

THE LAW OF CROSS-BORDER SECURITIZATION

A COMMENT ON FRANKEL

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In *The Law of Cross-Border Securitization: Lex Juris*,¹ Tamar Frankel discusses the formation of legal rules, and rightly refers to and explores the richness of the subject.² Legal rules are not only the products of our legislators and regulators, but also of the free will of the contracting parties. This idea was formulated well in Article 1134 of the Code Napoleon: “les conventions légalement formées tiennent lieu de loi à ceux qui les ont faites;” in other words, “contracts that have lawfully been entered into stand for the law as between the parties that have made them.”³ A thorough discussion of Article 1134 is well beyond the scope of the present subject, but its mention is useful to indicate that the notion of the contract as a source of legal rules clearly has been perceived by our forebears.⁴

The comparison that Frankel draws between *lex Juris* and *lex Mercatoria* reveals a number of similarities between the two concepts: both are close relatives, being forms of spontaneous laws, or laws arising out of commercial or legal practice.⁵ *Lex Mercatoria* originates in part in the parties’ free will, but goes further insofar as it

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1. Tamar Frankel, *The Law of Cross-Border Securitization: Lex Juris*, 12 DUKE J. COMP. & INT’L L. 475 (2002).

2. See generally ASSET-BACKED SECURITISATION IN EUROPE (T. Baums & E. Wymeersch eds., 1996).

3. CODE CIVIL [C. CIV.] art. 1134 (Fr.); CODE CIVIL [C. CIV.] art. 1134 (Belg.); Cf. CODICE CIVILE [C.C.] art. 1372 (Italy).

4. Indeed, Article 1134 of the French Code Civil, expressing the idea of *pacta sunt servanda*, serves as the basis for declaring a contract binding between the parties. Article 1134 also serves as the basis for the idea that a contract, having the full value of a law, acts as a source of law. Here, we approach Frankel’s idea that the law arises from the contractual behavior of the parties. However, Frankel further develops this concept by giving it an autonomous function, even outside the explicit agreement of the parties.

5. Frankel, *supra* note 1, at 480–81.

supposes the convergence of the views of numerous parties—the market participants—on the conduct to be adapted with respect to certain legal issues.⁶ Consequently, it becomes an objective standard, binding upon the parties, even if they have not expressly subscribed to it. It is not just a traditional way of handling a subject.

It is useful to note that in Western European jurisdictions, *lex Mercatoria* plays only a very limited role and is not recognized as an autonomous source of law.⁷ The discussion of whether rules considered to be part of *lex Mercatoria* indeed are binding has practical relevance, for example, concerning whether the International Chamber of Commerce's rules on Letters of Credit can be held applicable in the absence of any reference to these rules by the contracting parties.⁸ With the exception of a few cases, some of which are Belgian,⁹ the overwhelming opinion is in the negative.¹⁰

The rules of the International Chamber of Commerce, ultimately codified in a code of generally accepted rules, have been derived from international business practice. This practice involved the negotiation

6. There is quite some discussion as to what rules can be identified as belonging to the *lex Mercatoria*. See generally FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA (1992) (providing an extensive overview of *lex Mercatoria*); see also Clive M. Schmitthoff, *The Law of International Trade, Its Growth, Formulation and Operation*, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 3, 3–38 (Clive Schmitthoff ed., 1964) (examining the legal sources from which the similarity of the law of international trade in the various national systems is derived); CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 131–243 (Chia-Jui Cheng ed., 1988) (discussing the modern character of the law of international trade).

7. See generally DE LY, *supra* note 6.

8. See 4 JEAN VAN RYN & JACQUES HEENEN, PRINCIPES DE DROIT COMMERCIAL 471 n.606 (1988) (considering the ICC rules to be inapplicable absent an express reference). The rules are rendered applicable if the instructions for the Letter of Credit have been transferred by SWIFT, the worldwide messaging system. See Eddy Wymeersch, *Règles professionnelles et règles standardisées dans les opérations financières* [Professional and standard rules for financial operations], in COMMISSION DROIT ET VIE DES AFFAIRES, LES DROIT DES NORMES PROFESSIONNELLES ET TECHNIQUES 68 (1983); see also Jean Stoufflet, *L'Œuvre Normative de la Chambre de Commerce Internationale Dans le Domaine Bancaire* [The Normative Work of the International Chamber of Commerce in the Banking Area], in LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES 361 (1991).

9. See Comm. Trib. Brussels, Feb. 28, 1978, *Belgische Rechtspraak in handelszaken/Jurisprudence commerciale de Belgique* 1979, 8; Comm. Trib. Brussels, Nov. 16, 1978, *Bank- en Financiewezen/Revue de la Banque* 1980, 249; Comm. Trib. Brussels, Mar. 11, 1981, *Belgische Rechtspraak in handelszaken/Jurisprudence commerciale de Belgique* 1981, 366.

10. Clive M. Schmitthoff has looked at this question in detail. See generally CLIVE SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW, *supra* note 6; see also Clive M. Schmitthoff, *International and Procedural Aspects of Letters of Credit*, in THE LAW OF INTERNATIONAL TRADE FINANCE 227 (Norbert Horn ed., 1988) (discussing the international importance of the letter of credit and the procedural aspects contributing to its use as a common method of payment in international trade transactions).

and realization of numerous contracts, drawn up by hundreds of practicing lawyers, which have been litigated all over the world. One could identify this process as one of “legalization” or “petrification” of the contractual content. As opposed to *lex Juris*,¹¹ the vector of transmission is not the lawyers’ preference for efficient contractual drafting, but the market’s, or market participants,’ drive for widely accepted and predictable solutions to business disputes between merchants trading in different places in the world.

Frankel draws our attention to the increasing development of standardized legal practice, expressed in contract formulas, especially where intricate legal schemes are involved, such as is the case in securitization contracts.¹² The phenomenon cannot be denied and is not limited to securitization. It can be witnessed in all international markets, and deserves further analysis in terms of conditions, effects, and causes.¹³ Relatively homogeneous groups of people, especially professionals, will have a tendency to do certain things their way. This probably applies in all professions. What is typical in the legal field, however, is that the phenomenon is widespread, easily observable, and open to analysis. Efficiency, economies of scale, and risk aversion undoubtedly are among the major factors underlying the development.

Another field in which similar forces have been at work, resulting in quite spectacular results, has been the international securities markets. In international securities markets, prospectuses have to be drawn up in connection with the public issue of securities. These issues are supervised by national regulators, who apply their often outdated local rules. However, above and beyond the standards these regulators impose, the prospectuses that are used in cross-border deals develop along the line of international business practice.¹⁴ The latter is largely influenced by the practices of the United States’ Securities and Exchange Commission (SEC), but may differ on substantial points.¹⁵ The movement is driven by many factors such as acceptability in the international securities markets, the aversion of underwrit-

11. Frankel, *supra* note 1, at 476.

12. *Id.* at 482–485.

13. *See, e.g.*, Wymeersch, *supra* note 8, at 77 (discussing the Eurobond Market).

14. This was already the case for Eurobonds issues in the 1970s and 1980s, but has now been extended to cross-border securities issues. *See generally* REGULATING FINANCIAL SERVICES AND MARKETS IN THE 21ST CENTURY 214 (Eilis Ferran & Charles A.E. Goodhart eds., 2001) (explaining the deficiencies of the present regulatory system).

15. For example, forward-looking information is still found in European prospectuses, but increasingly refused under the influence of international banks.

ers, banks, and lawyers to introduce new rules to which unknown risks are attached,¹⁶ the international recognition of good practice and a certain form of competition for excellence, resulting in best practice.¹⁷ The lawyers working on these deals are the vectors for developing this common body of concepts, techniques, phrases, presentations, and the like.

Financial disclosure is another field in which many examples of the same phenomenon can be witnessed, but the phenomenon also extends to many other fields. Consider instruments of internal governance, like those of investment services firms. Increasingly, firms are adopting internal codes of conduct, for example those dealing with personnel's securities transactions. In some jurisdictions statutes contain general rules relating to this issue.¹⁸ In practice, rules have been drafted in great detail by in-house lawyers, relying on other lawyers' work. As a consequence, a new body of "generally accepted standards" comes into being, often grafted upon labor law rules, which may have significant influence, not only on the labor relations, but against third parties as well. So, for example, one could imagine that the existence of a strictly enforced insider trading code of conduct will constitute a defense in the case of an employee who inadvertently has traded securities about which he, or his firm, possessed insider information.

The subject of *lex Juris* is a very rich one and deserves further study and I thank Tamar Frankel for having drawn our attention to the phenomenon.

16. The increasingly lengthy MD&A (management discussion and analysis) statements in prospectuses can be cited as an example. For recently enacted rules on MD&As, see Cautionary Advice Regarding Disclosure About Critical Accounting Policies, Exchange Act Release No. 34,45149 [2000–2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,609, at 85,097 (Dec. 12, 2001); Disclosure of Equity Compensation Plan Information, Exchange Act Release No. 34,45189 [2000–2001 Transfer Binder] Fed. Sec. L. Rep. (CCH) ¶ 86,612, at 85,101 (Dec. 21, 2001).

17. Frankel, *supra* note 1, at 489.

18. Article 27 of the Belgian Banking Law of 22 March 1993 (as modified in 2002), provides that banks will be obliged to develop internal rules of conduct, in addition to the regulations imposed by the supervisor, dealing with securities transactions undertaken by their managers or directors in the company's shares. See Loi relative au statut et au contrôle des établissements de crédit/Wet op het statuut van en het toezicht op de kredietinstellingen [Law on the regulation of and the control of credit institutions], Mar. 22, 1993, art. 27 (Belg.).