… IN THE LIGHT OF ARBITRAL JURISPRUDENCE"

ARBITRAL AWARDS

Submitted by

Alfredo De Jesús O., and **José Ricardo Feris**

at the Beaune Meeting of September 27, 2014, on

"THE NEW WORLD ORDER OF ECONOMIC RELATIONS IN THE LIGHT OF ARBITRAL JURISPRUDENCE"

ICC INTERNATIONAL CHAMBER OF COMMERCE

Groupe de Beaune

TRANSNATIONAL LEGAL ORDERS

INTERNATIONAL CHAMBER OF COMMERCE

Groupe de Beaune

Treaty Shopping / Legitimacy

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

IN THE PROCEEDING BETWEEN

MOBIL CORPORATION, VENEZUELA HOLDINGS, B.V.,
MOBIL CERRO NEGRO HOLDING, LTD.,
MOBIL VENEZOLANA DE PETRÓLEOS HOLDINGS, INC.,
MOBIL CERRO NEGRO, LTD., AND
MOBIL VENEZOLANA DE PETRÓLEOS, INC.
(CLAIMANTS)

AND

BOLIVARIAN REPUBLIC OF VENEZUELA
(RESPONDENT)

(ICSID CASE NO. ARB/07/27)

DECISION ON JURISDICTION

Members of the Tribunal:
H.E. Judge Gilbert Guillaume, *President*
Professor Gabrielle Kaufmann-Kohler, *Arbitrator*
Dr. Ahmed Sadek El-Kosheri, *Arbitrator*

204. As stated by the Claimants, the aim of the restructuring of their investments in Venezuela through a Dutch holding was to protect those investments against breaches of their rights by the Venezuelan authorities by gaining access to ICSID arbitration through the BIT. The Tribunal considers that this was a perfectly legitimate goal as far as it concerned future disputes.

Rules adapted to the conditions of the international market / Lex Mercatoria

ICC award no. 8385 (1995) citado como fuente en Partial Award in Case 14208/14236

"[i]n international relations, the tribunal considers that it is preferable to apply rules adapted to the conditions of the international market and which provide a reasonable balance between the company's confidence in its distinct legal status and the protection of entities which may fall victim to the manipulations of a company controlling its subsidiary to deprive a creditor of the benefits to which it is entitled... The application of international principles offers many advantages. They apply in a uniform fashion and are independent from the peculiarities of each national law. They take into consideration the needs of international relations and allow for a fruitful exchange between systems which are sometimes excessively attached to conceptual distinctions, and systems which seek a just and pragmatic solution to particular situations. This is therefore an ideal opportunity to apply what is increasingly referred to as the lex mercatoria".

Ordre juridique transnational

Final Award in Case 13515

Attendu que [la demanderesse] demande l'exécution par son cocontractant de ses obligations contractuelles. Qu'une telle demande se revendique de l'effet obligatoire des contrats. Qu'en effet, chaque partie se doit, de respecter, en les exécutant les obligations qu'elle a souscrites. Que la force obligatoire des contrats, exigence de sécurité juridique, est formellement prescrite par l'article 1134 du Code civil français. Que le droit comparé ainsi que l'histoire du droit attestent de l'universalité d'une telle règle. Que le principe pacta sunt servanda est un principe de l'ordre juridique transnational, rappelé par nombre de sentences arbitrales.

La société internationale des commerçants et Etats… / Legitimité (adhesion des opérateurs du commerce international)

Final Award in Case 13515

Attendu que l'ordre public transnational ou véritablement international est « constitué de l'ensemble de principes ou de normes supérieurs et fondamentaux pour le commerce international qui visent en toutes hypothèses à protéger certaines valeurs essentielles ainsi que les intérêts de la société internationale » (Commerçants et États) (P. Lalive : « Ordre public transnational (ou réellement international) et arbitrage international » RA 1986 p. 331). Que l'arbitre international reconnaît l'existence de principes d'ordre public transnational, dès lors qu'il constate qu'ils font l'objet d'une large convergence entre les différents systèmes juridiques des États, et qu'ils sont retenus par des conventions, et lorsqu'il constate l'adhésion des opérateurs du commerce international.

...

Attendu que les opérateurs du commerce international, et notamment les grandes firmes multinationales, s'engagent par des codes de bonne conduite, à renoncer à de telles pratiques et, que « les règles de conduite pour combattre l'extorsion et la corruption dans les transactions commerciales » de la Chambre de commerce internationale, montrent que la réprobation de telles pratiques est largement partagée dans le milieu d'affaires.

The International Business Community

Final Award in ICC Case 7XXX

The Tribunal will apply those general principles and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned a wide acceptance and international consensus in the international business community, including notions which are said to form part of a *lex mercatoria*, also taking into account any relevant trade usages as well as the UNIDROIT Principles, as far as they can be considered to reflect generally accepted principles and rules.

International Business Community

Sentence partielle dans l'affaire CCI 12111

The Sole Arbitrator is persuaded that the parties wished to depart from a national system. They did not want to apply the private international law of an undetermined national legal system. The Sole Arbitrator agrees with Claimant that "international law" should be understood as international rules applicable to international contracts.

…

Accordingly, the Sole Arbitrator considers that the terms "international law" used by the parties refer to *lex mercatoria* and general principles of law applicable to international contractual obligations such as the ones arising out of the Contract. Such general principles are reflected in the UNIDROIT Principles of International Commercial Contracts which will be applied for the determination of the parties' respective claims in this arbitration.

As to the application of the PECL, i.e. principles established further to an initiative of the Commission of the European Union in order to harmonize private law within the State members of the European Union, the Sole Arbitrator notes that they constitute an academic research, at this stage not largely well-known to the international business community and are a preliminary step to the drafting of a future European Code of Contracts, not enacted yet. Claimant's claim for application of the PECL is therefore rejected.'

The Community of State and Investors…

UNCITRAL Ad Hoc Arbitration

between

[redacted]

Claimant

and

The Slovak Republic

Respondent

FINAL AWARD

9 October 2009

Place of arbitration: Paris

The Honorable Charles Brower
Separate Opinion
Date:

Dr. Vojtěch Trapl
Date: 7 October 2009

Prof. Gabrielle Kaufmann-Kohler
Date: 7 October 2009

84. The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law[8].

The Community of State and Investors…

International Centre for Settlement of Investment Disputes

BAYINDIR INSAAT TURIZM TICARET VE SANAYI A.Ş.

CLAIMANT

v.

ISLAMIC REPUBLIC OF PAKISTAN

RESPONDENT

ICSID Case No. ARB/03/29

AWARD

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President
Sir Franklin Berman, Arbitrator
Prof. Karl-Heinz Böckstiegel, Arbitrator

Martina Polasek, Secretary

145. The Tribunal is not bound by previous decisions of ICSID tribunals.[38] At the same time, it is of the opinion that it should pay due regard to earlier decisions of such tribunals. The Tribunal is further of the view that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases, comparable to the case at hand, but subject of course to the specifics of a given treaty and of the circumstances of the actual case. By doing so, it will meet its duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[39]

The Community of State and Investors…

ICSID Case No. ARB/07/5

GIOVANNA A BECCARA AND OTHERS
(CLAIMANTS)

and

THE ARGENTINE REPUBLIC
(RESPONDENT)

PROCEDURAL ORDER NO. 3

(CONFIDENTIALITY ORDER)

27 JANUARY 2010

On behalf of the Tribunal,

[signed]

Pierre Tercier,
Chairman

ARBITRAL TRIBUNAL
Professor Pierre Tercier, President
Professor Georges Abi-Saab, Arbitrator
Professor Albert Jan van den Berg, Arbitrator

58. At this stage, the Tribunal wishes to recall that, according to common practice, the Tribunal is not bound by previous decisions of other international tribunals. However, the Tribunal is also of the opinion that, subject to the specific provisions of a treaty in question and of the circumstances of the actual case, it should attempt to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[40] The Tribunal may therefore pay due consideration to earlier decisions of international tribunals, where it deems that such consideration is appropriate in the light of the specific factual and legal context of the case and the persuasiveness of the legal reasoning of these earlier decisions.

The Community of State and Investors…

International Centre for Settlement of
Investment Disputes

DUKE ENERGY ELECTROQUIL PARTNERS
&
ELECTROQUIL S.A.

("Duke")

CLAIMANTS

v.

REPUBLIC OF ECUADOR

("Ecuador")

RESPONDENT

ICSID Case No. ARB/04/19

AWARD

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President
Dr. Enrique Gómez Pinzón, Arbitrator
Prof. Albert Jan van den Berg, Arbitrator

Secretary of the Tribunal:

Mr. Gonzalo Flores

Date of Dispatch to the Parties: August 18, 2008

117. While the Tribunal considers that it is not bound by previous decisions, it is of the opinion that it must pay due consideration to earlier decisions made by other international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to consider the solutions consistently established in prior similar cases. Subject to the specifics of a given treaty and of the circumstances of the case under review, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards establishing certainty in the rule of law[2].

The Community of State and Investors…

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES

WASHINGTON, D.C.

IN THE PROCEEDINGS BETWEEN

Mr. Saba Fakes
(Claimant)

AND

Republic of Turkey
(Respondent)

(ICSID Case No. ARB/07/20)

AWARD

Members of the Tribunal:
Professor Hans van Houtte, Arbitrator
Dr. Laurent Lévy, Arbitrator
Professor Emmanuel Gaillard, President

Secretary of the Tribunal:
Ms. Martina Polasek

Assistant to the President of the Tribunal:
Ms. Anna Crevon

Date of dispatch to the Parties: July 14, 2010

96. The Tribunal is not bound by the decisions adopted by previous ICSID tribunals. At the same time, it believes that it should pay due regard to earlier decisions of such tribunals. The present Tribunal shares the opinion of the Tribunal in the *Bayindir v. Pakistan* case that, unless there are compelling reasons to the contrary, it ought to follow solutions established in a series of consistent cases that are comparable to the case at hand, subject to the specificity of the treaty under consideration and the circumstances of the case. By doing so, it will fulfill its duty to seek to contribute to the harmonious development of investment law and thereby meet the legitimate expectations of the community of States and investors towards certainty of the rule of law.[61]

The Community of State and Investors…

International Centre for
Settlement of Investment Disputes

NOBLE ENERGY, INC.
and
MACHALAPOWER CIA. LTDA.

CLAIMANTS

v.

THE REPUBLIC OF ECUADOR
and
CONSEJO NACIONAL DE ELECTRICIDAD

RESPONDENTS

ICSID Case No. ARB/05/12

DECISION ON JURISDICTION

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President of the Tribunal
Dr. Bernardo M. Cremades, Arbitrator
Mr. Henri Alvarez, Arbitrator

Ms. Natalí Sequeira, Secretary of the Arbitral Tribunal

March 5, 2008

50. The Tribunal considers that it is not bound by previous decisions. At the same time, it is of the opinion that it must give due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it should adopt solutions established in a series of consistent cases. It also believes that, subject to the specific provisions of a given treaty; to the circumstances of the actual case and the evidence tendered, it should seek to foster the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law[4].

The Community of State and Investors…

International Centre for Settlement

of Investment Disputes

SAIPEM S.p.A.

CLAIMANT

v.

THE PEOPLE'S REPUBLIC OF BANGLADESH

RESPONDENT

ICSID Case No. ARB/05/07

DECISION ON JURISDICTION

AND RECOMMENDATION ON PROVISIONAL MEASURES

Rendered by an Arbitral Tribunal composed of:

Prof. Gabrielle Kaufmann-Kohler, President

Prof. Christoph H. Schreuer, Arbitrator

Sir Philip Otton, Arbitrator

Mrs. Martina Polasek, Secretary to the Arbitral Tribunal

67. The Tribunal considers that it is not bound by previous decisions[7]. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. It believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law and thereby to meet the legitimate expectations of the community of States and investors towards certainty of the rule of law[8].

The Community of State and Investors…

International Centre for Settlement

of Investment Disputes

BURLINGTON RESOURCES INC.

CLAIMANT

v.

REPUBLIC OF ECUADOR

RESPONDENT

ICSID Case No. ARB/08/5

DECISION ON JURISDICTION

Rendered by an Arbitral Tribunal composed of:
Prof. Gabrielle Kaufmann-Kohler, President
Prof. Brigitte Stern, Arbitrator
Prof. Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal:
Marco Tulio Montañés-Rumayor

Date of Dispatch to the Parties: 2 June 2010

100. The Tribunal considers that it is not bound by previous decisions[5]. At the same time, it is of the opinion that it must pay due consideration to earlier decisions of international tribunals. The majority believes that, subject to compelling contrary grounds, it has a duty to adopt solutions established in a series of consistent cases. It also believes that, subject to the specifics of a given treaty and of the circumstances of the actual case, it has a duty to seek to contribute to the harmonious development of investment law, and thereby to meet the legitimate expectations of the community of States and investors towards the certainty of the rule of law. Arbitrator Stern does not analyze the arbitrator's role in the same manner, as she considers it her duty to decide each case on its own merits, independently of any apparent jurisprudential trend.

A Predictable Legal Order…

International Centre for Settlement of Investment Disputes

Burlington Resources Inc.

The Claimant

v.

Republic of Ecuador

The Respondent

ICSID Case No. ARB/08/5

DECISION ON LIABILITY

Rendered by an Arbitral Tribunal composed of

Prof. Gabrielle Kaufmann-Kohler, President
Prof. Brigitte Stern, Arbitrator
Prof. Francisco Orrego Vicuña, Arbitrator

(ii) ICSID case law

221. Before examining the specific cases upon which the Parties rely, the Tribunal must address a threshold matter concerning the precedential value of ICSID cases. Burlington has sought to diminish the relevance of some of the cases upon which Ecuador relies on the ground that statements which Ecuador cites are *obiter dicta*. Ecuador for its part has argued that in the context of investment arbitration, "[e]verything counts."[359] The Tribunal tends to agree with Ecuador. It is correct that there is no formal rule of *stare decisis* in international investment arbitration. At the same time, the Tribunal considers that it should "contribute to the harmonious development of investment law" and promote a predictable legal order.[360] In this light, there is no reason to distinguish between *obiter dicta* and holding. Whether peripheral or central to the decision, the statements of an international investment tribunal may provide guidance to investors and host States alike, and may serve to predict the decisions of future tribunals.

TRANSNATIONAL RULES

INTERNATIONAL CHAMBER OF COMMERCE

Groupe de Beaune

Everything counts !

International Centre for Settlement of Investment Disputes

Burlington Resources Inc.

The Claimant

v.

Republic of Ecuador

The Respondent

ICSID Case No. ARB/08/5

DECISION ON LIABILITY

Rendered by an Arbitral Tribunal composed of

Prof. Gabrielle Kaufmann-Kohler, President
Prof. Brigitte Stern, Arbitrator
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Sources of Transnational Law / Plurality of Sources

Final Award in Case 13515

Attendu que le droit transnational s'alimente de cette pluralité de sources. Que son autonomie est de nature à permettre à l'arbitre international, d'affirmer l'existence d'un principe d'ordre public transnational qu'il juge essentiel pour la société internationale. Qu'il en est ainsi quand il s'agit d'un *malum in se*, comme c'est le cas de la corruption, Que dans de telles hypothèses, l'arbitre ne peut tenir compte de la divergence qui peut se manifester dans les législations des États ou dans leur comportement, l'existence d'un principe d'ordre public transnational n'étant pas subordonnée à leur accord unanime. Que pour cette raison, le tribunal arbitral considère qu'il existe une règle matérielle d'application immédiate et impérative prescrivant la nullité d'un contrat dès lors que son illicéité pour corruption est établie (A.S. El-Kosheri et Ph. Leboulanger : « L'arbitrage face à la corruption et au trafic d'influence » RA 1985 p. 3 et sp. p. 18, P. Lalive : « Ordre public transnational(ou réellement international) et arbitrage international » RA 1986 p. 329/337 n° 22). Que cette règle est suffisamment précise et suffisante pour recevoir une telle application. Qu'en effet, l'ordre public est un moyen permettant à l'arbitre international de parvenir à des solutions substantielles (I. Fadlallah : « L'ordre public dans les sentences arbitrales » RCADI 1994 T.V. p. 369/p. 396), et donc un procédé de création normative.

Sources of Transnational Law / In General

Final Award in Case 9XXX

The most appropriate "rules of law" to be applied to the merits of this case are those of the "lex mercatoria", that is the rules of law and usages of international trade which have been gradually elaborated by different sources such as the operators of international trade themselves, their associations, the decisions of international arbitral tribunals and some institutions like UNIDROIT and its recently published Principles of International Commercial Contracts.

Sources of Transnational Law / In General

Sentence partielle dans l'affaire 7375

La majorité du Tribunal relève les imprécisions conceptuelles et terminologiques tenant à la notion de principes généraux du droit. La majorité du Tribunal constate qu'il est parfois fait référence à ces principes sous les dénominations suivantes : principes généraux du droit, principes de droit privé généralement acceptés, règles de droit anationales, règles de droit transnationales, lex mercatoria, principes du droit international, etc. Elle décide donc d'appliquer les principes généraux et les règles applicables aux obligations contractuelles internationales qui peuvent être considérées comme des règles de droit et qui sont largement acceptées par les acteurs du commerce international. Sont ainsi incluses dans la notion de principes généraux toutes les composantes de la lex mercatoria : les principes généraux, les usages commerciaux pertinents, et les principes Unidroit dans la mesure où ils reflètent des principes et règles généralement acceptés. Le Tribunal poursuit en disant que, même si les principes généraux ne peuvent pas, pour des raisons pratiques, être énumérés dans la sentence partielle du fait de l'abondance d'écrits relatifs à la lex mercatoria, ils ont une existence concrète qui permet au Tribunal de les utiliser pour trancher le différend.

Sources of Transnational Law / Rules of law that meet the expectations of the business community

Final Award ICC Case 11XXX

The rules of French law, stated above, are fair and correspond to the expectations of the business community. Consequently these rules are also part of the lex mercatoria; the Arbitral Tribunal has to take into account.

Sources of Transnational Law / Rules of law which have earned a wide acceptance in the international business community

Final Award in ICC Case 7XXX

The Tribunal will apply those general principles and rules of law applicable to international contractual obligations which qualify as rules of law and which have earned a wide acceptance and international consensus in the international business community, including notions which are said to form part of a *lex mercatoria*, also taking into account any relevant trade usages as well as the UNIDROIT Principles, as far as they can be considered to reflect generally accepted principles and rules.

Sources of Transnational Law / Doctrinal Codifications (UNIDROIT)

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the Proceeding Between

JOSEPH CHARLES LEMIRE
(Claimant)

and

UKRAINE
(Respondent)

(ICSID CASE NO. ARB/06/18)

DECISION ON JURISDICTION AND LIABILITY

Members of the Tribunal:
Professor Juan Fernández-Armesto, *President*
Mr. Jan Paulsson, *Arbitrator*
Dr. Jürgen Voss, *Arbitrator*

VI.1. APPLICABLE LAW

106. Clause 30 of the Settlement Agreement provides that the applicable law shall be that determined by "*Article 55 of the ICSID Additional Facility Arbitration Rules*". The relevant article in the Additional Facility Rules is in fact Article 54. The mistake is an obvious typographical error, and the Tribunal has no doubt that the common intent of the parties was to refer to Article 54. In accordance with this rule the Tribunal shall apply *"(a) the law determined by the conflict of laws rules which it considers applicable and (b) such rules of international law as the Tribunal considers applicable"*.

107. Should the Tribunal make use of this authorization to apply not only a municipal law, determined through conflict of laws rules, but also the "*rules of international law ... the Tribunal considers applicable*"?

108. The Settlement Agreement contains an extensive chapter called "*Principles of Interpretation and Implementation of the Agreement*", which includes Clauses 20 through 26. These Clauses were reproduced, with very light linguistic adjustments, from the 1994 UNIDROIT Principles[25].

109. It is impossible to place the UNIDROIT Principles – a private codification of civil law, approved by an intergovernmental institution – within the traditional sources of law. The UNIDROIT Principles are neither treaty, nor compilation of usages, nor standard terms of contract. They are in fact a manifestation of transnational law.

Sources of Transnational Law / Arbitral Awards

Final Award in Case 13515

Attendu que le droit transnational s'alimente de cette pluralité de sources. Que son autonomie est de nature à permettre à l'arbitre international, d'affirmer l'existence d'un principe d'ordre public transnational qu'il juge essentiel pour la société internationale. Qu'il en est ainsi quand il s'agit d'un *malum in se*, comme c'est le cas de la corruption, Que dans de telles hypothèses, l'arbitre ne peut tenir compte de la divergence qui peut se manifester dans les législations des États ou dans leur comportement, l'existence d'un principe d'ordre public transnational n'étant pas subordonnée à leur accord unanime. Que pour cette raison, le tribunal arbitral considère qu'il existe une règle matérielle d'application immédiate et impérative prescrivant la nullité d'un contrat dès lors que son illicéité pour corruption est établie (A.S. El-Kosheri et Ph. Leboulanger : « L'arbitrage face à la corruption et au trafic d'influence » RA 1985 p. 3 et sp. p. 18, P. Lalive : « Ordre public transnational(ou réellement international) et arbitrage international » RA 1986 p. 329/337 n° 22). Que cette règle est suffisamment précise et suffisante pour recevoir une telle application. Qu'en effet, l'ordre public est un moyen permettant à l'arbitre international de parvenir à des solutions substantielles (I. Fadlallah : « L'ordre public dans les sentences arbitrales » RCADI 1994 T.V. p. 369/p. 396), et donc un procédé de création normative.

Sources of Transnational Law / Arbitral Practice

Final Award in Case 15XXX

863. In the absence of a *loi de police* the Tribunal considers that, as is the practice in international arbitration, the market rate or a reasonable commercial rate would be the most appropriate interest rate.

Sources of Transnational Law / Arbitral Practice (Emergent tendencies)

Final Award in ICC Case 13XXX

There is a tendency in international commercial arbitration to award late interest as is reasonable and fair. The arbitral tribunal is thus given broad latitude in determining what it considers reasonable and fair. In international commercial arbitration, the determination of the rate of interest is not governed by strict and precise rules. The emerging tendency in legal commentary and in international arbitral practice is to leave the arbitrator broad freedom and discretion in determining the rate. An arbitral tribunal is not under an obligation to refer to a statutory rate of a national legal system, be it the law governing the contract or the law governing the arbitration.

Sources of Transnational Law / Arbitral Practice (Emergent tendencies)

Final Award in ICC Case 12XXX

The emerging tendency in legal commentary and in international arbitral practice is to leave the arbitrator broad freedom in determining the rate [references]. He is not under an obligation to refer to a statutory rate of a national legal system, be it the law governing the contract or the law governing the arbitration.

Sources of Transnational Law / Arbitral Practice (From the "Reasonable man" to the "Seasoned oilmen")

The "Reasonable man" standard

Final Award in ICC Case 14269

177. "Background knowledge" or the "factual matrix" against which the contract is to be construed includes any background facts which would have affected the way in which the language of the document would have been understood by a reasonable man and which was available to both parties in the situation in which they were at the time of the contract. Facts known to just one party are irrelevant

The "Reasonable businessmen" standard

Sentence finale dans l'affaire 9651

[23] Now, under the principle of confidence, would not a reasonable businessman reading section S in its entirety think that all disputes arising in connection with the said agreement should be governed by the law chosen by the Parties in the preceding paragraph? All those disputes should certainly be referred to arbitration. In fact, it is not obvious that reasonable businessmen would be alert to the difference between a "contractual issue" and "an issue arising in connection with a contract".

Furthermore, it would appear somewhat strange if businessmen would, as a matter of common intent, choose two different laws to rule on their relationship, to wit the law of the Contract and some other law for the negotiation of the agreement.

The "Responsible businessmen" standard

Final Award in ICC Case 9XXX

The majority of the Arbitral Tribunal further considers that, although the Claimant is entitled to be compensated for loss of profits, the basis for such loss of profit cannot be the ten years life span of the Management Agreement. In case a contract is wrongfully terminated, responsible businessmen are not expected to remain idle with the hope that the profit they would have made in performing the contract will be fully substituted by damages. A responsible businessman looks for other opportunities in the market and enters into new contractual relations. Failure to do so must be seen as a breach of the obligation to mitigate damages, that is considered by international arbitrators as one of the generally accepted principles of international business law

The "Seasoned Oilmen" standard

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

IN THE PROCEEDING BETWEEN

OCCIDENTAL PETROLEUM CORPORATION
OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY
(CLAIMANTS)

- AND -

THE REPUBLIC OF ECUADOR
(RESPONDENT)

(ICSID Case No. ARB/06/11)

AWARD

Members of the Tribunal
Mr. L. Yves Fortier, C.C., Q.C., President
Mr. David A.R. Williams, Q.C., Arbitrator
Professor Brigitte Stern, Arbitrator

348. Members of the Version A clan prevailed. They did not heed the sound advice of the lawyers and, in doing so, may have acted unwisely and been imprudent. Their proposed course of action may have been risky, as later events confirmed, but, for the reasons set forth in more detail below, the Tribunal fails to see any evidence that their views were driven by bad faith. They were business people, seasoned oilmen, for whom legal niceties were not as important as the business realities of the deal. Their behaviour, unfortunately for the Claimants, was to have dire consequences.

384. The Tribunal has found that the Farmout Agreement and the Joint Operating Agreement operated to effect a transfer of rights under the Participation Contract from OEPC to AEC. The Tribunal has also found that this transfer required authorization on the part of the Ecuadorian authorities, that this authorization was not sought, but that OEPC's failure to secure such authorization in October 2000, while imprudent and ill advised, did not amount to bad faith.

687. Having considered and weighed all the arguments which the parties have presented to the Tribunal in respect of this issue, in particular the evidence and the authorities traversed in the present chapter, the Tribunal, in the exercise of its wide discretion, finds that, as a result of their material and significant wrongful act, the Claimants have contributed to the extent of 25% to the prejudice which they suffered when the Respondent issued the *Caducidad* Decree. The resulting apportionment of responsibility as between the Claimants and the Respondent, to wit 25% and 75%, is fair and reasonable in the circumstances of the present case.

377. Pursuant to Clause 50 of the General Conditions of Contract, the Contract shall be governed and construed in accordance with the laws of [State X]. The parties further specified in paragraph 45 of the Terms of Reference, that the Arbitral Tribunal had not been given the power to act as amiable compositeur or to decide matters ex aequo et bono.

378. The fact that [State X] law governs the merits of the dispute does not mean that it necessarily also governs the issue of joining a non-signatory or, in other words, the issue of whether the arbitration clause should be extended to [the Parent Company].

379. It appears from the record that there is broad agreement between the parties concerning the rules of law applicable to the issue of the extension of the arbitration clause to a non-signatory, including the issue of whether the corporate veil should be pierced in a particular case. In support of their positions, the parties have submitted detailed and extensive legal opinions of prominent law professors and leading arbitration practitioners. All of them agree that international arbitrators often decide this issue in cases with a cross-border element through the application of transnational legal principles and that it is legitimate for them to do so, although there are differences among the experts with respect to the importance to be accorded such principles in respect of possible corporate veil-piercing.

Transnational Rules / Principles / Lifting of the corporate veil

Partial Award in Case 14208/14236

391. The Arbitral Tribunal does not consider that these additions contradict the general principle that transnational norms should be applied to determine the issue of extension of the arbitration clause to a non-signatory, even when piercing the corporate veil is at issue. First, Article 17(2) of the ICC Rules does not restrict in any way the duty of arbitrators to take into consideration trade usages to decide the issues before them. Moreover, Professor [B] himself recognizes that transnational norms "direct arbitrators to principles contained in more than one national legal system, as well as established practices and expectations in cross-border business transactions"; and that "[a] transnational version of 'veil piercing' amalgamates notions linked to several legal systems". He further recognizes that "[g]iven that national and transnational criteria for veil piercing generally relate to fraud, abuse and confusion, the application of both sets of principles can be broadly similar. Different legal systems might differ one from another in the emphasis given to particular criteria."

…

396. The Arbitral Tribunal will therefore decide the issue of jurisdiction and therefore of extension of the arbitration clause to [the Parent Company] by application of transnational principles, as will be further explained below.

…

425. As they result from the arbitral case law, the transnational principles governing the issue of piercing the corporate veil are the following:

- the existence of complete control over the subsidiary by the dominant shareholder, the indicia of such control being in particular:

i. the insufficient capitalization of the subsidiary,
ii. confusion in the administration management and assets;

- the indicia must establish the existence of a fraud, a wrong or an abuse of rights, for example when the control and effective management of the subsidiary by the parent company contribute to compromise the financial situation of the subsidiary and to make any action against the subsidiary illusory or at least doubtful or are used to promote and protect the parent company's own interests at the costs of those who deal with the company.

Sources of Transnational Law / Standards and Practices (Oil and Gas Industry)

International Centre for Settlement of Investment Disputes

Burlington Resources Inc.

The Claimant

v.

Republic of Ecuador

The Respondent

ICSID Case No. ARB/08/5

DECISION ON LIABILITY

Rendered by an Arbitral Tribunal composed of

Prof. Gabrielle Kaufmann-Kohler, President
Prof. Brigitte Stern, Arbitrator
Prof. Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal
Marco Tulio Montañés-Rumayor

Assistant to the Tribunal
Gustavo Laborde

D. ECUADOR'S REQUEST FOR RELIEF

174. On the basis of this position, Ecuador requests the Tribunal to render an award:

808. that Burlington is liable towards Ecuador for the costs required to bring back the infrastructure of Blocks 7 and 21 into good working condition in accordance with the best standards and practices generally accepted in the international hydrocarbons industry.

Sources of Transnational Law / Practices (Satellites Industry)

Satellites (Best practices)

Sentence finale dans l'affaire 10216

A chaque étape de son raisonnement, et qu'il relève ou non la faute de la défenderesse, le tribunal considère que la cause du dommage, qu'il retient comme étant essentiellement une cause unique, constitue un cas de force majeure. Selon le tribunal, la cause est extérieure, imprévisible en l'état de la technique et irrésistible au vu de l'installation dans laquelle se trouvait le satellite comme des pratiques généralement mises en œuvre dans cette industrie. Dès lors, la majorité du tribunal considère que, quelles qu'aient été les éventuelles fautes commises par la défenderesse au cours des procédures de test ou analyse de puissance préalable, celles-ci sont sans lien causal avec le préjudice dont la demanderesse sollicite la réparation. Le tribunal note que certains des reproches formulés par la demanderesse à l'égard de la défenderesse, pris individuellement, ne peuvent avoir causé sur le dommage dont il est demandé réparation, ou qu'au moins la demanderesse n'a pas su démontrer ce lien de causalité.

Sources of Transnational Law / Practices (Construction Industry)

Final Award in Case 15789

If the business practice is to be assessed, what would be the method to settle a question what is the Warranty Period used in construction industry?

G.3.1 Claimants' position

…

133. Claimants hold the opinion that it is a usual practice and quite common in the construction engineering industry that, in cases where basic Defects Liability and additional Warranty Periods are agreed, the Retention Money is released upon the expiration of the basic Defects Liability Period.

134. In the Reply to the Respondent's Answer to the Request for Arbitration the

Claimants stated that they do not seek the Payment of the Retention Money with reference to the common business practices but only aim to point to the standard split of the Defects Liability Periods, in the construction engineering industry, for purposes of payment of the other half of the Retention Money.

G.3.2 Respondent's position

135. In its Answer to the Claimant's Request for Arbitration, the Respondent stated that the Defects Liability Period was stipulated in compliance with the Act on Public Works and therefore reviewing the Defects Liability Period in accordance with the common business practice is excluded.

136. Respondent also alleges that common business practices can, according to … the … Commercial Code, apply only on condition that the contract does not tackle the given problems and in case they are not contrary to those relevant provisions of law which have mandatory character.

137. In the given case it is excessive to deal with the common business practices because the Defects Liability Period is determined in the direct contractual agreement and in compliance with the cogent provisions of the Act on Public Works to 60 months.

138. The Respondent also indicated that as the Works were financed and depended on the state budget and public investments, the rules of the Contract Agreement were determined by the Act on Public Works and so the business practice is here excluded.

139. In the Final Statement the Respondent provided that the business practice must not contravene any legal norm of the statutory force of the law relating to subject matter and contents of the Contract and even divergent understanding of the Warranty Period in Anglo-Saxon legal system and in [State X] legal order cannot debit [*sic*] but must be in compliance with the [State X] legal order.

140. The impediment to adopt mode of the common business practice ... was directly reflected in the Contract arrangement.

G.3.3 Discussion and Decision

141. With regard to this issue the Sole Arbitrator points to the fact that Claimants themselves, in their Reply to the Respondent's Answer to the Request for Arbitration, consider/aimed to refer to the common business practice only as to an instrument designed to support their claim in respect to the split of the Warranty Period and other arguments directly referring to the law or the contract itself.

142. Reference to the common business practices shall be considered as a supportive but not the main and only argument.

143. In this regard, neither the Sole Arbitrator finds solving this issue to be crucial for rendering an award.

144. Application of common business practices within business relationships recognizes the ... Commercial Code as amended ... which states following "Common business practices, generally observed in the particular line of business, unless contradicting the contents of the contract or law, shall also be taken into account when determining the rights and duties ensuing from a certain contractual relationship".

145. It is evident that application of the common business practices in the field of state commissions is not excluded by the law.

146. Although the common business practices have, according to ... Commercial Code, only a subsidiary character they shall be binding without a need of their further contractual probation, provided that they do not contradict the law or content of the contract and are commonly used in a certain business sector.

147. The Sole Arbitrator is not associated with a view of the Respondent who contends that while the contract is governed by/subordinated to the Act on Public Works and with respect to the fact that the Works were financed from the state budget and public finances, the common business practice cannot be applied in this case, and does not see any legal substance which would support the Respondent's point.

Reference to “International Law” as Transnational Law

Sentence finale dans l'affaire 7235

L'application de ces textes et la référence au droit international dans le contrat conduisent l'arbitre à trancher toute question qui ne serait pas directement réglée par le contrat par recours aux règles de droit transnationales, aux règles de la lex mercatoria, aux usages commerciaux et aux règles supplémentaires ou correctives d'un ordre public transnational.

Reference to “International Law” as Lex Mercatoria

Partial Award in Case 17XXX

7.8 Rather, it is reasonable to interpret the reference to "International Law", and thus to give effect to the words of the contract, as meaning (1) a choice that the law of a particular country shall not apply as the governing law of the merits of the dispute, but rather (2) a choice that the lex mercatoria and general principles of contractual obligations in international commercial contracts should apply.

7.10 Although the Tribunal is not bound by the findings in that Award, it is relevant to note that the finding of the sole arbitrator there was: "Accordingly, the Sole Arbitrator considers that the terms "international law" used by the parties refer to lex mercatoria and general principles of law applicable to international contractual obligations such as the ones arising out of the Contract. Such general principles are reflected in the Unidroit Principles of International Commercial Contracts which will be applied for the determination of the parties' respective claims in this arbitration."

7.13 The Tribunal concurs with this. To the extent that a choice of law can be discerned from the wording of Contract XXXXX, the reference to "International Law" and the XXXXX Agreement points towards the UNIDROIT Principles; and in any event the reference to "International Law" indicates that the lex mercatoria has been chosen, and the UNIDROIT Principles are a good representation of the lex mercatoria.

Reference to “International Law” as Lex Mercatoria

Partial Award in ICC Case 12XXX

Article 14 of the Contract states: "the present Contract is governed by international law". It is clear that XXXX, by executing the Contract, agreed that English law was not applicable. The issue is therefore the interpretation of the terms "international law".

The Contract is a sales contract entered into between two entities established in two different countries. Given the fact that they renounced during the negotiations to refer to a national law, the terms "international law" cannot refer to the portion of so-called private international law of a national law. Indeed, "private international law" as applied to international contracts consists of a set of rules of conflict of laws which help the judge or the arbitrator to determine the law applicable to the contract. The Sole Arbitrator is persuaded that the parties wished to depart from a national system. They did not want to apply the private international law of an undetermined national legal system. The Sole Arbitrator agrees with Claimant that "international law" should be understood as international rules applicable to international contracts.

This complies with the terms of Articles 17-1 and 17-2 of the ICC Rules of Arbitration which authorize the parties or the arbitrator not to apply a national law to a contract.

Accordingly, the Sole Arbitrator considers that the terms "international law" used by the parties refer to *lex mercatoria* and general principles of law applicable to international contractual obligations such as the ones arising out of the Contract. Such general principles are reflected in the Unidroit Principles of International Commercial Contracts which will be applied for the determination of the parties' respective claims in this arbitration.

Lex Mercatoria develops over time…

Final Award in ICC Case 17XXX

3.4 In relation to the governing law of Contract XXXXX, one of the introductory paragraphs of that agreement states: "the following signed Contract is a document that is legally binding and enforceable under International Law and ICC Rules and Regulations, including Non-Circumvention and Non-Disclosure."

3.5 There was a dispute between the parties as to the meaning of this. In the Partial Award the Tribunal decided that the UNIDROIT Principles of International Commercial Contracts (the "UNIDROIT Principles") shall apply to the merits of this arbitration (together with the provisions of the contract and the relevant trade usages: see Article 17(2) of the ICC Rules).

3.6 When the Partial Award was issued, the 2004 version of the UNIDROIT Principles was in effect. Subsequently on 10 May 2011 the 2010 version came into effect. The Claimant in its Closing Submissions has submitted that the 2004 version should continue to apply in this matter. It argues that it would be "inefficient and unfair" to use the 2010 version. However, the Claimant has also confirmed that the provisions of the UNIDROIT Principles that are relevant here have not changed between the 2004 version and the 2010 version.

3.7 The choice between the 2004 version and the 2010 version of the UNIDROIT Principles has no import, therefore. Nonetheless, since the Claimant has raised the issue and since extensive reference is made below to the UNIDROIT Principles, it is appropriate for the Tribunal to rule on it.

3.8 The lex mercatoria develops over time, and the UNIDROIT Principles do so too, in concert; and in the absence of an agreement by the parties attempting to "fix" the governing law at a particular point in time, it would be wrong for the Tribunal to ignore such developments. The current version of the UNIDROIT Principles therefore applies here, meaning for the purpose of this Final Award the 2010 version.

Transnational Rules / Industry Rules (Oil and Gas Industry)/ The oil industry widely accepted principles

International Centre for Settlement of Investment Disputes

Burlington Resources Inc.

The Claimant

v.

Republic of Ecuador

The Respondent

ICSID Case No. ARB/08/5

DECISION ON LIABILITY

Rendered by an Arbitral Tribunal composed of

Prof. Gabrielle Kaufmann-Kohler, President
Prof. Brigitte Stern, Arbitrator
Prof. Francisco Orrego Vicuña, Arbitrator

Secretary of the Tribunal
Marco Tulio Montañés-Rumayor

Assistant to the Tribunal
Gustavo Laborde

3. Did Ecuador Expropriate Burlington's Investment?

3.1. What is the proper approach to examine Burlington's expropriation claim?

3.2. Were the application of Law 42 and the failure to absorb its effects measures tantamount to expropriation?

3.2.2. Ecuador's position

375. Because taxes are in a special category, only in exceptional circumstances will a tax be expropriatory. Case law and doctrinal writings suggest that a tax measure may be tantamount to expropriation if (i) it produces the effects required for any indirect expropriation and (ii) in addition, it is discriminatory, arbitrary, involves a denial of due process or an abuse of rights. Thus, in *EnCana*, the tribunal held that "[o]nly if a tax is extraordinary, punitive in amount or arbitrary in its incidence would issues of indirect expropriation be raised."[579] In short, only in "extreme" cases will a tax be expropriatory.[580]

377. Law 42 was a necessary and appropriate measure under the circumstances. As of 2002, there was an unprecedented and unforeseen rise of oil prices. This unforeseen increase in the price of oil destroyed the economic equilibrium of the PSCs. This economic equilibrium must reflect the oil industry's widely accepted assumption that the State, as the owner of the non-renewable resource, "is to be the main beneficiary of extra revenue resulting from high oil prices."[584] However, the PSCs have limited price elasticity, *i.e.* the State's participation share remains the same even though prices increase. With the massive and unforeseen increase of oil prices, Ecuador was no longer the main beneficiary of the oil revenues. As a result, the PSCs no longer reflected a fair division of extractive oil rent between the State and the contractor.[585]

Transnational Rules / Industry Standards (Oil and Gas Industry)/ The generally accepted standards designed to achieve efficient and safe development and production of petroleum

INTERNATIONAL CENTRE FOR SETTLEMENT OF INVESTMENT DISPUTES
WASHINGTON, D.C.

In the arbitration proceedings between

NIKO RESOURCES (BANGLADESH) LTD.
(Claimant)

and

PEOPLE'S REPUBLIC OF BANGLADESH
(First Respondent)
BANGLADESH PETROLEUM EXPLORATION & PRODUCTION COMPANY LIMITED ("BAPEX")
(Second Respondent)
BANGLADESH OIL GAS AND MINERAL CORPORATION ("PETROBANGLA")
(Third Respondent)

(jointly referred to as Respondents)

ICSID Case No. ARB/10/11
and
ICSID Case No. ARB/10/18

DECISION ON JURISDICTION

Members of the Tribunal
Mr Michael E. Schneider, President
Professor Campbell McLachlan
Professor Jan Paulsson

502. The performance of the JVA, as has just been mentioned, touches on a variety of substantive matters which are regulated not in the agreement itself but by laws, regulations and practices concerning Petroleum Operations. This appears from a number of provisions in the JVA and is set out in a general provision in Article 26.2.4 which prescribes that Niko as the Operator shall:

> "*conduct all Petroleum Operations in a diligent, conscientious and workmanlike manner, in accordance with the applicable law, this JVA and generally accepted standards of international Petroleum industry designed to achieve efficient and safe development and production of Petroleum and to maximize the ultimate economic recovery of Petroleum from the JVA Area.*"

503. One may argue that compliance with these laws and standards has a contractual basis in the JVA. To this extent, a dispute concerning compliance with these laws and standards may be considered of a contractual nature in a wider sense. However, the laws to which reference is made in Article 26.2.4 and other applicable laws and regulations apply not just because they are included in the Operator's obligations under the JVA; but they have a direct application. This application also may have to be considered as connected to the performance of the JVA.

504. When the Respondents argue the contrary and assert that the arbitration clause is limited to contractual disputes they do not use the term contractual disputes in the wider sense just mentioned. Rather they state that the rights invoked must derive "*from a contractual commitment*" *and not from* "*different normative sources*".[338] However, they do not explain on what basis they seek to justify their position. In particular they do

not give any reason why claims "*in connection with the performance*" of the JVA must by necessity be contractual claims in the narrow sense in which the Respondents use the term.

505. In view of this wide scope of Niko's obligations under the JVA and the difference in the origin of these obligations, extending beyond specific prescriptions in the agreement itself, the Tribunal understands disputes "*in connection with the performance*" of the JVA in a wider sense, which may include sources of liability other than the agreement itself. The question what these sources are and which obligations, contractual or other, fall to be considered concerns the substance of the dispute and is not determined at this stage of the arbitration.

506. The Tribunal concludes that it may well be possible that it can make findings concerning liability on grounds other than the JVA. A more precise determination depends on an analysis of the claim made. This will be undertaken when the Tribunal considers the merits of the dispute.

Transnational Rules / Industry Principles (Oil and Gas Industry)/ The DCF method is most widely used and generally accepted method in the oil and gas industry for valuing sales or acquisitions.

INTERNATIONAL CENTRE FOR THE SETTLEMENT OF INVESTMENT DISPUTES

IN THE PROCEEDING BETWEEN

OCCIDENTAL PETROLEUM CORPORATION
OCCIDENTAL EXPLORATION AND PRODUCTION COMPANY
(CLAIMANTS)

- AND -

THE REPUBLIC OF ECUADOR
(RESPONDENT)

(ICSID Case No. ARB/06/11)

AWARD

Members of the Tribunal
Mr. L. Yves Fortier, C.C., Q.C., President
Mr. David A.R. Williams, Q.C., Arbitrator
Professor Brigitte Stern, Arbitrator

779. The Tribunal recalls that it has formed the view that the discounted cash flow method is the most widely used and generally accepted method in the oil and gas industry for valuing sales or acquisitions.

3. The Discounted Cash Flow ("DCF") Method

708. The Tribunal is of the view that, in this case, the standard economic approach to measuring the fair market value today of a stream of net revenues (*i.e.*, gross revenues minus attendant costs) that can be earned from the operation of a multi-year project such as OEPC's development of Block 15 is the calculation of the present value, as of 16 May 2006, of the net benefits, or "discounted cash flows". These net cash flows are appropriately determined by calculating the flow of benefits ("cash flows") that the Claimants would have reasonably been expected to earn in the "but for" state of the world in which the termination of the Participation Contract hypothetically did not occur relative to the actual cash flow that the Claimants will derive subsequent to the termination. The difference between these two cash flow streams (the "but for" state of the world with no termination less the actual state of the world with contract termination), discounted to the date of the actual contract termination, is the economically appropriate and reliable measure of the cumulative economic harm suffered by the Claimants as a consequence of the contract termination.

709. Using a DCF model as the starting point for measuring FMV, the Tribunal further observes that the analytical framework for determining FMV in the present circumstances requires several steps. These steps are clearly summarized by the Respondent. The Claimants agree. They are:

(a) Determination of the size of the reservoir (project the number of barrels that are in the field);

(b) Creation of a production profile (establish the number of barrels that can be produced each year economically);

(c) Assignment of risk adjustment factors ("RAFs") to the reserves (to reflect the risk that certain reserves categories will not produce the amount of oil projected);

(d) Application of a price forecast (multiplication the number of barrels in the production profile by a projected price of oil, subtraction of the costs to produce those barrels); and

(e) Application of a discount rate (to reflect, among other things, the time-value of money and business and country risks).

Transnational Rules / Industry Principles (Oil and Gas Industry)/ The group of principles ordinarily used to determine gas market value: the value of natural gas is determined by the full costs associated with using competitive fuels minus associated costs for using Natural Gas (no)

Final Award in ICC Case 13XXX

111. According to Article 6.10(a) first sub-paragraph of the [Contract], any adjustment of the price provisions in Article 6.1 to 6.4 [Contract] shall reflect "in particular the value of Natural Gas in the end user market of the Buyer". Claimants maintain that "the value of Natural Gas" must be determined on the basis of market values and prices actually obtained or obtainable in the end user market of Claimants as a prudent and efficient gas company. Respondent, on the other hand, argued that the value of natural gas is determined by the full costs associated with using competitive fuels minus associated costs for using Natural Gas and that such costs to a certain extent have to be calculated according to a theoretical model. Respondent maintains that the term "value of Natural gas" has long been used in long-term gas contracts, and that in the gas market it is commonly understood as referring to the cost of end users at which they are indifferent to use other fuels than gas. Furthermore, the Parties have previously discussed questions of price review on this basis. Accordingly, Respondent argues that changes of values and prices for gas in a market do not necessarily mean that "the value of Natural Gas" has changed. However, Respondent recognizes that actual gas-to-gas competition affecting the market value of gas may be relevant as a basis for adjustment of the price provisions even if this does not imply any change of "the value of Natural Gas" as so interpreted.

In the opinion of the Arbitral Tribunal, the [Contract] itself does not contain any precise provision how to calculate "the value of Natural Gas". Clearly, the word "value" is a quite general term which may cover values determined according to different principles. However, the principle relied on by Respondent does not belong to the group of principles ordinarily used to determine values in most contractual contexts.

….

A market is an environment where actual transactions are carried out between sellers and buyers, and the "value" in commodity markets is generally determined according to prices contained in offers from sellers and buyers and, in particular, the prices of the various transactions concluded. Accordingly, in the absence of a particular provision in the [Contract] as to the meaning of "the value of Natural Gas", the Arbitral Tribunal considers that this expression should be interpreted as referring to the ordinary market value of gas, and that the market value of gas is to be determined on the basis of prices obtained or obtainable in actual transactions in the various market segments constituting the end user market of the Buyer.

Transnational Rules / Trade Usages (Cement Industry)/ To negotiate a price for an operating cement plant based on the rated capacity of that plant and an appropriate price per tonne of production capacity

Final Award in Case 10977

A. Applicable rules of [State X] law and trade usages

251. Many of the relevant provisions of the [State X Civil Code] are based on the United States' Uniform Sales Act1 and, thus, United States' case law interpreting these principles is persuasive, although not binding, on [State X] courts interpreting the principles in the [State X Civil Code].2

252. The ICC Rules also apply and Article 17(2) provides that "[i]n all cases the Arbitral Tribunal shall take account of the provisions of the contract and the relevant trade usages".

253. The Tribunal accepts that it is a trade usage within the cement industry to negotiate a price for an operating cement plant based on the rated capacity of that plant and an appropriate price per tonne of production capacity. The evidence showed that the relevant price per tonne negotiated in this case included limestone supply and strategic considerations such as the location of the Plant and the local circumstances . . .

254. The Tribunal also notes that it is a trade usage within the cement industry to identify an acquisition target, make general inquiries and investigations regarding the state of the assets and then negotiate an agreement that contains warranties designed to protect the buyer's interests ...This is necessary because in order to perform a full inspection of the internal workings of an operating cement plant, it would be necessary to stop production, which is not a standard practice.

Transnational Rules / Industry Practice (Cement Industry)/ To refer to production lines in terms of their rated capacity

Final Award in Case 10977

(ii) Scope of the express warranties

298. [Claimant] relies first on the express warranty contained in Clause 4.2(f) of the SPA which provides that "the Cement and Mining Assets listed in Annex C represent all of the assets required to operate a cement factory with a clinker capacity of 2.46 million tonnes per year, in the ordinary course of business". As already discussed, the components of this warranty at issue between the parties are "capacity"; "2.46 million tonnes per year"; and "in the ordinary course of business".6 The Claimants say that this "Assets Warranty" required the Respondents to transfer all of the assets required and that those assets, when operated in the ordinary course of business, be capable of producing 2.46 million tonnes of clinker per year.

299. What did the parties intend by the use of the word "capacity" in Clause 4.2(f) of the SPA? At the time the SPA was signed, the Claimants were aware that the Plant was incapable of actually producing 2.46 million tonnes of clinker per year. Nonetheless, the Claimants argue that the use of the word capacity was intended to insure that the Plant that was the subject of the sale, when operating normally, was actually able to produce the specified amount of clinker. The Respondents readily admit that Line 2 never achieved the rated capacity. However, the Respondents contend that the word capacity relates to the designed capacity and not actual capacity. The Tribunal agrees that capacity refers to designed capacity, or what the parties also referred to as rated capacity. The industry practice was to refer to production lines in terms of their rated capacity.

Application of Lex Mercatoria / Legitimacy of Lex Mercatoria in State Contracts

Sentence partielle dans l'affaire 7375

La majorité des arbitres examine ensuite les différentes possibilités de choix des règles de droit applicables selon la théorie du « choix négatif », à savoir : l'application d'un droit neutre, l'application de la théorie du « tronc commun » selon laquelle doivent être appliquées les dispositions communes aux droits des deux contractants, l'application de la lex mercatoria en prenant en compte les principes Unidroit et les usages commerciaux. La majorité écarte, d'une part, l'application d'un droit neutre du fait de l'impossibilité de déterminer quel droit neutre devrait être choisi et, d'autre part, la théorie du « tronc commun », trop difficile à mettre en œuvre en pratique et qui ne permettrait pas de dégager une solution au litige. La majorité décide, après avoir entendu l'opinion dissidente qui prônait l'application du droit du demandeur, de retenir l'application des principes généraux du droit. La majorité du Tribunal arbitral considère que malgré les difficultés de mise en œuvre d'un tel choix, tenant à l'imprécision des principes généraux et de la lex mercatoria, cette solution est la plus pertinente, la seule qui tienne compte des hésitations parfois exprimées d'un État souverain à se soumettre au droit d'un autre État, qui mette les parties dans la même situation, et qui maintienne par conséquent une égalité de traitement des parties tout en respectant la nature étatique du demandeur, et la seule qui, vraisemblablement, aurait été choisie par les parties si elles avaient poursuivi les discussions sur la détermination du droit applicable lors de la négociation de leur contrat. La majorité du Tribunal arbitral conclut finalement que cette solution est la seule qui permette de maintenir un équilibre entre les parties, de répondre à leurs attentes et d'écarter leurs arguments pro domo.

La majorité du Tribunal poursuit et conforte son raisonnement en faisant référence à des sentences arbitrales, tout en signalant l'absence de valeur de « précédents » de ces décisions qui ont retenu les principes généraux du droit et la lex mercatoria.

La majorité du Tribunal relève les imprécisions conceptuelles et terminologiques tenant à la notion de principes généraux du droit. La majorité du Tribunal constate qu'il est parfois fait référence à ces principes sous les dénominations suivantes : principes généraux du droit, principes de droit privé généralement acceptés, règles de droit anationales, règles de droit transnationales, lex mercatoria, principes du droit international, etc. Elle décide donc d'appliquer les principes généraux et les règles applicables aux obligations contractuelles internationales qui peuvent être considérées comme des règles de droit et qui sont largement acceptées par les acteurs du commerce international. Sont ainsi incluses dans la notion de principes généraux toutes les composantes de la lex mercatoria : les principes généraux, les usages commerciaux pertinents, et les principes Unidroit dans la mesure où ils reflètent des principes et règles généralement acceptés. Le Tribunal poursuit en disant que, même si les principes généraux ne peuvent pas, pour des raisons pratiques, être énumérés

dans la sentence partielle du fait de l'abondance d'écrits relatifs à la lex mercatoria, ils ont une existence concrète qui permet au Tribunal de les utiliser pour trancher le différend.

Transnational Public Policy

Final Award in Case 13515

Attendu que la désignation d'un droit étatique peut, dans certaines circonstances, permettre, en raison de ses modalités propres, de « sauver » un contrat portant, pourtant, sur des actes de corruption ou de trafic d'influence. Que pour cette raison, la compétence du droit choisi ne peut faire obstacle à l'application des principes de l'ordre public transnational, ayant eux aussi vocation à régir le contrat. Attendu que bien que le tribunal arbitral soit enclin, dans la présente affaire, à appliquer directement les principes de l'ordre public transnational, il ne peut méconnaître la volonté des parties dès lors qu'elles ont expressément soumis leur contrat au droit français.
…
Attendu que l'ordre public transnational ou véritablement international est « constitué de l'ensemble de principes ou de normes supérieurs et fondamentaux pour le commerce international qui visent en toutes hypothèses à protéger certaines valeurs essentielles ainsi que les intérêts de la société internationale » (Commerçants et États) (P. Lalive : « Ordre public transnational (ou réellement international) et arbitrage international » RA 1986 p. 331). Que l'arbitre international reconnaît l'existence de principes d'ordre public transnational, dès lors qu'il constate qu'ils font l'objet d'une large convergence entre les différents systèmes juridiques des États, et qu'ils sont retenus par des conventions, et lorsqu'il constate l'adhésion des opérateurs du commerce international.
…
Attendu que les opérateurs du commerce international, et notamment les grandes firmes multinationales, s'engagent par des codes de bonne conduite, à renoncer à de telles pratiques et, que « les règles de conduite pour combattre l'extorsion et la corruption dans les transactions commerciales » de la Chambre de commerce internationale, montrent que la réprobation de telles pratiques est largement partagée dans le milieu d'affaires.

…

Attendu que si ces principes de solutions ne font pas de doute, et qu'ils ont été admis par les parties au présent arbitrage, il importe pour tout arbitre, de faire preuve de beaucoup de prudence dans son appréciation d'un contrat particulier. Que cette obligation de prudence est d'autant plus lourde pour l'arbitre international que celui-ci ne dispose pas des moyens d'investigations mis à la disposition de la justice étatique. Qu'il en est d'autant plus ainsi que la corruption emprunte souvent des figures contractuelles connues et d'apparence légale : prestation de service, courtage, mandat, et que l'objet illicite est dissimulé derrière des dispositions contractuelles d'apparence régulière.

…

Par ces motifs, le tribunal arbitral déclare nul, de nullité absolue, l'accord de distribution exclusive conclu […] entre [la demanderesse et la défenderesse].

….

Attendu que l'ordre public transnational peut trouver à s'appliquer ici. Qu'en effet en complément de la nullité qu'il prescrit, il peut préciser sa nature et ses effets, de manière à assurer à ses solutions une meilleure cohérence. Qu'à cet égard une règle d'interdiction des restitutions est de nature à compléter la sanction de la nullité. Que l'exception d'indignité qui correspond à une coutume d'origine savante, qui n'est pas en droit français une création jurisprudentielle, trouve naturellement sa place dans l'ordre juridique transnational.