécessairement des normes juridiques mondialisées et un recul sans précédent des particularismes nationaux* ». E. LOQUIN, « *Les règles matérielles internationales* », in *Recueil des Cours*, Académie de droit international de la Haye, Tome 322, Martinus Nijhoff Publishers, 2007, p. 63, n° 114.

<sup>73</sup> E. LOQUIN, *Les règles matérielles internationales*, in *Recueil des Cours*, Académie de droit international de la Haye, Tome 322, Martinus Nijhoff Publishers, 2007, p. 24, n° 11.

<sup>74</sup> E. LOQUIN, « *Les règles matérielles du commerce international* », in *Revue de l’arbitrage*, N° 2, Litec, Paris, 2005, p. 444.

#### THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

transnational rules can easily be transposed to the transnational rules of the *Lex Petrolea*. Indeed, it may be affirmed that these rules are made and conceived to govern transnational petroleum contracts and present the advantage of being conceived to satisfy the needs and interests of the transnational petroleum society, the *Societas Petroleatorum*. These transnational rules are substantive or material rules and their content may be completely different from the rules of national and international legal orders. The transnationality of the relationship is the main condition for their application<sup>75</sup>.

They are also characterized by their supremacy in relation to the rules found in other legal orders<sup>76</sup>. This supremacy is based on three arguments: their adequacy, their simplicity and because they assure a fair competition regarding the determination of the applicable rule. They are adequate because of their capacity to satisfy the needs and interests of the transnational petroleum society. They serve the needs of the society because the rules are flexible and take into consideration the legal risks attached to transnational petroleum contracts; in particular the effect of time on long-term contracts. They also assure legal security in the sense that they are conceived with a logic of *favor contractus* and are favorable to a solidaristic approach grounded on the parties' duty to take into consideration the interest of the other party and of collaboration and cooperation in the performance of the contract; elements which are indispensable for the survival and the preservation of any long-term contractual relationship. They serve the interests of the society because these transnational rules are aimed to facilitating transnational petroleum transactions while introducing some non-economic values that are also important for the petroleum industry. Their supremacy is also due to their simplicity and, in general, because they are easy to access, particularly if they are codified like in the Unidroit Principles or compiled like in the Extractive Industries Source Book. Finally, transnational rules have the virtue of being economically efficient since, from a perspective of law and economics, they place the parties to a contract on equal footing regarding access to the law.

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<sup>75</sup> E. LOQUIN, *Les règles matérielles internationales*, in *Recueil des Cours*, Académie de droit international de la Haye, Tome 322, Martinus Nijhoff Publishers, 2007, p. 24, n° 13.

<sup>76</sup> E. LOQUIN, *Les règles matérielles internationales*, in *Recueil des Cours*, Académie de droit international de la Haye, Tome 322, Martinus Nijhoff Publishers, 2007, p. 42, n° 58.

## 2. *The methodological aspects of the rules of the petroleum society*

32. Regarding the methodological aspects of the transnational rules of the *Lex Petrolea* one might follow once again the *École de Dijon's* approach regarding transnational rules in general. The first principle is that these transnational rules are to be found or extracted from all the sources of law (state or non-state sources of law). These rules may be created by the petroleum society itself or incorporated from other legal orders. In this regard, they can either be created by industry practices, standards and usages or they can be incorporated from international conventions or doctrinal codifications (i.e. the Unidroit or Lando principles or the works of the Gandolfi and von Bar commissions). Members of the petroleum society, including arbitrators, may also incorporate general principles of law as transnational rules to the *Lex Petrolea*. Regarding the incorporation of general principles of the transnational legal orders, Professor Kahn affirms, for example, that when an arbitrator applies and incorporates a principle of law he transforms it in a certain way, detaching it from its source which might as well be a national or an international legal order and transnationalizes it<sup>77</sup>. The only requirement for their incorporation in the *Lex Petrolea* is that they meet the test of serving and satisfying the needs and interests of the transnational petroleum society. In short, transnational rules and transnational legal orders such as the *Lex Petrolea* are constantly enriched from all sources of law.

At this point it seems important to address the question of whether arbitrators involved in petroleum disputes should be considered as members of the *Lex Petrolea*. The question is pertinent because the incorporation of arbitrators in other transnational legal orders such as the *Lex Mercatoria* is the core of an ongoing debate that may also be transposed to the *Lex Petrolea*. Modern arbitration law academics, practitioners and a few avant-gardist national legal orders<sup>78</sup> proclaim that arbitrators are autonomous from national legal orders, in particular from the national legal order of the place

<sup>77</sup> Ph. KAHN, « Les principes généraux du droit devant les arbitres du commerce international », in *Journal de droit international (Clunet)*, N° 2, Litec, Paris, 1989, p. 305.

<sup>78</sup> For example, the French and Swiss legal orders. In particular, the French legal order has explicitly recognized that an arbitral award is not incorporated in any national legal order: « Mais attendu que la sentence internationale, qui n'est rattachée à aucun ordre juridique étatique, est une décision de justice internationale dont la régularité est examinée au regard des règles applicables dans le pays où sa reconnaissance et son exécution sont demandées... ». Cass. 1re civ, 29 juin 2007, *Sté Putrabali Adyamulia c/ Sté Rena Holding*, in *Journal de droit international (Clunet)*, 2007, p. 1236, obs. Th. Clay.

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

of arbitration. This belief has also led us to proclaim that arbitrators are not public agents and they don't have a *forum* as national judges do<sup>79</sup>. This arbitral autonomy which is not exclusively circumscribed to the arbitrator also has important effects on the rules of law governing the validity of the arbitral agreement, the rules applicable to the arbitral procedure and to the merits of the dispute, as well as to the validity of an arbitral award. The question at the core of the debate is the origin of this autonomy: is it autonomous because transnational arbitrators form a community or society of their own which is in essence autonomous and independent from national legal orders, or because they belong to a transnational legal order such as the *Lex Mercatoria* or the *Lex Petrolea*, which are also autonomous from national and international legal orders? We believe that even if transnational arbitrators form a transnational legal order of their own, e.g. a transnational arbitral legal order autonomous and independent from national and international legal orders<sup>80</sup>, relevance between such order and, for example, the *Lex Petrolea*, has as a consequence that when arbitrators are involved in petroleum disputes they also act as organs of the *Lex Petrolea*. This statement is also anchored in the very essence of legal pluralism: an individual may belong to one or more legal orders at the same time. Therefore, a transnational arbitrator involved in a petroleum dispute is also an organ of the *Lex Petrolea* and it is an expression of its organic and organizational autonomy. This is very important because transnational arbitrators – the natural judges of transnational petroleum disputes – play a fundamental role in the creation and construction of the *Lex Petrolea*. Among other things, they are able to incorporate into the *Lex Petrolea* the rules or principles of other legal orders, if they consider that such rule or principle satisfies the needs and interests of the transnational petroleum society.

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<sup>79</sup> The concepts of the “place of arbitration” and the so called “*lex arbitri*” are nothing but the old concepts of the theory of conflict of law (“*forum*” and “*lex fori*”) applied to arbitration that are no longer admissible in the modern theory of arbitration in a transnational global or legal environment.

<sup>80</sup> On the notion of a transnational arbitral order: Th. CLAY, *L'arbitre*, Préf de Philippe Fouchard, Nouvelle bibliothèque de thèses, Dalloz, Paris, 2001, p. 213, n° 259. – J.-B. RACINE, « Réflexions sur l'autonomie de l'arbitrage commercial international », in *Revue de l'arbitrage*, N° 2, Litec, Paris, 2005, p. 339, n° 45. – E. GAILLARD, *Aspects philosophiques du droit de l'arbitrage international*, Académie de droit international de la Haye, Martinus Nijhoff Publishers, Leiden, 2008, p. 60.



33. The incorporation of rules and principles of other legal orders to the *Lex Petrolea* and the determination of the applicable transnational rule is made through the method of comparative law, which consists in the extraction of common principles to the most relevant legal orders. According to Professor Loquin this method is “*in reality a method of selection*”<sup>81</sup> that is organized by two parameters: legal syncretism and legal Darwinism. These are exactly the two parameters described by Professor Emmanuel Gaillard in his 2008 Hague lecture on the “*Aspects philosophiques du droit de l’arbitrage international*” when he explains the method of transnational rules used by arbitrators. The only variation on the mechanism of the method is one of terminology; if Professor Loquin uses the expressions of “*legal syncretism*” and “*legal Darwinism*”, Professor Gaillard prefers to talk about “*arbitral syncretism*” aiming to search of the dominant trend and “*the selection of the rule that follows the sense of the evolution*”<sup>82</sup>. In any event, the logic behind the method for determining the transnational rules is, according to both Professors Loquin and Gaillard, to prevent the application of rules and solutions that do not have an acceptable support in comparative law.

The first phase of the method consists in identifying the different trends and principles. The second phase of the method consists in selecting the rule or solution that better serves the needs and interests of the *Lex Petrolea*. Paraphrasing Professor Loquin’s findings related to the *Lex Mercatoria*, one might say that the method presents itself in a functional manner, in the sense that the basis of the selection of the rule is its ability to satisfy the needs and interests of the specific transnational society<sup>83</sup>. This is exactly what Professor Gaillard defends when he affirms that the chosen rule by no means has to be accepted unanimously by other legal orders<sup>84</sup>. One of the purposes of this method is to choose between rules that benefit from a large recognition from those that represent an exacerbated or obsolete

<sup>81</sup> E. LOQUIN, *Les règles matérielles internationales*, in *Recueil des Cours, Académie de droit international de la Haye*, Tome 322, Martinus Nijhoff Publishers, 2007, p. 218, n° 498.

<sup>82</sup> For the sake of clarity, we will mention that although Professor Loquin’s and Professor Gaillard’s meet on the methodological aspects of the determination of transnational rules, they have fundamental philosophical differences regarding the sources of such rules.

<sup>83</sup> E. LOQUIN, « Où en est la *lex mercatoria* ? », in *Souveraineté étatique et marchés internationaux à la fin du 20ème siècle, A propos de 30 ans de recherche du CREDIMI, Mélanges en l’honneur de Philippe Kahn*, CREDIMI, Litec, Paris, 2000, p. 39.

<sup>84</sup> E. GAILLARD, *Aspects philosophiques du droit de l’arbitrage international*, Académie de droit international de la Haye, Martinus Nijhoff Publishers, Leiden, 2008.p. 77, n° 54.

## THE PRODIGIOUS STORY OF THE *LEX PETROLEA* AND THE RHINOCEROS

particularism<sup>85</sup>. By no means is this method aimed at searching for wide and general principles. On the contrary, as discussed by Professor Gaillard the effort allows the application of very detailed<sup>86</sup> and foreseeable rules<sup>87</sup>.

### CONCLUSION

34. The last paragraph of Professor El-Kosheri's Hague lecture states that "*for participation agreements to work in harmony and in order to guaranty maximal possible efficacy, petroleum relations must be carried in a larger and truly international environment in the form of an agreement of a global scale... If that form of internationalization is not achieved, we will continue to be under the shadow of an ephemeral law*"<sup>88</sup>. Today, thirty seven years after El-Kosheri's statement, it seems impossible not to recognize its visionary nature. What better representation of a worldwide agreement than the recognition of the existence of the *Lex Petrolea*: a spontaneous and transnational legal order created by the players of the worldwide oil and gas industry (*transnational petroleum society* / *Societas Petroleatorum*), functioning under the belief that the sharing of the common purpose of making petroleum exploration and production possible and profitable unites them with a special bond (*transnational petroleum solidarism*), that encourages the creation of rules specially designed not only to govern their contracts (*transnational petroleum contracts*) but also to serve the needs and interest of the transnational petroleum society? This is nothing more but the recognition of the existence of a ***new transnational petroleum world order***.

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<sup>85</sup> E. GAILLARD, *Aspects philosophiques du droit de l'arbitrage international*, Académie de droit international de la Haye, Martinus Nijhoff Publishers, Leiden, 2008.p. 77, n° 54.

<sup>86</sup> E. GAILLARD, « Du bon usage du droit comparé dans l'arbitrage international », in *Revue de l'arbitrage*, N° 2, Litec, Paris, 2005, p. 379.

<sup>87</sup> E. GAILLARD, « Du bon usage du droit comparé dans l'arbitrage international », in *Revue de l'arbitrage*, N° 2, Litec, Paris, 2005, p. 379.

<sup>88</sup> « Afin que la Participation puisse fonctionner d'une façon harmonieuse et avec le maximum d'efficacité possible, les rapports pétroliers doivent se dérouler dans un cadre plus large véritablement international, sous la forme d'un accord mondial... Tant que cette forme d'internationalisation ne sera pas achevée, nous resterons dans l'ombre du « droit de l'éphémère ». A. S. EL-KOSHERI, *Le régime juridique créé par les accords de participation dans le domaine pétrolier*, in *Recueil des cours, Collected courses of the Hague Academy of International Law*, 1975 IV, Tome 174, Sijthoff & Noordhoff, The Hague, 1978, p. 338.

Of course, the position that one might have in relation to the existence, content and efficacy of the *Lex Petrolea* largely depends on one's perception of the dynamics of the modern world order, its economy and its regulation. Our vision is that the hyper-connected world in which we live in no longer responds to the logic of the Westphalian fragmentation of the world. Our vision of the global configuration of the economy is that economic transactions are made within a worldwide economic space and this view is completely detached from the ideology of liberalization of the economy: that's the reason why we don't even question the States' plenary and permanent sovereignty over their national resources. Our vision regarding regulation is one of transnational governance.

When these three elements are examined in relation to the transnational petroleum industry there is only one thing that I can think of, only one thing that I can see... ***I see the Lex Petrolea: I see a rhinoceros!***

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- *Best Industry Practices and Environmental Regulation for Offshore Petroleum Operations - A Contribution to the Study of the Lex Petrolea* (Julian Cárdenas-García), – *TPLI Series on Transnational Petroleum Law*, Vol. 1, N° 2, 2012.

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