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2006

Book Review of Klaus-Peter Berger (ed.), The Practice of Transnational Law

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This book is the proceedings of a mini-conference in which the results of an ambitious survey on the use of “transnational law” were presented. Both editors and contributors to the book must be congratulated. There are really two books here, the former a collection of the six papers presented in the conference (and the discussion that followed), while the latter is the survey itself.

What brings these two parts together is *transnational law*, to whose existence all of the book’s contributors subscribe more or less (cf. the pluralism of classic volumes such as *Lex Mercatoria and Arbitration*). The survey is premised on the twin hypotheses that practice “has led to the formation of a transnational legal system, that has to be distinguished from domestic law and public international law, a new ‘lex mercatoria’” – a legal system in the sense of the “classic theory of the sources of law”, which “serves as a predominant point of reference” in contract formation and international arbitration (95).

Some authors favor a definition encompassing [*824*] “virtually all principles and rules other than those established by a particular domestic law” (Michael Joachim Bonell, 23; see also Horn, 67-68), while two others (Emmanuel Gaillard and Friedrich K. Juenger) continue to refer to lex mercatoria as an equivalent term.

I. The first part contains, in this order a tour d’horizon on “transnational law” by the project’s soul, Professor Berger. Papers on the UNIDROIT Principles and ICC arbitration by Prof. Bonell and M° Y. Derains. An overview of the theoretical discussions about the nature of lex mercatoria by Prof. E. Gaillard. A paper by Professor N. Horn on the use of transnational law in international trade and finance. Finally, some concluding remarks by Prof. F. Juenger.

*Klaus Peter Berger’s* paper (1-22) is part introduction, part manifesto. He first presents an elaborate genealogy of lex mercatoria/transnational law (“The ‘Milestones’ of the Lex Mercatoria Debate”) and then describes the “Present State of the Doctrine”. The titles of the sub-sections in Part II are telling: “The Evolution of a “Global Market Place” and a ‘Global Civil Society’”, “The Decreasing Significance of State Sovereignty in the Traditional Theory of Legal Sources”, “The Modern Law Merchant in the Global Market Place”.

The title of Professor Gaillard’s excellent paper (53-65) questions whether transnational law is “a legal system or a method of decision-making”. The distinguished French arbitration practitioner thinks lex mercatoria is a method of comparative legal reasoning (the “Cartesian pragmatism” alluded to by Prof. Berger, e.g. 3, 21), but the real contrast
he has in mind is with the “creeping codification” approach (56-58). In short, lists of principles are presented as tools facilitating the task of arbitrators “in the absence of any conflict of ambiguity” (59). Likewise, Gaillard emphasizes the pluralism of its sources and plays down the notion that transnational business rules have been conceived, or emerged, because of the “specific needs of international business” and the inadequacy of national laws (55). But is transnational law a legal system, which can be applicable in arbitral proceedings? The author sets four criteria (completeness, structured / evolving character, predictability) which he concludes that lex mercatoria, as he has defined it, meets (59-65).

F.K. Juenger’s “Some Random Remarks from Overseas” (81-89) are not that random. This is a summary of the views on lex mercatoria that the much-regretted scholar has stated in several texts late in his life, as well as a commentary on the relative skepticism of U.S. lawyers vis-à-vis legal transnationalism. Prof. Juenger on the one hand creates an American genealogy for lex mercatoria and on the other describes instances of an “American pragmatism and eclecticism” which facilitate recourse to foreign sources and should “bring about a revival of the lex mercatoria in the U.S.”.

The other three papers study international business practice. Professor Bonnel (23-41), the father figure of the UNIDROIT Principles, examines the instances where “the Principles can be used in the context of international dispute resolution” – by express choice of the parties, in litigation or arbitration; absent party intention, being applicable as “general principles of law”, or intervening to interpret and supplement international uniform law (principally CISG, but the 2004 Principles have an expanded scope) and even domestic law. Bonnel notes [*825] the conflicting opinions of doctrine, and, indeed, arbitral tribunals as to the Principles’ being the general principles of law. Bonnel comes out as a moderate, or at least a pragmatist who, for example, at this early stage defends the Principles “as one of the various sources available to determine the content of … vague formulation used by the parties”, while leaving for the future the possibility of the Principles “establishing themselves, in their entirety, as the most genuine expression of the ‘general principles of law’ or the lex mercatoria in the field of contract law” (29).

Maitre Derains’ paper (43-51) examines ICC arbitrators applying transnational law absent an express choice to that effect by the parties – a practice continuing even under the 1975 Rules (it is duly noted that the majority of arbitrators just apply national law, and the enforceability of the award is the paramount preoccupation of the arbitrators). When the parties have made no choice, the arbitrators may decide no national legal system has an objective relation or a close enough connection (objective approach, which Derains and practice favor), or deduce the intention of the parties to apply transnational law (subjective approach, regarded as more problematic). When the parties have selected a national law, the arbitrators may use transnational law to fill a gap, to strengthen a national-law rule or in extremis as a public-policy exception.

Norbert Horn makes the most sweeping examination of international business practice (67-80). His expansive definition of transnational law is functional, in the spirit of Jessup and Clive M. Schmitthoff, as he considers a broad range of material, including the
domestic-law implementation of instruments attempting legal harmonization such as the EU directives, the uniform interpretation of international uniform-law instruments and the various functions of the UNIDROIT Principles. Of particular interest is his consideration of the Uniform Customs and Practice for Documentary Credit, the UN Convention on Independent Guarantees and Stand-by Letters of Credit and the FIDIC Standard Terms (78-80).

The summary of the discussion that followed each presentation (115-132) is as thorough as it is interesting. The range of opinion represented therein is much broader than among the panelists. Interesting doctrinal points are made, and some remarks are revealing of the personalities and agendas that shape the field.

II. The empirical study which gave rise to the conference (91-113, 133-224) is the most sweeping survey of its kind, the product of a methodic effort.\(^1\) The study suggests a much more favorable reaction to transnational law by arbitration lawyers than corporate counsels (104). A high percentage of respondents “indicated their awareness of the use of transnational law in legal practice” (104), especially of “general principles of law” (105, 159). As might have been expected, good faith, *pacta sunt servanda* and *force majeure* stand out (109). Such use had to do more with supplementing or interpreting domestic law than its substitution (107; especially [*826*] in the arbitration stage, 160). The survey’s “high percentage of positive responses is surprising given that the alleged rejection by international legal practice serves as one of the main arguments for those who oppose the existence of an autonomous legal system” (104), while “the alleged incompleteness of the lex mercatoria and enforcement concerns do not play a major role in legal practice” but “practitioners attach substantial if not overwhelming weight to the issue of enforceability in general” (110). The survey does find – and certainly emphasizes – a need for the “proliferation of knowledge about international business law around the globe” (113). Indeed, the conference was soon followed by the launch of CENTRAL’s own database.\(^2\)

The CENTRAL enquiry has taken a concrete ideological commitment in formulating its two hypotheses (95). Organizing a survey in terms of positive or negative responses which do or do not confirm the hypothesis is not without its dangers. In fact, the questionnaire did not make explicit mention of the hypotheses – and this is good for the end result. One need look only at the – sympathetic – papers of this volume to remember how diverse, and without easy answers, the “practice of trasnational law” really is.

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\(^1\) The enquiry is also presented in ZVglRWiss 2002, 12-37.  
\(^2\) [http://www.tldb.de](http://www.tldb.de).