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## Horacio A. Grigera Naón, Choice-of-Law Problems in International Commercial Regulation

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# Horacio A. Grigera Naón, Choice-of-Law Problems in International Commercial Regulation

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## **Abstract**

In Professor Grigera Naon's latest work, *Choice-of-law Problems in International Commercial Arbitration*, he attempts to "analyze diverse aspects of international commercial arbitration so as to determine to what extent arbitral tribunals are willing to perform the independent role ascribed to them by *lex mercatoria* theoreticians, namely, the creation of an autonomous, national and all-prevailing international commercial law."

CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION. By Horacio A. Grigera Naón. Tübingen: Mohr, 1992. xii + 337 pp. ISBN 3-16-145636-X. DM 129.

*Reviewed by Joseph T. McLaughlin\**

In Professor Grigera Naón's latest work, *Choice-of-law Problems in International Commercial Arbitration*,<sup>1</sup> he attempts to "analyze diverse aspects of international commercial arbitration so as to determine to what extent arbitral tribunals are willing to perform the independent role ascribed to them by *lex mercatoria* theoreticians, namely, the creation of an autonomous, anational and all-prevailing international commercial law."<sup>2</sup> This introduction is as broad as the scope of international arbitration itself. Professor Grigera Naón's lofty ambition is somewhat blunted, however, by the complexity of his thoughts and ponderous writing style. While the title of the book suggests a relatively discrete field of study, the author follows virtually every available detour onto complicated pathways of international law, policy, national court systems, and the theoretical bases for that "Alice in Wonderland" doctrine known as *lex mercatoria*.<sup>3</sup>

The book's strongest point is its description of choice-of-law methodologies in various countries throughout the world.<sup>4</sup> The author's analysis of these methodologies is quite extensive, spanning nearly 150 pages.<sup>5</sup> Professor Grigera Naón dissects the choice-of-law rules followed by some of the world's major commercial powers including the United States,<sup>6</sup> the United Kingdom,<sup>7</sup> the Federal Republic of Germany,<sup>8</sup> and, cu-

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1. HORACIO A. GRIGERA NAÓN, *CHOICE-OF-LAW PROBLEMS IN INTERNATIONAL COMMERCIAL ARBITRATION* (1992) [hereinafter *CHOICE-OF-LAW PROBLEMS*].

2. *Id.* at 1.

3. *Id.* at 26-37.

4. *Id.* at 153-284.

5. *Id.*

6. *Id.* at 168.

7. *Id.* at 161.

8. *Id.* at 210.

riously, Argentina.<sup>9</sup> He continues with a discussion of the Socialist systems, from (former) Soviet jurisprudence to the law of the People's Republic of China, particularly in the context of their commercial relations with non-Socialist countries.<sup>10</sup>

In his quest to make the point that parties should not be completely free to choose what law should apply to their commercial relations, Professor Grigera Naón examines a number of legal systems, including the law of the United Kingdom.<sup>11</sup> He begins by noting that "[i]f taken literally, the proper law doctrine [United Kingdom's prevailing choice-of-law doctrine] would embody a recognition of the absolute freedom of the parties to choose the applicable law even if the law so chosen has no connection with the transaction or the dispute."<sup>12</sup> The author's tone suggests a certain distrust of such freedom. He then analyzes the relevant U.K. law with a discussion of the seminal case of *Vita Food Products v. Unus Shipping Co.*<sup>13</sup> In *Vita*, Lord Wright held the parties' express statement as to choice-of-law conclusive "provided the intention expressed is *bona fide* and legal."<sup>14</sup> Professor Grigera Naón then points out that the "*bona fide* and legal" requirement requires reference to a legal order, possibly different than that chosen by the parties, in order to determine whether this requirement has been met.<sup>15</sup> From this the author concludes that compulsory limitations may be imposed on choice-of-law provisions in order to balance the interests of the contracting parties and "the concerns of third parties and of communities connected with the transaction."<sup>16</sup>

Absent examples, which the author does not offer, it is difficult to criticize his abstract conclusions. Surely most members of the international legal community would agree that the parties' contractual autonomy is limited in certain basic respects, for example, an agreement to bribe a public official is

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9. *Id.* at 187.

10. *Id.* at 179-87.

11. *Id.* at 161-67.

12. *Id.* at 162.

13. *Id.* (citing *Vita Food Products v. Unus Shipping Co.*, 1 All E.R. 513 (Privy Council 1939)).

14. *Vita Food Products v. Unus Shipping Co.*, 1 All E.R. 513, 521 (Privy Council 1939).

15. CHOICE-OF-LAW PROBLEMS, *supra* note 1, at 164.

16. *Id.*

not enforceable. However, notwithstanding Professor Grigera Naón's fondness for abstract theories of choice-of-law limitations, the parties' choice-of-law should not be subjected to indiscriminate attack based upon unspecified "concerns of third parties" if there is to be the necessary predictability in the international business community.

Professor Grigera Naón, however, does point out a number of ways in which the U.K. courts have restricted the freedom of the contracting parties to choose the applicable law.<sup>17</sup> One such example is the courts' policy of holding a contract invalid if it would be invalid under the law of the place of performance when the place of performance is other than the United Kingdom.<sup>18</sup> The author concludes his discussion of the U.K. choice-of-law approach by noting that it is "compatible with emerging functionally-oriented methodologies in the field."<sup>19</sup>

The author's analysis of the choice-of-law rules of the United States includes a discussion of methodologies used to choose the applicable law when the parties have not agreed on what law would apply to any disputes.<sup>20</sup> This is the only instance where the author extensively discusses the issue of choice-of-law in the absence of an expressed intent by the parties to the contract. Here, also, in discussing U.S. law, Professor Grigera Naón makes what might well be his most telling point: that each forum, in cases of true conflict with competing policies of equal force, will apply its own law.<sup>21</sup> Such an observation should come as no surprise to international practitioners because judges and arbitrators are generally more familiar with the law of their home state and thus more likely to apply it, given any choice in the matter.

Professor Grigera Naón also discusses the sharp contrast between the classic socialist and capitalist positions on freedom to choose the applicable law:

It is in the sector of relations between socialist and capitalist enterprises where socialist laws allow greater freedom

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17. *Id.* at 165-66.

18. *Id.* at 166.

19. *Id.* at 167.

20. *Id.* at 168.

21. *Id.* at 171.

to contractual autonomy and choice-of-law stipulations because there is a general consciousness of the differences in the social, political and economic systems to which the parties belong and the impossibility of insisting upon certain conceptions and institutions of the internal law of socialist nations in international transactions with capitalistic partners. In this sense, we seem to be confronted, although to a greater degree, with the same phenomenon observed when analyzing French and American law: the impossibility of extending the application of certain mandatory rules for domestic transactions to the sphere of international exchanges. This does not however imply a general willingness of socialist parties to submit their transactions with capitalist counterparts to a foreign law. Rather, on the contrary, they try to require through choice-of-law stipulations that their own special legislation, practices, customs and usages concerning international trade and economic relations govern their contracts.<sup>22</sup>

Thus, the prevailing (former) Soviet school of thought on choice-of-law attempts to promote (former) Soviet commerce, notwithstanding the fact that the legal analysis required may not always remain consistent.<sup>23</sup> Ironically, there appears to be a strong similarity between (former) Soviet law and that of the United States on choice-of-law. The U.S. Supreme Court recently held that "parties are generally free to structure their arbitration agreements as they see fit."<sup>24</sup>

In *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, the Court focused upon the parties' freedom to contract with complete autonomy, including agreements to submit any disputes to arbitration, to select a specific forum for the arbitration or to allow some claims to be decided by arbitration and some by judicial proceedings.<sup>25</sup> Ironically, (former) Soviet law also focuses upon the parties' freedom to contract as to choice-of-law. As Professor Grigera Naón notes, however, this is true only because in most cases

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22. *Id.* at 185.

23. Recent events in the former Soviet Union and Eastern Europe have outrun the author's ability to keep his extensive discussion of "Socialist Systems" current. This portion of the book already reads like a historical study rather than a topical analysis.

24. *Volt Information Sciences, Inc. v. Board of Trustees of the Leland Stanford Junior University*, 489 U.S. 468, 478 (1989).

25. *Id.*

the parties have agreed that (former) Soviet law will apply and the arbitrators believe this will benefit (former) Soviet commerce.<sup>26</sup> The parties' freedom to contract would not be so easily upheld in a case where a different forum or a different law was chosen. This results in an inability to create an anational *lex mercatoria* or general principles of law superseding national law, as to which the author expresses his dissatisfaction.<sup>27</sup>

One might fairly question the support Professor Grigera Naón gives to either a *lex mercatoria* or a superseding general or anational law. These two amorphous doctrines are more conceptual myth than reality. Both provide arguments for undermining clear, unambiguous contractual choice-of-law clauses that, absent fraud, simply reflect the informed will of the parties. These mythical doctrines similarly allow one party to seek to avoid the application of the law freely chosen, despite the fact that the parties' intent was clearly expressed in their original contract.

It is precisely because the (former) Socialist systems have allowed a *lex mercatoria* to develop that non-Socialist parties can, or at least could in the past, freely contract with parties in these countries, because in so doing the non-Socialist parties could rely upon the contract's choice-of-law clause. This in turn allows the parties to plan for disputes that may arise, to consult legal advisors as to their obligations under the contract, and to take appropriate steps, if necessary, to protect their rights under the law applicable to the contract. By contrast, if, in Professor Grigera Naón's brave new world, the general principles of the *lex mercatoria* applied, the parties would be severely disadvantaged because they could not accurately assess their legal rights and obligations nor predict their ultimate exposure in the event of a dispute.

Professor Grigera Naón neatly summarizes the choice-of-law principles of Argentina, especially where the parties have not selected the applicable law in their contract.<sup>28</sup> In the case of "contracts already performed or to be performed outside of the place of contracting they will always be governed by the

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26. CHOICE-OF-LAW PROBLEMS, *supra* note 1, at 187.

27. *Id.*

28. *Id.* at 189-90.

law of the place of performance.”<sup>29</sup> The general rule in Argentina, however, is that the law of the place of concluding the contract will govern contracts made outside Argentina.<sup>30</sup> This provision in essence allows, as the author later points out, the parties to make a choice-of-law without including a specific clause in the contract denominated as such.<sup>31</sup> The author also advocates a practical method of determining the applicable place of performance.<sup>32</sup> This method looks to the facts of each contract as a whole on a case by case basis.<sup>33</sup>

After his discussion of Argentine choice-of-law principles, Professor Grigera Naón comments on the doctrines *fraude à la loi* and “abuse of rights,” both of which limit the parties’ autonomy in their choice-of-law.<sup>34</sup> Both doctrines are grounded in the notion that there are general principles of morality and justice that private parties cannot ignore when they enter into contractual relations. Once again, it is difficult to criticize the author’s espousal of an abstract principle of general applicability, but it is difficult to assess the impact of such theories without specific examples which the author is not inclined to offer.

In the Federal Republic of Germany, the parties are granted fundamental freedom to choose the applicable law or forum.<sup>35</sup> However, in some cases German courts have required some contact between the law and the transaction.<sup>36</sup> Like Argentine law, there are limits in Germany that require the application of “public policy” and “*lois de police*” (international mandatory rules) limitations to the parties’ freedom to make a choice-of-law.<sup>37</sup> As Professor Grigera Naón points out, these restrictions in Germany are similar to *fraude à la loi* doctrine as well as the “abuse of rights” doctrine in other countries.<sup>38</sup>

Professor Grigera Naón’s discussion of French law in this area seems somewhat repetitive of his prior analysis of the

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29. *Id.*

30. *See id.* at 189-97.

31. *Id.* at 195.

32. *Id.* at 197-204.

33. *See id.*

34. *Id.* at 203.

35. *Id.* at 210.

36. *Id.* at 211.

37. *Id.* at 212.

38. *Id.*

French choice-of-law rules.<sup>39</sup> In his analysis of a French statutory provision giving broad authority to the French courts to review arbitral awards (both foreign and domestic), the author notes that this scope of review will allow the parties or the arbitrators to choose *lex mercatoria* or general principles of law.<sup>40</sup> The author concludes that this freedom of choice “entitles arbitrators directly to designate the law they deem applicable without having to refer to a particular body of private international law which would justify that choice.”<sup>41</sup>

Such an argument does not support the freedom of the parties to choose a particular law to govern their contract, nor does it provide comfort to those who, quite rightly, seek some certainty in their international commercial relationships. Sadly, the author does not consider these critical points, but rather resorts to the somewhat mythical *lex mercatoria* and general notions of “*ordre public international*” to explain his concept of freedom to choose an applicable law.<sup>42</sup>

After his discussion of choice-of-law principles, Professor Grigera Naón presents a section entitled “State Controls Over Arbitral Agreements, Proceedings and Awards.”<sup>43</sup> This section explores the degree of control that states retain over international arbitration within their territorial jurisdiction. Once again, the analysis focuses upon a number of countries, including the United States, the United Kingdom, and France.

The author’s discussion of U.S. law is particularly extensive and detailed, concluding with praise for the U.S. Supreme Court’s decision in *Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc.*, where the Court upheld the arbitration of an antitrust claim arising out of a transnational contract where the arbitration was to be held in Japan.<sup>44</sup> Professor Grigera Naón concludes that “the Supreme Court did weigh conflicting interests both for and against the arbitrability of certain disputes, thus observing a functional choice-of-law methodology for

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39. *Id.* at 155-61.

40. *Id.* at 229.

41. *Id.*

42. *Id.* at 230.

43. *Id.* at 219.

44. *Id.* at 235 (citing *Mitsubishi Motors Corp. v. Soler Chrysler—Plymouth, Inc.*, 473 U.S. 614 (1985)).

finding a principled solution for the specific issue at stake.”<sup>45</sup> His discussion analyzes a number of other cases integral to the development of U.S. law in this area, including *M/S Bremen v. Zapata Off-Shore Co.*<sup>46</sup> and *Scherck v. Alberto-Culver Co.*<sup>47</sup>

While Professor Grigera Naón’s analysis of choice-of-law methodologies is extensive and detailed, his book suffers from some important flaws. The author’s style at times becomes intolerably obtuse and complex. The author often combines many different and complicated ideas into a single sentence that runs on, and on and on.

To a certain extent, this text suffers from a lack of focus on a specific audience. The bulk of the book, an analysis of choice-of-law methodologies, provides useful background on the topic under the laws of major commercial countries. The forty-four page Table of Citations<sup>48</sup> is a useful collection of the relevant literature, legislation, and arbitral awards, although with two or three exceptions, the sources are all dated 1989 or earlier. However, in the end the author gives limited assistance to one who is looking to the book for what its title suggests, i.e., solutions, or at least a discussion of, the practical problems of choice-of-law in international commercial arbitration.<sup>49</sup>

The section of the book describing choice-of-law methodologies for international commercial arbitration is plagued with textual problems which drive the reader to multiple foreign language dictionaries and, ultimately, to distraction. The author makes extensive use of phrases and lengthy quotations in a number of languages (*e.g.*, Italian, German, Spanish, and French) other than English. Although an international law text should, by definition, be written for an international audience, an English language book should not require a multi-lingual translator to interpret the text for the presumably intended English-speaking audience.

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45. *Id.* at 240.

46. *Id.* at 233 (citing *M/S Bremen v. Zapata Off-Shore Co.*, 407 U.S. 1 (1972)).

47. *Id.* (citing *Scherck v. Alberto-Culver Co.*, 417 U.S. 506 (1974)).

48. *Id.* at 293-337.

49. *Id.* at 285-91.