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# **The Autonomy of Global Contracts**

## ***Judicial Legitimacy and contract Fragmentation***

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University of Minho, Braga, Thursday 26 of October 2006

Since this morning, a nice and “harmonious” music is coming from the hills of Fiesole... I would like to thank Pr. Nuno Manuel Pinto Oliveira for his invitation to this meeting, for the opportunity to meet again comrades and friends from the European University Institute of Florence, and eventually for being able to discover Portugal, beginning by the Bom Jesus of Braga.

I have been asked to give some introductory remarks about the ongoing debate regarding contract law unification/globalisation processes; just back from a conference in Wuhan, China, where contract law is being completely reformed under the influence of occidental law, this topic appears indeed of an outmost interest. But what I am going to say might seem quite discouraging after the very optimistic presentations of my colleagues this morning. My point will be sceptical ... - well, you may think that there is nothing less than surprising from a citizen of a country where the most important European legal endeavour was rejected in a shameful referendum... So I am going to talk about contracts, but contracts “without State”, contracts in a context of globalisation that does not rhyme with unification but with fragmentation.

*“Uncertainty and ambiguity (...) constitute a double reason to confer a real autonomy to the contractual relation that will make it escape the vagaries of ideology, politics and history”(...). “In the middle of the constant transformations that we live in, the master task is to set oneself up as legislator in order “to make the contract stand on its own”. Achieving this task makes it necessary to have a precise analyse of the background of the transaction to forge a clear and exhaustive document that allows the contractual parties to live legitimately under the cover of cleavages between economic and judicial systems”<sup>1</sup>.*

Grounded on the observation of negotiated contracts developments, this plea in favour of a contractual autonomy is particularly meaningful for the contemporary evolution of contractual relations. Globalisation and growing autonomy of contracts characterise this evolution whose combination shape little by little what one would define as a new *lex mercatoria*. This phenomenon (Section I – Globalisation and growing autonomy of contractual norms) arouses the question of its judicial legitimacy (Section II – Legitimacy of an autonomous contractual formation).

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<sup>1</sup> PISAR, S., *Négociier et rédiger un contrat international*, BLANCO, D., Paris, Dunot, 3e éd. 2002, préface

## SUMMARY

### SECTION I – GLOBALISATION AND GROWING AUTONOMY OF CONTRACTUAL NORMS

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- A – The emergence of global contractual norms
- B – A growing autonomy in the production of contractual norms

§II – The *lex mercatoria* : a “global contract without a State”?

- A – A new global judicial order founded on customs, corporation, without a State ?
- B – The deadlock of a definition founded on classical judicial criteria

### SECTION II – LEGITIMACY OF AN AUTONOMOUS CONTRACTUAL FORMATION

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- A – The required hierarchy
- B – The required externalisation
- C – The required temporisation

§II – The presupposition of an autonomous contract

- A – Economic legitimacy
- B – Social and judicial illegitimacy
  - 1 - A social critic of autonomous contracts
  - 2 - The risk of a new “feudalisation” of contractual rapports
- C – The challenge of the lawyer: a quest for rationalisation in the negotiation process

## **Section I – GLOBALISATION AND GROWING AUTONOMY OF CONTRACTUAL NORMS**

The double phenomenon of globalisation and the increasing autonomy of contractual norms explain the development of a new *lex mercatoria* (§I – The development of a new *lex mercatoria*). Can we define this set of norms as a ‘global law without State’? – The traditional judicial criteria to define this law seem to lead to a deadlock (§II – The *lex mercatoria*: a “global contract without a State”?).

### **§I – The development of a new *lex mercatoria***

The emergence of a new *lex mercatoria* is a correlation between globalisation phenomena (A) and the increasing autonomy of contractual norms (B).

#### **A – The emergence of a globalisation of contractual norms**

The globalisation of society changes the law as well as the economy. First it reveals oneself by intensifying international exchanges. The acceleration of the merging process of multinational firms, the increasing number of international co-operations contracts, are logically making partners to intervene in issues of different cultures and judicial orders. The law practiced here appears to be more and more transnational.

Some internal judicial regimes, constituted within multinational firms, produce a system that one may call a “law without a State”. Thanks to worldwide coordination where State interventionism is less and less present, technical standardisations and professional regulations are better able to develop by their own. Fields in economic law such as commercial and industrial law, employment law or environmental law are globalising in a more and more autonomous way.

A multitude of firms organised at national level are moving towards global ones. This evolution is continuing and dynamic; it is not uniform. So this is not about the emergence of a global society under the political inter-state politics (like the European construction could have been), but it is rather about very fragmented and contradictory processes in which Nation States are progressively losing their part as leaders in the judicial norms production.

One of the most significant symptoms of this evolution is the rapid development of international law firms. These multinationals are creating a law that appears less and less defined on the basis of the judicial models within national frontiers; this law seem less territorial or national and more divided in economic sectors. Some economic sectors and financial markets overtake territorial frontiers to create their own norms. The outcome is a new law of conflicts more private than public, which seems to regulate disputes between different economic and social sectors rather than national ones. National legislations appear less and less competent in the regulation of very technical and specialised economic sectors. In that way, globalisation couples with a growing autonomy of contractual norms production.

## B – The growing autonomy in the production of contractual norms

To organise their transactions or solve their disputes, contractual parties choose rules, institutions or techniques in which the links with national states are less and less obvious. Contract law is no longer monopolised by a State regulator producing contractual justice with exclusivity, but seems rather to diffuse through the mediation of various national or international institutions in the form of industrial, commercial, bureaucratic, banking or insurance networks. The principle of legal unity, ideally dominant, symbol of national identity, seems to be outdated. Should we consider these phenomena as positive law or only as a set of social norms taking only a judicial form by the mediation of national or international decisions? – Is it a global contract without State?<sup>2</sup>

## §II – The *lex mercatoria*: a “global contract without a State”?

Grounded on custom, international corporation or on the idea of a “Contract without law” (A), when we have to define this new *lex mercatoria*, every classical criterion of the judicial character of the contractual norm lead to a deadlock (B).

A – A new global judicial order founded on customs, corporations, without a State ?

For some, this new *lex mercatoria* is a real global judicial order whose sources lay on the practice of global commerce, common economic directives, standardised contracts, on the activity of multinational industrial groups, the constitution of codes of good conduct or in the international tribunals sentences of arbitration. Based on usage and custom, this law seems independent of national sovereignty.

For some others, this new *lex mercatoria* is comparable to the law of the middle age, constituted as a very closed community of merchants’ corporations, producing organisational sanctions and disciplinary codes.

Another point of view developed the idea of a “contract without law”, which supposes to exist without national or international grounds.

This appears incompatible with a definition founded on the theory of judicial sources. The principle of Nations-State sovereignty reduces this *lex mercatoria* to a “fictional law”. According to this principle, every judicial phenomenon is rooted in a national judicial order requiring a “minimal tie” with a national law. Therefore, commercial usages from a corporatist or not origin cannot themselves create autonomous law. These norms can only become the law by a formal act from the sovereign State; idem for standardised contracts which are subordinated to the control of national judicial orders. Without State acknowledgement, these norms have no obligatory force. At the end of the day, international arbitration, can always be questioned by national tribunals or by an exequatur procedure. Therefore only the classical theory of the conflict of laws, of private international law, is capable of

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<sup>2</sup> Cf. : TEUBNER, G., « Global Bukowina : Legal Pluralism in the World Society », in Teubner éd., *Global law without a State*, Aldershot : Dartmouth Gower, 1996.

regulating these disputes efficiently. If globalisation is unavoidable, nothing can prevent from the application of the only legitimate sources that are the international treaties and conventions.

The idea of a new *lex mercatoria*, based on a “contract without law”, breaks the taboo of the natural tie between the law and the State, and suggests the existence of “private” judicial orders considered as a *lex illegitima*.

How a valid spontaneous law could emerge from transnational contexts without the authority of a State, without its power of sanction, without its political control, without the legitimacy of a democratic process of normative production? - Where is the “Grundnorm” on the world scale? Where is the “rule of global recognition”? - Where does the genuine production of these norms come from? - National politics, international relations, national judicial procedures or economic and social processes on the global scale? - The development of an economic global law appears to shape simultaneously itself from several dimensions; classical judicial criteria seem then to lead to a deadlock.

#### B – The deadlock of a definition based on classical judicial criteria

The “sanction” has lost its place as a central concept in the definition of law. It becomes a normativity criterion among others. If the criterion of national tribunals sanction were used as an argument against the global character of this law, many regulations avoid this sanction. Therefore, although this criterion may be necessary, it is not however sufficient.

The notion of “legal rule” has lost its strategic position as the central subject in the interpretation of law. The paradigmatic turn from “structure” to “procedure” has led to consider statements, communicating events and acts that apply these rules as the central elements of the judicial order. This transformation cannot be characterised by the mere production of rules, but by their insertion in a context of speeches. The indecisiveness, the imprecision of rules produced by the *lex mercatoria* is a misleading criterion. The existence of a group of formal elaborated rules is not decisive. What should count is the process that organises the mutual constitution of judicial acts and structures. The contractual context of self-validation would be the privileged criterion of normativity, but this seems paradoxical.

Only a contract by itself seems to have the power to overtake national frontiers and transform a traditionally national legal production into a global one. Only contracts that long for having a transnational validity manage to cut themselves off from their national roots. It is necessary therefore to observe again this contractual practice, and detect the requirements of *lex mercatoria*.

If we ask ourselves the question of the foundation of the rules set down by these contracts, and if this question is asked in the manner of Durkheim: from where the non-contractual premises of a contract stem from - the only possible answer is to be found in contracts themselves; but again, we reach a dead end. The self-validation of a contract leads to a paradox that takes the following form- “we agree that our contract is valid or not valid”. It is pure tautology; it is a typical self-referring paradox, which leads to nothing more than a never-ending oscillation, valid/non-valid,

non-valid/valid etc., which resumes itself in the impossibility of making a decision. Thus, if we cannot accept the idea of a self-valid contract, the *lex mercatoria* has no judicial ground<sup>3</sup>. Practice is however more imaginative than theory. International negotiators have found means to avoid the self-validation paradox by elaborating a specific, and autonomous process for contracts formation.

## **Section II – LEGITIMACY OF AN AUTONOMOUS CONTRACTUAL PRODUCTION**

Globalisation and growing autonomy of contractual norms production lead to a new representation of contract law. In the practice of international businesses, an autonomous process for the formation of contracts is elaborated. This process is to create through longer negotiations the required conditions for a self-valid contract (§I – Required conditions and effects of an autonomous contractual formation). However, the required conditions for the implementation of autonomous negotiated contracts are not without serious reserves and arouse again the question of their legitimacy (§II – Problematic legitimacy of global autonomous negotiated contracts).

### §I – Required conditions of an autonomous contractual formation

International negotiators set themselves through long negotiations the rules that will frame and organise their relationships within the foreseen contractual operation. The formation of these negotiated contracts organises not only the commercial or industrial transaction but establishes also within the form of contractual standards, a system of legal regulation of private order. Therefore, besides classical rules of contract formation, conventional clauses may set up competence of either arbitration tribunals or private institutions that “legislate” themselves on the contractual model, by a higher level of negotiation and deliberation? The implementation of this formation requires some conditions characterised in doctrine<sup>4</sup> by a hierarchy (A) and externalisation (B) and temporization of the rules in negotiated contracts (C).

#### A. The required hierarchy

The autonomous formation of negotiated contracts requires an internal hierarchy within the contractual rules. Negotiators have not only to set some “primary rules” that foresee the future parties behaviour, but they also have to set “secondary rules” that regulate the recognition of the primary rules, their identification, their interpretation and also the procedure for the conflicts resolution. The paradox of the self-validation is not excluded, but it is concealed by a distinction of the various levels of hierarchy between primary and secondary rules that constitute the formation of the contracts. Even if they remain of contractual origin, secondary rules appear to be the

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<sup>3</sup> Cf. : TEUBNER, G., « Global Bukowina : Legal Pluralism in the World Society », in Teubner éd., *Global law without a State*, Aldershot : Dartmouth Gower, 1996

<sup>4</sup> Cf. : TEUBNER, G., « The King's Many Bodies: The Self-Deconstruction of Law's Hierarchy », *Law & Society Review*, Vol. 31, No. 4 (1997), pp. 763-788

most autonomous.

### B. The required externalisation

Negotiated contracts have to externalise themselves; they have to be subjected to the conditions of validity, to the regulations of non-contractual and contractual institutions since they are produced by the contract itself. For example, the sentences of a tribunal such as the International Chamber of Commerce of Paris, and every other international legal or economic institution grounded on contractual terms.

This practice creates therefore, *ex-nihilo*, an institutional triangle combining legal, judicial and conventional rules. The process of externalisation makes easier the interaction between official and non-official legal orders. The production of a contractual law organised spontaneously, creating a functional equivalent of state law, distinct from a purely national form of some contracts. Moreover, this practice transforms the part played by international contracts; although arbitration and standardised contracts are themselves founded on a contract, they transform contractual formation into “non-official” law, controlled by “non-official” law set up by official and non official, public or private authorities<sup>5</sup>.

### C. The required temporisation

The implementation of this autonomous formation of negotiated contracts, combining hierarchisation and externalisation processes operates necessarily within time duration. The self-validation of contractual rules cannot be understood outside the duration of their formation. This time duration is the result of an interactive process of legal acts and structures. Logically, the formation of a contract extends into the past and the future; negotiated contract refers itself to pre-existent standardisation of rules, and projects itself into the future by the elaboration of clauses that foresee their regulation. In that way, negotiated contracts create themselves in a progressive and continuous formation, a self-production in which each act generates other acts.

Requirements of a self-validation of a contractual production are therefore gathered within a system set up by a hierarchy of standards and by organisational authorities shaped in a long term. This has nothing to do with customary law founded on traditional practices labelled “*opinio juris*”. Commercial customs only play a limited role. In the same way, professional organisations are not formally organised business communities, which produce their own law. The formal source of validity of these contracts is structurally different from professional organisation. Finally, this is no longer about a “contract without law”, since it remains linked, indirectly, by an institutional network in which Nation State standards are presented<sup>6</sup>. However, the legal and political legitimacy of such autonomous contracts remain a problem.

## §II – Problematic legitimacy of global autonomous negotiated contracts

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<sup>5</sup> Cf. : TEUBNER, G., « Global Bukowina : Legal Pluralism in the World Society », in Teubner éd., *Global law without a State*, Aldershot : Dartmouth Gower, 1996.

<sup>6</sup> *ibidem*



The presuppositions based on the implementation of an autonomous contract raise a vital debate. In a straightforward way, the debate traditionally opposes those who see, in the dawn of the role of the State (supposed to be the only producer of contractual standards) the risk of an increasingly impersonal and corporate society (B), and those who, on the contrary, consider that economic world requires more freedom and flexibility to guarantee a maximum of efficacy in commercial and industrial exchanges for the development of wealth (A). The lawyer has to find a way between the economic legitimacy and the social illegitimacy of the new *lex mercatoria*.

#### A. The economic legitimacy of an autonomous formation of negotiated contracts

It is clear that to choose a law outside the existing national regulations does not mean that a new law is created outside national legal orders. The legitimacy of this autonomous contract will always be questioned in the context of its link with national laws. Even if this link is very weak, from the moment where a national rule of recognition is enshrined within the hierarchical network formed by the negotiated contracts, the link does exist and set the obligatory or non-obligatory legal character of the contract. This type of contract is to being legally sanctioned.

However, 'rules of recognition' are not always produced by a public legal order; they may be the outcome of private contractual arrangements. In this case, one is more in the context of self-validation comparable to genuine revolution; however like every laws founded on some revolutionary acts, except by violence, autonomous contracts require a recognition by other legal orders.

The issue of judicial legitimacy appears then unavoidable – but is it not secondary? Does legal legitimacy of a contract need necessarily a pre-existence of a legal order? Is *lex mercatoria* logically inferior to national law? Will the autonomous contract not continue to develop and evolve at the global stage according to the requirements of economic transactions and organisations rather than according to the recognition of national legal orders? These complex agreements like investment projects in developing countries, constitutive of a medley of sophisticated legal regimes, having an effect on the economy of entire countries or regions - do not they set up their validity by themselves? Are they not legitimate only by the fact that they are economically efficient? Is the legitimacy that grounds them not guaranteed in a more direct way by private groups in charge of their constitution, by the creation of standards and techniques, far from the formal requirements of a national law<sup>7</sup>?

Some people oppose that the combination of these general principles and varied standards whose interpretation can change from case to case, gives to their normative substance, and therefore their contractual legitimacy, an extremely indeterminate character. On the contrary, some others consider that this conventional character gives a larger margin for manoeuvre to the negotiators. The flexibility that characterises these contracts would give them a greater capacity to adapt the contract

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<sup>7</sup> Cf. : TEUBNER, G., « Global Bukowina : Legal Pluralism in the World Society », in Teubner éd., *Global law without a State*, Aldershot : Dartmouth Gower, 1996.

to the change of circumstances. This flexibility would appear then more legitimate, at least in the eyes of their users, because it would produce more stability than national legal rules subjected to constant reforms according to changing social or economic contexts. The stability created by these negotiated contracts, in the long term, synonymous with economic efficiency, would appear therefore to be a sufficient condition to their legitimacy and enforceability.

The multiple sources and the diversity of legal orders in charge of the control of the negotiated contracts, is also considered as a guaranty of a better contractual justice. Global competition between legal or not legal sources, between various State based or not, professional or institutional, regional, national or international judicial organs, would appear to be preferred by contractors<sup>8</sup>.

However, this conception is far from being unanimous. On the contrary, there is a particular scepticism with regards to this model of the self-valid contract. The autonomous contract would not only be legally illegitimate, but would also represent a social danger.

## B – The social illegitimacy of negotiated contracts

The greater scepticism comes firstly from legal sociologists who, according to Durkheim, have always objected the idea of “autonomous contractualism”, asserting very strongly that contract enforceability should always be rooted in a broader social context than the one of the contract (1). The development of autonomous contracts would risk then to end up with what some call a “new feudalisation of contractual relationships” (2).

### 1 – A sociological critique of “autonomous contractualism”.

To understand this critique, one has to read again “*La Division du travail*”<sup>9</sup>. Durkheim compares the two fundamental states of societies. In archaic societies, the core of the social structure is solidarity of a mechanistic type, a “solidarity by similarity” that binds the individuals. As they are all similar, they share the same beliefs, have the same feelings, and are orientated by the same values. In archaic societies, collective conscious is strong and widespread. The law is above all of a repressive nature. On the contrary, in organic societies, the cement of the social organisation is the complementary nature of the roles and functions exercised by individuals, which produces an organic solidarity, based on differentiation. This type of solidarity assumes a law of retributive nature, sanctioning all sorts of activities that prevent its good functioning. This is what gives rise to other diverse branches of law (commercial law, tax law...)

These two types of solidarity constitute two poles, between which societies evolve. The passage from one to another operates not as economists seem to believe – that individuals have found advantages in the division of tasks to increase productivity, but because the extension and the more and more dense character of

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<sup>8</sup> COLLINS,H., *Contracting...*

<sup>9</sup> DURKHEIM, *De la division du travail social* (1894), Paris : Puf, Quadrige, 2e éd. 1991, chap. 7.

theses societies (concentration of individuals as well as the increase of their communications and exchanges between them) have paradoxically removed their similarities, and increased their differentiation. In order for these individuals to sustain the need to share the tasks, there must already exist between them a conscious knowledge of their individualities, a conscious knowledge, which could not result without the division of work. When there is a passage of a type of division of work to another, this passage is translated by the decreasing proportion of repressive laws to the extent of the increasing density of societies.

The growing interdependence between the various social activities does not necessarily accompany the dependence of everyone between them to a group of common rules. This is one of the numerous consequences of the division of work, in modern societies. This set of rules may exist in professional areas without being found in other areas like those of everyday life for example. In such a way that in slackening, moral constraints, which allow individuals to feel bound by an organic solidarity in the society, progressively empty itself of its substance. This emptiness is above all observed in some specialised activities; the co-operation characterising the relationships of work in traditional societies is replaced by an unbridled competition, sharpened in periods of transitional crisis. Durkheim refers to this state of a society in crisis as an anomic one. When the division of work is anomic, this means that individuals are no longer complying with the rules imposed from the exterior by the society because the society is no longer organized in such a way that it may impose on individuals rules maintaining social harmony.

It is hence, clear, that for Durkheim, it is within the structure of constraints imposed by societies, the structure imposed in general by the society, by the professional milieu in particular, and only within that structure, that contractual freedom may be performed. The autonomy of will is only possible because it is accepted by a social context that authorizes it.

Based on this consideration, some others build a general critique of the phenomenon of the society “contractualisation”. One critique, justly doubts the true autonomous character of the process of contractual negotiation, which is at the end, always put under constraints either by the State, by individuals, or by arbitration : *“The experience between the States, in a society deprived of a central regulatory power, shows that negotiation may only operate correctly within a margin between the threat of the use of force and the necessity of a consensus on the rules of the game (...)”*. *“It is illusion to think that negotiations can make the economy of the force, that the intervention of arbitration can bring the opponent back to easy-going. The “internal” negotiations do not escape these constraints. Many dealings during which protagonists pretend to confront without mercy take actually place under the protecting wing of a regulating power that patiently wait his time to give his arbitrage”*<sup>10</sup>.

It is the reason why the idea of raising to the rank of model of normative production the practice of contractual negotiations would become not only technically wrong, but above all, socially dangerous. The development of such an autonomous contract, producer of a “global law without a state”, would be the sign of disintegration of society. *“The fact that the rallying (to the procedure of negotiation) would operate*

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<sup>10</sup> MERLE, P., « De la Négociation » in, *La négociation*, Ardant, P., Dupuis, G., Parodi, J.-L. ed., *La Revue Pouvoir*, Vol. 15, 1981, p. 26

*in favour of the international model, and not the opposite, would tend to prove that societies are threatened by the risks of internal dislocation rather than by the irresistible movement of integration on a worldwide scale. The spectacle of international "disorder", progressively encroaches on terrain attributed in the past to internal "order" would only delight those who see in the decline of State-Nation the necessary and sufficient condition for the restructuration of an international society on entirely new bases*"<sup>11</sup>. The development of these autonomous contracts would also push towards a new feudalisation of contractual relationships.

## 2 – The risk of a new "feudalisation" of contractual relationships.

*"Historically, negotiation appeared as a palliative, aimed at compensating for failure of the authority in charge of saying the law and applying it; the favour which the negotiations enjoys nowadays, is it not the image of the decline of the authority and a sign of the rise of new powers who claim their sovereignty and do not accept to yield to rules before having debated to accept them"? We consider that "it is neither the weak, the have-nots, nor the dropout, who are admitted to negotiate, but those who already dispose, by their power or by their strategic position they occupy in the circuit of production or on the social ladder, of what should well be called the bargaining power. The right to negotiate is only recognized to those who already have the force and who are capable to use it: we negotiate with the unions, but not with the unemployed, the retired, the handicapped or the immigrant workers"*<sup>12</sup>. If some could dream of contractualisation in all sectors of social, political, economic and cultural life, synonym with "the general triumph of the *proudhonian* idea according to which "the social contract must be liberally debated, individually consented to, signed *manu propria* by all who participates".

On the other hand though, some others consider that "the topography of negotiation that is actually used touches the contours of relationships of pre-established and consolidated forces. In other terms, the substitution of negotiation to an injunction marks most often a return to the idea of integration at the profit of reconstitution, in a socially allegedly liberal, of political feudality and of socio-economic corporations<sup>13</sup>. What is then, the position the lawyer interpret of this process of negotiated formation of contracts, who cannot be satisfied by a critique and who has to decide?

## C – The challenge of a lawyer : a research for rationalisation in the negotiation process

At this stage, if we retain the plea of the international negotiator for more contractual autonomy, we agree on the findings that the ambiguity and the growing unpredictability of solutions given by the traditional organs of justice have three main causes: - an insufficiently specified interpretation by national law by the fact that

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<sup>11</sup> CROZIER M., *L'acteur et le système*, Paris : Seuil, 1977, p. 366

<sup>12</sup> MERLE, P., « De la Négociation » in, *La négociation*, Ardant, P., Dupuis, G., Parodi, J.-L. ed., *La Revue Pouvoir*, Vol. 15, 1981, p. 26

<sup>13</sup> SUPIOT, A. : Bibliography in, *Le travail en perspectives*, Paris : L.G.D.J., 1998, See also, *Au-delà de l'emploi*, Paris : Flammarion, 1999

there is a very huge gap between classic rules of contract and the particular context of international transactions; - the risk of being confronted to concepts or usages issued from systems or unknown judicial cultures; - finally, the lack of knowledge, not to say the ignorance of our traditional jurisdictions regarding other organs of contractual justice.

From these findings, resulting from the experience of a genuine practice of negotiated contracts, the first qualities required is accuracy, so that contract law appears less ambiguous, more predictable and hence more reliable. The model of interpretation to be defined has to firstly, guarantee the conditions for a more accurate interpretation that can give an account of the “transaction environment”. To this end, it has to better contextualise contractual relationships. The list of clauses or the formal documents do not suffice to interpret the contract in the most adequate way. Only a contextual interpretation of the negotiation, allows a better understanding of what is at stake and what are its constraints. Furthermore, the model to come up with “*has to define in minute details the rights and obligations that each of the parties are responsible for, by way of reducing, not eliminating, the intrusion of often exotic or singular concepts or customs*”<sup>14</sup>. Only a comparative interpretation may define the contractual concepts common to different judicial systems. Finally, it has to facilitate traditional jurisdictions the recognition of other contractual organs of justice. The only a model of interpretation capable of this methodology is characterised by a certain openness.

The response to this new challenge appears quite simple: the law must guarantee the autonomy of contractors. If this solution seems simple, its actual application is not. Can we avoid the dissolution of law, and the fragmentation of its sources? – If one of the essential reasons push the contractors to turn towards other forms of justices, supposedly more adapted to their context, is explained by a need greater than autonomy. We must imagine how the law can constitute these conditions and exercise this contractual autonomy.

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<sup>14</sup> PISAR, S., *Négocier et rédiger un contrat international*, BLANCO, D., Paris, Dunot, 3e éd. 2002, in préface