

A Regional *Lex Mercatoria* for the Caribbean?

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Introduction

First of all, I have to express my gratitude to the organisers of this conference, for arranging it and for honouring me with an invitation, that gave me the opportunity to visit Cuba and the beautiful city of La Habana.

This presentation will not reflect a specific and focused research on a specific issue; neither will it aim at being a “road map” of sorts with a view to the regional legal integration of the Caribbean in commercial matters. It rather consists of a number of discrete ideas and themes for future research connected to the themes of regional legal integration through spontaneous law and ADR.

The question mark in the title is both in the sense that we actually ask ourselves whether such a regional body of law – soft or hard – does indeed exist; and in the sense that we wonder whether we should welcome it. I will assume that the answer to the latter question is positive: it is generally accepted that similar or even uniform rules are beneficial for the international business environment. The next question would then be what should we do to promote their development.

1. History shows how European merchants developed their law in the Middle Ages,¹ irrespective of local legal systems: too many, too complex and too inadequate to suit their needs of world business people.

Practices and customary rules developed in market places; merchants started having their disputes solved through mediation or arbitration within their professional circles or associations, rather than seeking justice in local lords’ courts.

Scholarly law mostly based on continental *ius commune* became the general framework, then, of a system of *lex mercatoria* generated spontaneously; more and more merchants and their dispute resolvers made recourse to legal scholars from the universities flourishing everywhere in Europe around the study of Roman and Canon law, to obtain guidance to solve their disputes as the developments of the economic environment required more sophisticated legal concepts, principles, rules. That body of law would eventually form the basis of modern era codifications of commercial law; which is now fragmented due to the political fragmentation of post-medieval Europe which only in the second half of the XX century started being blurred within the EU.

Local jurisdictions, meanwhile, also realised the importance of the growing interchange, and also started producing legal rules which were appropriate for the needs of the international business environment. An example of those is given by the early rules of private international law developed by the scholars of *ius commune* (notably Bartolus, Cinus and Baldus)² and more and more applied in local courts, especially in the city-states of northern Italy.

¹ See F.GALGANO, *Lex mercatoria*, Bologna, 1976. This precious and very successful booklet has undergone several subsequent editions.

² For a recent analysis of Bartolus’ contribution to the inception of early private international law in the Middle Ages see, e.g., N.HATZIMIHAİL, *Bartolus and the conflict of laws*, *Revue Hellénique de Droit International*, 60 (2007), 11-79.

2. In the XX century the phenomenon became visible again: local jurisdiction once more became too many and too diversified, unable to provide satisfactory responses to the needs of transnational commerce; the world community of merchants turned again to making recourse to its internal body of practices and customary laws, more and more enforced through arbitration mechanisms.

Private associations of business people and business entities, such as the Chambers of Commerce worldwide, notably the ICC, started collecting and disseminating uniform practices, contractual terms and formats, business usages, for the benefits of negotiating business people, parties to arbitration and litigants in court; as well as developing rules for dispute resolution processes.

National states, meanwhile, recognised the importance of international commerce and the ability of the business community to develop its own rules to regulate its activities.

Along with legislative tools to uniformise national legislations on selected issues – such as the 1930s conventions on cheque and promissory note, or the 1980 Vienna Convention on the International Sale of Goods – national lawmakers started producing legislative tools to make arbitration more free and convenient: they so did by providing tools for enforcing international arbitral awards without much interference of state courts in the process. Other legal mechanisms supporting the development of an efficient transnational legal environment have also been produced (e.g. harmonised private international law rules, rules on enforcement of foreign decision, other judicial cooperation mechanisms).

International bodies such as UNICITRAL also did an admirable work in developing a Model Uniform Law on Arbitration, so far transformed into national legislation by dozens of countries and jurisdictions, as well as developing widely accepted procedural rules for international arbitration.

Scholars and institutions worldwide studied these developments, framed them in a comparative law perspective, and produced more and more research and scholarship related to this XX – XXI century *lex mercatoria*, including all the products of the world's merchant community – ranging from the ICC Incoterms to the UNIDROIT Principles of International Commercial Contracts.

Some of those products became black-letter legislative rules, as it is the case of UNIDROIT model law on international leasing and factoring; or affected national legislations, as it happens, e.g., with the UNIDROIT principles of international commercial contracts – one of the reference instruments for the drafting of the Chinese law on Contracts of 1998.

3. We can identify a repetitive pattern: spontaneous law occupies new territories in the economic environment, and pushes legal borders further, through practice and ADR mechanisms; scholarly law follows, framing the new developments into a more general technical framework. Legislation comes at the side, producing legal mechanisms enhancing market efficiency and thus also legal dynamics; or/and it comes at the end – if at all – to fine-tune, polish and stabilise what has developed within practice and scholarly communities, and often to apply policy consideration to orient the development.

Legislative products return then to the economic/professional forces, again interpreting, developing them, combining them with factual developments – until new legislation comes perhaps, once more, at some further stage.

A balance must be found, as both legislation and spontaneous law are necessary for the healthy development of an economic system.

Too much legislation would make it rigid and would lead to failure of the legal mechanisms or of the economy altogether; too little legislation would make the system chaotic and unpredictable in many areas where customary law does not develop with sufficient precision and general consensus, and could make the economic system move in directions which could not be the most desirable in

policy terms.

All jurisdictions, historically, have acknowledged it is very difficult or impossible, and not desirable indeed, to legislate every area of the law – of the transnational commercial and economic law, at least. It has often been considered much better to provide, along with the legislation deemed appropriate, a general setting and a set of mechanisms to promote some degree of self-regulation of the business community.

Even “classical” socialist states, first and foremost the Soviet Union, had legal tools such as civil codes and commercial laws, as well as banking, financial and arbitration institutions, related to foreign commerce and operations on foreign markets – both within the Council for Mutual Economic Assistance (CMEA, also known as COMECON) ambit, which provided the macro-planning of exchanges amongst the member countries, and outside of it.

Even there and then, foreign commerce mostly functioned at micro-level according to private law models, including legal norms and praxis related to arbitration, enforcement of foreign applicable laws or foreign decisions or awards through private international law mechanisms. Socialist countries’ economic organizations continued for a good part of the twentieth century doing business with non-socialist entities, making negotiations, concluding contracts, etc., and also making ample recourse to arbitration/ADR mechanisms, in which business practices were enforced as applicable customary rules – both within the Comecon and in East-West transactions (notably through arbitration in neutral places such as Stockholm, Vienna or Geneva).³

This makes market institutions and legal institutions related to markets not completely unknown to socialist experiences. Nowadays China is really a success story with respect to this; Vietnam seems to be also following the Chinese model of development to a large extent; others may follow in the future.

4. Many seem to think that the *lex mercatoria* is a rather evanescent concept, or a description of a non-existing entity.

Obviously, it would be difficult to identify all the elements of a national legal system, in the world’s business communities’ usages and customary rules. If we observe these communities looking for a “legal system” in the sense we attribute to national or inter-national laws, with a quite positivist approach to the law, certainly we won’t find it.

Besides, if we consider that every community produce their functioning rules, certainly the world business communities produce theirs; we may call those bodies of behavioural rules “customary law”, “practices”, or *lex mercatoria*.

We don’t need to identify a “legal system” similar to a national one; non-national rules hailing out of business practice do exist, ranging from very basic practical rules of small market places to very sophisticated global practices or scholarly products. We have to recognise their existence and understand them. We may decide they are useful, perhaps, and could play a positive role for economic growth.

More: if a world *lex mercatoria* is certainly identifiable nowadays, I also submit that regional specificities *both produce and make desirable the creation* of regional bodies of law merchant; it is an egg-chicken kind of process where it is impossible to discern between causes and effects.

Law, in a sociological sense, develops according to history, geography, traditions, culture, economy, usages. Certainly every region which is reasonably homogeneous in geographical, historical, social and economic terms, despite its being subdivided in several jurisdictions, has potential for

³ See Kazimierz Grzybowski, *Soviet Private International Law*, 10 Law in Eastern Europe (Leyden, 1965), chapter III, *The Trading State*, 69-110, and the literature and documents cited therein.

developing –and probably does develop– its own larger or smaller mass of regional *lex mercatoria*, and/or its own specifications of the general, world one.

In the following analysis, thus, I will often use the word “should” (e.g. this or that should be done), both to indicate a presumable way to obtain the desired effect and to indicate a pattern or trend that is likely to become visible anyway.

The underlying assumption is that *lex mercatoria* is a desirable thing, being capable of (cooperating with other political-legal products like States, state laws, regional institutions and legal instruments and) improving the level of normative uniformity in transnational business relations, has it has already happened both in the Middle Ages and in the last century, through the described practice/research/legislation process.

In the Caribbean area

5. This particular area of the world has relatively homogeneous geography and ethnic structure; the general patterns of history coincide for most states in the region.

However, a great political fragmentation is visible, due to the historical and still preferential relations of most of the different Caribbean jurisdictions with their different former colonial powers, and with the presence of different political and economic systems in the different countries of this area.

It is almost self-evident that this high level of fragmentation must somehow affect adversely the development of a strong regional economy. Many jurisdictions in the area still behave, as economic actors, like satellites of their respective former metropolitan powers.

The legal discourse follows the historical-political-economic one: legally speaking, common law (both the English and the North American one), civil law (of French, Spanish, Dutch tradition), the socialist legal tradition and many customary laws are present in the region.

A local community of uniform or reasonably harmonised commercial laws – not necessarily incompatible with other regional organisations or cooperation schemes already in place (e.g. ALBA, CARICOM) – would enhance the regional economy, overcoming to some extent the different legal traditions of individual countries.

Especially, it could contribute to *give the Caribbean region some much-needed critical mass*, to put it on the world map of the world’s economic regions; in perspective, able to stand as a global economic actor together with the EU, ASEAN, OHADA, MERCOSUR.

A regional organisation and a *Lex Mercatoria* for the Caribbean

6. A regional organisation producing uniform commercial laws would almost certainly have a positive impact on the economic development of the Caribbean. The diversity of political, institutional, legal traditions in the region make the creation of a general, EU-like community or union not very likely at least in the medium-short term.

Suggestions have been made at this conference about taking inspiration from the OHADA experience, based on a model devised and developed for the African reality, which has historical ties and some similarities of economic and historical developments with the Caribbean region.

This organisation has a more limited scope than, e.g., the EU, being only related to the development of a harmonised or even unified body of commercial laws.

On the other hand, it is more efficient as it produces legal enactments directly enforceable in the member states, with the automatic repealing of all contrasting national laws, and with a supranational court having last instance jurisdiction on the application of common enactments.

Different political environments or legal traditions, per se, do not make such an organisation impossible.

The OHADA, originally developed within francophone West African states, is now developing to include different jurisdictions, of Spanish and Portuguese legal heritage; common law countries (in addition to bijural Cameroon, part of Ohada since the beginning) such as Nigeria and Ghana, are observing the developments of Ohada very closely and with interest. Even the Islamic legal tradition is becoming perceived as a dialoguing legal tradition within Ohada, not only due to the Comoros Islands, also present in the Ohada since the beginning, but also in relation to other Ohada member states with an important Islamic presence (Niger, Senegal, Mali) and to possible future accessions (Nigeria?).

It is then clear that the different legal traditions, per se, do not make such an organisation impossible. The Ohada can already be considered a success story, especially considering that is a unique model developed in the developing reality of Africa, for Africans.

7. A “OHADAC” organisation, reproducing the Ohada model in the Caribbean would thus be an extremely interesting political-institutional-legal experiment, and could prove beneficial to the regional economy. It is certainly an idea to be elaborated upon, to say the least.

The very diversified legal traditions in the Caribbean could possibly make uniform legislation difficult in technical terms, with respect to what has happened so far in relatively homogeneous Ohada. Substantive legislative Acts within a possible Caribbean community could cover many areas, but not all; and/or not rapidly enough and/or without keeping pace with the subsequent changing reality.

To accelerate regional legal integration in the business law area, State’s or regional organisations’ hard laws should/could thus be supplemented by an accepted, if developing, body of uniform spontaneous (soft, customary, practice-developed, scholarly) laws.

A role of a regional organisation with the mission of promoting harmony or uniformity in regional business laws would, thus, also be the one of creating a framework of conditions favourable to the development of such a regional corpus of spontaneous lex mercatoria.

This could seem in a certain sense contradictory with any ambitious program of uniform legislation.

In fact, it is not.

Promoting the development of spontaneous uniform practices and customary rules would amount to promoting the first step in the process, or the first ring in the chain, as described supra: spontaneous law/ADR/scholarly law/legislation.

The role of a regional organisation as described above, with respect to the mentioned issues, could go beyond the one discharged so far by the Ohada in Africa –of being just a unified legislative mechanism–; a “Ohadac” could also engage in setting favourable conditions for spontaneous law to grow uniformly in the region.

Not by accident I use the term “grow”: states and regional organisations, institutions and scholars alike may all give a contribution, like farmers or like gardeners in a forest; the final result will be the growth of essences and trees from a soil which would naturally produce something anyway. The skills put by the gardeners will be critical to the quality, quantity, homogeneity of the growth of those (quasi)spontaneous products.

How to create those favourable conditions?

8. One way could be by promoting the usual historical factors of development of the *lex mercatoria*:

- *Practice: Chambers of Commerce and other professional institutions* are fundamental for the

development of those communities in which the most appropriate rules for the relevant economic sector are developed; the raw legal materials come from here, before research and study is conducted by the scholars and much before legislation steps in the picture. Regional organisations of that type would be powerful factors of uniformisation.

- *Arbitration and ADR mechanisms and institutions* are fundamental circuits to give strength to the spontaneous rules of the business communities: they provide a forum for their enforcement, thus becoming themselves sources of rules applicable to the business environment (it would be a matter of preferences or personal views to consider the origins of those rules in a quasi-judicial function or in customary law subsequently identified and enforced by the arbitrators).
- *Scholarly law*: universities, research centres and professional education institutions or schemes (e.g. scholarships and other forms of financing for students and researchers) with specific focus on regional politics, economy, legislation, customary laws, transnational commerce and ADR.

Those three driving forces would have *to be made capable of operating sinergetically*, to maximise the results: transnational-law-oriented ADR should be promoted, studied, practiced; arbitral awards should be collected and disseminated by Chambers of Commerce, arbitral institutions, universities and other research centres. Steady information flows and *fora* for the exchange of experiences should be put in place and/or enhanced.

The role of a Caribbean regional organisation with respect to the mentioned issues should include active promotion, creation, sponsoring and financing the mentioned institutions, organisations, activities.

Should this be not immediately feasible within the frame of a “Ohadac” institution, the individual Caribbean states could however engage in the same promotional activities – they should do it anyway as parte of their regional cooperation policies.

9. Other ways for a regional organisation to provide favourable conditions for the development of a regional body of spontaneous law, on the more usual institutional and legislative point of view, would include:

- *Regional state cooperation*: interstate cooperation in the economic field, as well as in the administrative and judicial matters would also be factors favouring the development of a stronger regional economic community, which would in turn favour the development of its regional legal frame.
- *Uniform or harmonised substantive commercial laws*, of course.
- *Uniform or harmonised supporting legislation and policy actions*: including other forms of interstate covenants and/or reasonably harmonised state legislations when a unified regional legislation would be not possible or not advisable. I am not referring here to substantive laws on commercial/economic matters only, *but also to those legal enactments capable of supporting the spontaneous development of a regional economic legal environment* – by fostering indirectly economic activities and the related elements of growth of a *lex mercatoria* already identified as the practice/ADR/scholars(/legislator) process.

On supporting legislation:

10. It should be considered, I think, that Caribbean countries should not only become a regional economic bloc with laws internally consistent, but also become a regional economic/legal system which is full-interactive with the rest of the world.

Some basic global commercial instruments should doubtlessly become part of the legislation of “Ohadac” countries, such as the CISG, having nowadays more than 70 member states and regulating some 75% of the world trade of goods. The New York Convention of 1958 on the Recognition and Enforcement of Arbitral Awards, currently with 145 member states, would provide a powerful tool for intra-regional and worldwide enforcement Caribbean arbitral awards.

Speaking of indirect tools, regional mechanisms for judicial cooperation would also be very desirable (e.g. to make evidence-taking easier across jurisdictions), for instance.

A common set of private international law rules would also improve the systemic dimension of the Caribbean jurisdictional mosaic – certainly, the OAS and the CIDIP conferences produced a number of instruments which could be useful in that respect.⁴

Of the utmost importance, an efficient regional legal framework for international arbitration would be urgently needed.

Specifically on arbitration

11. The OHADA arbitration system certainly shows some originality, and a strong favourable attitude towards a pan-African arbitration, perceived as a valuable resource for commercial developments.

I just want to point out at a few of its remarkable features:⁵

1) the existence of a single court of last instance (Common Court of Justice and Arbitration – CCJA) for all OHADA jurisdictions in commercial matters, also providing last instance support to arbitration in all OHADA cases according to the OHADA Uniform Law on Arbitration; a much-needed development would be of course the creation of several offices, sections or panels of this court, now seated in Abidjan, in OHADA countries other than Ivory Coast, to bring the OHADA justice reasonably close to a wider number of potential its users.

2) the provision of a CCJA *exequatur* amounting to a sort of a pan-African *res iudicata* for awards issued in arbitral proceedings conducted under the auspices of the CCJA (CCJA arbitration), as provided in articles 30 (especially at.30.2) and 31 of the CCJA arbitration rules.

3) The ability of the arbitral tribunal in a CCJA arbitration to issue *interim* and conservatory measures, to be given award status and immediate pan-African *exequatur* (articles 10.5 of the CCJA arbitration rules) also reinforces the CCJA arbitration as a valuable tool for transnational commercial operators in Africa.

4) The solid CCJA supervising authority resembles for many reasons to the powers given to the Chinese CIETAC, proving a certain degree of compatibility in the fundamental philosophy of the ADR system in both China and Africa (see, e.g. art. 1 of the arbitration rules). The unified supervisory system where the CCJA is the appointer/confirmer of arbitrators, the reviewer of the draft award (articles 2.2. and 23 of the Arbitration Rules), and is also the last instance judge on the

⁴ Art. 17 of the 1994 Mexico CIDIP-V instrument on the law applicable to international contracts makes an express reference to State laws, as possible applicable ones, not to non-state systems of rules. This is quite common in legislations worldwide, and does not impair the ability of the *lex mercatoria* to work within the frame of most state laws, through the more or less express and wide latitude all national and supranational laws (e.g. the CISG), as well as most arbitration laws, regulations and rules allow to trade usages in international commercial activities.

⁵ As I have already done in my *A Non-Western Approach to law and ADR as a Resource for Sino-African Business Relations*, a paper presented within the proceeds of the 2007 Ohada-Chine conference held in Macau, edited by S.MANCUSO, Macau, 2008, 239 . A more complete review of the Ohada arbitration’s features can be found in N.PILKINGTON – S.THOUVENOT, *Les innovations de l’Ohada en matière d’arbitrage*, in *Cahiers de droit de l’entreprise*, supplement n. 5 to *La Semaine Juridique* n. 44 of 28 October 2004, p. 28 ff. ones.

validity of the award made a famous scholar⁶ observe that a full mechanism of checks and balances has not been put in place.

I think that in fact this observation is well-founded; but this is not necessarily a problem. The concept of “supervision”, very well known in the Chinese public organizations, rather than the western one of “checks and balances”, is at the basis of this model⁷.

“Supervision” is less resource-consuming than “checks and balances”, and more cost/effective, as two separate instances (one administering the arbitration and the other providing the jurisdictional check) would cost twice as much and at this stage wouldn’t probably provide much better results. Besides, legal norms strictly applied by the municipal courts of many different African jurisdictions would not necessarily guarantee a more uniform and fairer response of the system to the needs of the relevant business communities.

In this particular African context the system has been devised and put in place in a way capable to provide reasonable efficiency, uniformity and specialization. “Supervision”, in contrast to the “checks and balances” model, already proved in China to be a successful developmental model for the organization of public powers (whether a transitional one or not, it remains to be seen).

5) The possibility for sovereign States to submit to the OHADA arbitration and final CCJA jurisdiction (article 2 of the OHADA Uniform Act) makes recourse to CCJA arbitration a possibility for economic operations involving governments, which are not uncommon in the developing world.

6) It is an important development, consistent with Chinese and African contexts, favourable thus to the development of a commercial legal environment perceived as fair by business persons and entities hailing from both areas. These two areas of the world so far have suffered somehow the rigours of western legal principles, rules and ways of solving disputes, often perceived as inappropriate and basically unfair. It is reasonable to expect a higher ratio of compliance to CCJA arbitral awards, with respect to the awards following more westernized proceedings.

12. With respect to arbitration model, the UNICITRAL Model Law (1985, reformed in 2006) is becoming more and more a globally appreciated model, with its reception in several dozens of national legislations.

An interesting comparative analysis should be done here, between the UNICITRAL Model law and the Ohada Arbitration Act (and the related Ohada regulations, also with legislative force).

The Uncitral model has the enormous advantage of providing a legal regime consistent with the New York convention, thus contributing to the development of a worldwide seamless system of national arbitration laws combined with the world-accepted instrument for enforcement of the New York Convention.

The Ohada Arbitration Act has other very interesting features; *in primis*, I would mention the possibility of a regional *res iudicata* and enforceability of the award; as well as the possibility of obtaining *interim* measures immediately enforceable on a regional scale.

I do not see why the two models could not be combined, featuring a substantive arbitration law pivoting around the Uncitral model, especially its articles 34 and 36 (reflecting the New York convention provisions on conditions to set aside the award or to refuse its enforcement). And also including a Ohada-style mechanism to give awards regional enforceability. Combining, thus,

⁶ Philippe FOUCHARD, *Le système d'arbitrage de l'Ohada: le démarrage*, in *Petites Affiches*, 39, 13.10.2004 n.205, 52-58, especially paragraphs 14 and 15.

⁷ See Ignazio CASTELLUCCI, *Rule of Law with Chinese Characteristics*, in *13 Annual Survey of International and Comparative Law* (2007) 35, Chapter II, ‘Socialist Law’, and the bibliography indicated therein.

regional higher enforceability with the extra-regional, world one – Caribbean countries should not only think of their internal market but also, of course, of their ability to conduct economic activities outside the Caribbean.

This issue of the Ohada-like mechanism for enforcement could be quite sensitive, however – involving the idea of a regional *ordre public* and of an award that becomes enforceable automatically across jurisdictions with quite different political environments.

A regional Common Court, Ohada-like, could be the place where the balance between different approaches is struck, as the ultimate solution. The surviving possibility of a local check based on the model of the UNICTRAL Model Law could be, if necessary, a *interim* solution for a regional law on arbitration – delaying the emplacement of a full-Ohada-like award enforcement mechanism to a time when such an emplacement would be considered appropriate by contracting states.

13. Many other aspects should also be considered in establishing a regional law of international arbitration : would a “Ohadac” organisation feature an arbitral supervisory body separate from the common court of justice (not so in the Ohada)? Would this body, if separate from the court, still have a supervisory function granting the award its regional status of *res iudicata*?

Would this institution need to be seated in more than just one city (as it is now the case for the Ohada CCJA, only sitting in Abidjan)?

Even more in detail: should the default rule on the composition of the Tribunal be based on a three-person panel, or on a sole arbitrator? Maybe not, considering the smaller size of Caribbean countries and the little distance between them; supporting the reasonable expectation that arbitrations in the “Ohadac” region could involve, in the average, much smaller transactions, even micro-ones. Thus, suggesting a more cost-effective default rule of a single arbitrator rather than a panel of three.

Very distinguished speakers have dealt with the Uncitral model law and the Ohada Arbitration Act in this conference, so I will stop at that.

14. On arbitration procedural rules: a set of arbitration rules would also be necessary within a regional arbitration environment, whether having a legislative force, as in the Ohada, or not.

The Rules should reflect a combined model taking into account all different legal traditions in the region, and regional and international practices. This would be quite necessary especially on evidence-taking, where the differences amongst the various legal traditions are well-known – and more and more made the subject of debate, study and research in the field international arbitration.

The arbitration rules should be produced following a close comparative scrutiny of most arbitration rules present in the different jurisdictions of the region; of those more common in the world arbitration scene such as those of UNCITRAL, AAA, CIETAC, LCI Arb etc.; and of other bodies of rules and principles such as the UNIDROIT Principles of Transnational Civil Procedure, a scholarly consolidation of principles reflecting international arbitration’s best practices.

An ADR model – and one extra option

15. The different reality of developing regions and countries vis-à-vis western developed economies make a more communitarian approach preferable over the absolute individualistic one which can be identified in north-western laws and practices in relation to contract, arbitration etc.

In a more communitarian vision, a contract is seen as an enduring relationship, requiring the

enduring cooperation of the parties, who shall always act in good faith and pursue their common interest.

The dispute resolution thus becomes a way to reassess/readjust the contractual mechanism when needed, sort of a maintenance process for an enduring relationship rather than a warring process after the relationship is over.

Different types of ADR mechanisms would prove useful due to the natural inclination in these environments towards keeping the relation alive rather than terminating it – with general benefits for the economies of the parties' respective communities; a model certainly more appropriate for a developing context.

The main feature of a communitarian arbitration process is in the fact that the arbitrator(s) may well be not neutral with respect to the parties and to the dispute.

The arbitrators in such a scheme are able to play an adjudication role where the community impact of the decision they make – its policy dimension, we may say – is also taken into account.

16. Of course conciliators/mediators/arbitrators shall be independent: this means they shall not depend from the parties. However, in many non-western traditions, e.g. in Imperial China or in the Horn of Africa,⁸ the tradition is sometimes reversed: the *parties do depend* in some sense from dispute-solvers, who mustn't necessarily be impartial/neutral.

An important guarantee for the parties in modern Western environments seems to be given by the required independence of arbitrators from their appointing party. In different contexts like those traditional ones the guarantee for a satisfactory outcome of the proceedings is given by *the authority or influence of the arbitrator on his appointing party* – with a view, of course, to relation maintenance rather than disruption. Seniority of arbitrators within the parties' communities and the trust they enjoy also provide the dispute-solvers with a wider perception of the needs of both communities, putting the dispute in a wider perspective.

17. This model can be widely applicable, even nowadays, in developing contexts, whenever big business corporations or governments should have controlled entities engaged in joint economic ventures.

The perfect dispute-solvers could in many cases be higher-level representatives of the corporations/governments controlling the parties involved in litigation, representing the wider, long-term interest of both communities. This approach is transforming maybe arbitration into a fuzzier product, also akin to mediation and/or conciliation but still characterized by some of the typical adversary approach – still featuring a third arbitrator, rules and principles for procedure and merits, an adjudicative role discharged by the dispute-solvers.

It is the so-called *med/arb process*, with mediation and conciliation activities involving disclosure of facts to the conciliators followed by arbitration, with the same conciliators acting as the tribunal⁹ – of course, a reverse process of adj/med or arb/med is also possible, as it is in the common experience of every lawyer: quite often litigating parties only need to have some issues decided by a

⁸ See my article *World laws v. global law*, on the Ohada website at www.ohada.org; this article is a development of the paper I presented at the conference in Macau organised in 2007 by the Club Ohada – China presided over by Prof. Salvatore Mancuso, cited *supra*, fn.5.

⁹ A practice also allowed by Asian laws and arbitral regulations, if normally subject to an express mandate or approval of the parties. See M.PRYLES-M. J. MOSER, Introduction to the volume they edited *The Asian Leading Arbitrators' Guide to International Arbitration*, JurisNet Publishing, 2007, at 13-14; in the same volume also see WANG WENYING, *The Role of Conciliation in Resolving Disputes: a PRC Perspective*, at 501, and S.A.HARPOLE, *The Role of the Third Party Neutral when Arbitration and Conciliation Procedures are Combined: a Comparative Survey of Asian Jurisdictions*, at 525.

third party to be able to find a general settlement immediately after.

In this attitude, non-western arbitrators often engage in activities, completely acceptable, for instance, for Asians, that western arbitrators would be horrified of thinking, or at least consider with a clear sense of unease – such as the so-called back-to-back consultations.¹⁰

The existence of an Asian traditional archetype behind these processes is demonstrated by the importance attached to court-annexed arbitration and mediation processes, with significant ‘med/adj’ mechanisms, so to speak, in many Asian jurisdictions, such as the ones of China,¹¹ South Korea¹² and India.¹³

Appropriate legal models and rules operated within this kind of arbitration will be instinctively perceived as more fair on the parties, within a developing context. One consequence would probably be a higher ratio of spontaneous adhesion to arbitral awards, and a lesser amount of unenforced ones, with respect to awards issued following arbitral proceedings conducted the usual western way, by distant, aseptic Geneva-based arbitrators.

It wouldn’t take much to implement such an ADR model within a global framework of enforceability, through the usual mechanism of national laws and international instruments such as the New York Convention or the OHADA arbitration act: it would suffice to obtain the appropriate reciprocal parties’ written consent to the appointment of the tribunal’s members – thus making successive challenges or applications to set the award aside an inadmissible case of *venire contra factum proprium*.

18. It must be noted that also in the western legal thought the need for impartiality of arbitrators hasn’t always been a requirement. In continental developments during the XVIII and XIX century, for instance, many expressed the opinion that a father could arbitrate for a son or even vice versa, especially in the presence of the counterparts’ consent.¹⁴ A fundamental work of modern civil law such as *Les lois civiles dans leur ordre naturel* by J.Domat also stresses the contractual nature of arbitration¹⁵ and does not indicate any condition related to independence from the parties for being appointed as an arbitrator – whose duties can be discharged by anyone, except women, minors, incapacitated persons.¹⁶

In 1942, the Italian code of civil procedure introduced an option between two kinds of arbitration; both feature the entrusting of a dispute to party-appointed arbitrators and a final decision after a process. One can be considered more judicial, or quasi-judicial in nature (*arbitrato rituale*), whereas

¹⁰ See, e.g., P.J.McCONNAUGHAY, *supra*.

¹¹ See WEI Ding, *The Reform of Grass Roots Tribunals and the Application of the Law in Rural China*, in *Perspectives Chinoises*, 61 (September-October 2005).

¹² See Kwang-Taek WOO, *Court-Annexed Mediation in Korea*, in T.E.Carbonneau-J.A.Jaeggi, *Handbook on International Arbitration*, Juris Publishing, 2006, of the *American Arbitration Association Handbooks series*, at 253 and ff. ones.

¹³ See, e.g., Niranjan J. BHATT, *Court Annexed Mediation*; paper presented at the fourth Indo-US legal forum meeting at the US Supreme Court on Oct. 15, 2002.

¹⁴ G.ALPA, Chapter *Arbitrati*, in *La parte generale del diritto civile*, vol.2, *Il diritto soggettivo*, in Rodolfo SACCO (ed.) *Trattato di diritto civile*, UTET, Torino, 2001, at 228; this Author stresses the fundamentally contractual nature of arbitration..

¹⁵ From the introduction of *Livre I, Titre XIV, Des Compromis*: « *L’autorité des sentences arbitrales a son fondement dans la volonté de ceux qui ont nommé les arbitres. Car c’est cette volonté qui engage ceux qui compromettent à exécuter ce qui sera arbitré par les personnes qu’ils ont choisis pur être leur juges* ».

¹⁶ ID., same *titre*, section 2, subsection VII.

the other amounts to basically a contractual mechanism (*arbitrato irrituale*),¹⁷ working in many respects according to a med-arb or arb-med scheme.¹⁸ The 2006 reform of the Italian civil procedure code, the contractual arbitration still features less strict conditions for discharging the role of an arbitrator, basically following Domat's model¹⁹. In both cases, however, the approach of Italian lawyers towards arbitration is generally speaking that of recognising the potential of arbitration as a way to find solutions bearable to all the parties involves, rather than using arbitration as a mere substitute for court litigation.²⁰

Even in the US tradition of arbitration it has been considered common and acceptable until very recently that a party-appointed arbitrator be not neutral.²¹

Only in the second half of the XX century the ideal of absolute neutrality, impartiality, independence of arbitrators became so important in the Western world and global commerce, carrying with it the sensitive character of the issue in modern international arbitration – and the related flourishing of detailed rules and ethical guidelines.

The global idea seems to be that arbitration is a convenient substitute for litigation: a process to litigate alternative to Court, rather than an alternative way to solve a dispute.

One could even consider that a very developed global economy mandates, perhaps, that kind of approach. Precisely for this reason, however, the developing world would find more appropriate and be more comfortable with a “less modern”, different approach, so to speak; an approach that used to belong to the western world too, until recently.

19. This particular ADR model would suit particularly well the cases of disputed between business entities controlled by holdings or governments: the two party-appointed arbitrators could well be appointed by the controlling holdings or governments, and they would certainly be able to put the dispute in a wider perspective, making a med/arb effort aimed at producing the best solution in cooperation policy terms, considering the wider picture of the interest of the parties' respective economic groups – or political communities, in the case of publicly owned enterprises (as it would be, e.g., in an arbitration between state-owned companies from Cuba and Venezuela)

A possible future “Ohadac” arbitration mechanism should not prevent the parties from agreeing to a med/arb dispute resolution process, providing the awards or orders issued within that kind of

¹⁷ The different nature brings about a different level of enforceability, similar to a court decision in the former case, more similar to a contract in the latter. Moreover, the applicability of the New York convention to decisions of the latter kind is very debated. One should go through the *arbitrato rituale*, to secure an internationally enforceable decision; however, full disclosure of the background of party-appointed arbitrators and full written acceptance from the parties would still enable the approach suggested to be implemented.

¹⁸ R.M.MORRESI, *Should We Revisit and Revise the Prevalent U.S. View of Med-Arb (and Arb-Med) as ADR Stepchildren in Light of Their Extensive Use in China, Italy, and Other European Countries?*, paper presented at the ABA–Pacific Currents International Med-Arb Program in Seattle on Apr. 5, 2008.

¹⁹ Italian c.p.c., article 808-ter.

²⁰ My opinion, of course, based on my experiences within the Italian legal community; also *see* Alpa, *supra*, and Morresi, *supra*.

²¹ The joint AAA/ABA Code of Ethics of 1977 included a presumption of non-neutrality of party-appointed arbitrators. Only in 2004 the presumption has been reversed with the revised Code of Ethics Canon IX.A. However, a non-neutral stance of party-appointed arbitrators is still permitted, if disclosed and agreed upon by the parties; these are what the AAA Code calls “Canon X arbitrators”, permitted to discharge their duties subject to the specific ethical rules stipulated in the tenth canon of the Code. These ethical rules permit them to be “predisposed” towards the appointing party, and to have communications with that party, subject to an obligation of “good faith, integrity and fairness”.

process with the same enforceability of “regular” arbitral awards.

In practice it could suffice to obtain the parties’ acceptance of the specific type of process to be conducted, as well as of each other’s party-appointed arbitrator despite his previously disclosed lack of neutrality, to avoid any violation of the due process and comply with the applicable rules on enforceability – such as articles 34 and 36 of the Uncitral Model Law on Arbitration.

The “Ohadac” rule on independence of the arbitrators, however, should be drafted to include the flexibility related to what I just discussed.

Not so has been made perhaps with the Ohada Arbitration Act: the Act provides in fact for both independent and impartial arbitrators (article 6); whereas the CCJA Arbitration Rules just provide for “independent” ones (article 4.1): these rules should have been better drafted and coordinated.

Possible problems can be prevented, anyway, with the acknowledgement and acceptance of the parties, according to article 7.2 of the Rules: as discussed above, there shouldn’t be any problem of legality of process and the parties should not have any problem in accepting each other’s selection, if both party-appointed arbitrators are selected with a more traditional approach, as discussed above.

The success of such an arbitration and the fairness/acceptability of results would of course rely very much on the authority enjoyed by the arbitrators on the parties as well as on their integrity and their sense of the importance of their function, encouraging them to work in the parties’ best interest rather than acting as mere advocates of their respective appointing parties within the tribunal.

On contracts

20. Of course a uniform act on law of contracts would also be desirable.

In the case of Ohada this proved a difficult issue, so far. A first attempt has been made having in mind the UNIDROIT Principles as a model. Now the idea seems to have been reconsidered, in favour of a more French-flavoured one. The influence of the French model in most Ohada countries may have something to do with that stall situation. Also, it is not easy, in very general terms, to unify the contract law of so many distant and different places.

It is reasonable to think that a prevailing influence of just one national model will not be visible in the Caribbean region, with its many concurring legal traditions, and that producing a Uniform act would be an extremely long process, even longer than the Ohada one.

However, the Unidroit Principles could be a very useful and immediately available soft law instrument for the needs of the merchant community and of an incepting regional organisation.

They have been developed considering many different legal traditions, by a working group of scholars hailing from all continents (including China, Africa, Eastern Europe, Latin America), and from common law, civil law, socialist legal traditions.

They are well-known, considered by many in the international academic communities as the most recent expression of the transnational *lex mercatoria*, and increasingly used in international practice, not only in western countries. They have probably been the single most influent instrument in the drafting of the Chinese law on contracts of 1998, and their use in international practice also in non-western environments is testified by arbitral awards and court decisions based on them issued in countries like Belarus or the Russian Federation.²²

The Unidroit Principles allow ample room for trade usages, which includes local usages, and imply the possibility of developing localised ramifications of them, or of developing more region-specific or sector-specific interacting bodies of *lex mercatoria* (which could be some day consolidated in

²² Cases reported (in their original full-text and with an abstract in English) in UNILEX, a database edited by M.J.BONELL and A.VENEZIANO, founded by the former, collecting and making freely available online all case law worldwide related to both the C6SG and the UNIDROIT Principles (www.unilex.info).

specific black-letter “soft codes” or not), based on local legal realities including customary laws.

On regional specificities affecting the possible development of a regional legal environment

I can think of at least two areas where the local specificities may produce considerable developments of a regional soft law used for economic transactions:

21. The first one: the presence of important countries in the Caribbean region with a socialist political system warrants a special attention to the public law dimension of a commercial contract. This occurs when at least one of the parties is a government of a socialist country, or is owned by that government, or however belongs to it.

I am not discussing here any issue related to investments and the ICSID arbitration, which also works within a frame of international rules or transnational concept principles and rules of a variety of origins and natures (some of them, doubtless, being part of the *lex mercatoria*).

I want to point at the fact that commercial activities can be carried out by publicly owned commercial entities, and still that special nature of those entities could be capable of affecting the contract (e.g. in a contract between two state-owned commercial entities of Cuba and Venezuela, or between one of those and, say, a Chinese government-owned one).

As an example, according to the 1998 Chinese law on contracts, administrative law may impose restrictions on the operation of contract law in some cases, affecting the *validity* of the agreement.

It is also to be considered that the semi-public nature of at least one of the two parties to a “normal” commercial contract and business venture – thus keeping the transaction outside the different frame provided by the Washington Convention of 1965 and ICSID – may well affect the *interpretation* of the agreement and of the related documents and behaviour of the parties.

The very *behaviour* of the parties in the DR process, and the *evidence-taking* process in the same might be affected by the nature of the parties.

For international commercial contracts, however, the general UNIDROIT Principles do not feature a chapter, nor any rules, on how to deal with such contractual parties.

The Caribbean region has important commercial actors with economic and political systems which could make desirable the development of specific (regional?) rules on private-public dealings; or at least a common frame of terms of reference could be developed in the Caribbean out of practice, arbitration, governmental cooperation etc., as discussed above, to improve the legal environment even without any regional hard legislation.

22. The second specific regional feature is the very geography of the Caribbean region, with many small insular jurisdictions quite close to one another. It creates a very specific commercial environment, with a comparatively smaller importance of global-style logistics for transportation of goods. Intra-regional commerce in the Caribbean is less related to big logistic hubs, global forwarding companies and oceangoing container carrier ships; and more related to smaller means of sea transportation, often operated by small companies or by the same supplier of goods transporting its produce from one island to another – notwithstanding the fact that sea transportation of the goods and/or the other transactions of that kind keep being international ones.

This specificity on one side would warrant specific rules for regional maritime law, transportation of goods, sales of transported goods etc.; on the other side is probably a favourable environment for the development of a specific customary law which could be the starting point for the already mentioned usages-ADR/scholarship/legislation process; or just end up with a more refined and developed area- and sector- specific *law merchant*. Those practices perhaps already exist. That reality should be observed, and usages identified.

23. In general, collecting trade usages would be an activity favourable to the development of regional legal uniformity; it could be done by Chambers of Commerce and other institutions, and promoted by governments and regional organisations such as a Caribbean “Ohadac”, to foster the practice/ADR/research/legislate “law-growing” circuit and process: regional restatement or consolidation of rules could follow, and perhaps some black letter legislative instrument, on selected areas of the regional economic practices.

Conclusions:

24. The development of the *lex mercatoria*, whether local, regional or global, is not something that can be decided at governmental level, or by legislation. *It just happens.*

What governments, legislators can do is deciding, or not, to provide an appropriate frame of conditions, so that this spontaneous body of law may emerge with ease, and develop more or less strongly – and at a subsequent stage maybe to decide to intervene, trimming and stabilising some of its products through legislation.

On the other side, when the legislative uniformisation or harmonisation of law seems impossible or very difficult, the spontaneous development of the *lex mercatoria* may make it become feasible, after some time, due to the economic forces’ push towards behavioural uniformisation.

The issue is whether this is a desirable phenomenon or not – history demonstrates, I think, that this phenomenon is a positive one, producing development and being able to interact with “harder” systems of law.

25. Legislation making world commerce easy, including private international law, ADR and judicial cooperation instruments, will help the development of a *lex mercatoria*.

Professional associations, research institutions, education institutions, both private and public, may play a stimulating role within that process.

Governments and regional organisations such as a possible Caribbean “Ohadac” may have a critical role in promoting all these processes.

26. A regional *lex mercatoria* is not only possible, in the Caribbean as in every homogeneous business environment; it is probably already existing – if at a low intensity – hailing from the interaction of all the legal traditions present in the region with Caribbean customary laws and business practices.

It only needs to be unearthed and developed; and to be interfaced efficiently with all other tools of state, regional, global soft and hard law.

It is not necessary to imagine an entirely different environment, of regional practices absolutely distant from anything we know, which once “discovered” will surprise the world and produce an entirely new, unexpected regional legal environment.

Caribbean practices will probably be practices, like anywhere else, region-specific but certainly not exoteric. They will probably look reasonable in the circumstances, just like all business practices in all specific environments.

Their identification research process would certainly be, at the very least, a good exercise for local lawyers and legislators, to better understand their regional reality. Or, perhaps, the Caribbean communities would eventually benefit from legal tools more appropriate for them, reflecting their needs, traditions and visions of economy and life; with a view to a more humane, fair and equal development of its diverse national communities.

27. This means that we, as a community of scholars with an interest in these topics, have to study more. We'll need to research and observe the reality more carefully, and to study with a systemic approach a large number of areas of hard and soft laws: customary, scholarly, national, supranational, scholarly laws; commercial, procedural, private international, public international, arbitration laws. Administrative laws may get in the picture as well, especially when actors from socialist countries, or however governmental entities, engage in economic activities.

A comparative law approach seems a necessary tool, of course not per se sufficient, to cope with such a demanding challenge before us.

Thank you very much.