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Theory of *Lex Mercatoria* and Recent Developments

A Thesis submitted to

Professor William Tetley

and the Faculty of Graduate Studies and Research in partial fulfillment of the requirements of the degree of

Master of Laws

by

Hodjat Khadjavi

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To

Amira

whose faithful support and constant encouragement made this project possible.

ABSTRACT

Since the early 1960s, some scholars of international commercial law and arbitration have begun to introduce new sources of law, other than domestic law, for international transactions. This is the result of two factors: (1) the immense growth of transnational contracts; and (2) their distinctive nature.

This line of thought generated a lively battle over delocalization or domestication of transborder contracts which still exists today. Scholars of different legal systems have introduced diverse theories including that of *lex mercatoria* which has received considerable attention. The controversy is not merely over the terminology, but also concerns the complex issue of the delocalization of substantive law in international commercial dispute resolution. A few scholars have maintained that this idea constitutes a third legal system described as a transnational legal system, in addition to the national and international systems. In turn, opponents claim that such a substantive law exists, if at all, only within the ambit of domestic jurisdiction.

The main theme of the present study is to identify the major schools of thought with respect to the theory of new *lex mercatoria*, and then to trace its influence and impact on scholarly writings, national and international legislation, transnational practices, and case law.

RESUMÉ

Le début des années soixante a été marqué par l'introduction, à l'initiative d'une fraction de la doctrine de droit du commerce international et de l'arbitrage, de nouvelles sources de droit, distinctes du droit national, applicables aux échanges internationaux. Deux facteurs sont à l'origine de ce phénomène: (1) le développement considérable des contrats internationaux et (2) leur nature spécifique.

Ce courant doctrinal a suscité un vif débat, toujours d'actualité, relatif à la délocalisation ou au rattachement à un ordre juridique national des contrats transfrontières. Diverses théories ont été élaborées par des auteurs appartenant à différents systèmes juridiques; parmi celles-là, la *lex mercatoria* a fait l'objet d'une attention considérable. La controverse ne porte pas uniquement sur un point de terminologie; elle soulève également la question délicate de la délocalisation du droit substantiel dans le règlement des litiges du commerce international. Une doctrine minoritaire affirme que ce phénomène donne naissance à un système de droit à part entière (le système "transnational"), qui coexiste avec le système national et le système international. A cette affirmation, les adversaires de la *lex mercatoria* opposent que, même si son existence était admise, ce droit substantiel ne pourrait tirer sa force que de sa reconnaissance par les juridictions nationales.

La présente étude aura pour thème principal l'identification des écoles de pensée les plus importantes, à l'origine du développement de la théorie de la nouvelle *lex mercatoria*, et la recherche de son influence sur la doctrine, la législation nationale et internationale, les pratiques transnationales et la jurisprudence.

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It is patently evident that the responsibility for all ideas and probable errors expressed here is wholly mine.

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ABBREVIATIONS

A.C.	Appeal Cases (U.K.)
All E. R.	All England Law Reports (U.K.)
Am. Rev. Int'l Arb.	The American Review of International Arbitration
Am. J. Int'l L.	American Journal of International Law
Am. J. Comp. L.	American Journal of Comparative Law
Arb.	Arbitration
Arb. Int'l	Arbitration International
A.S.A. Bull.	Bulletin de l'association suisse de l'arbitrage
Boston U. Int'l L. J.	Boston University International Law Journal
Boston U. L. Rev.	Boston University Law Review
Brit. Y.B. Int'l L.	British Yearbook of International Law
Brooklyn J. Int'l L.	Brooklyn Journal International Law
Bus. Lawy.	Business Lawyer
C.T.R.	Iran-United States Claims Tribunal Report
Calif. L. Rev.	California Law Review
Cambridge L.J.	Cambridge Law Journal
Civil Jus. Q.	Civil Justice Quarterly
Clunet	Journal du droit international
Colum. J. Transn'l L.	Columbia Journal of Transnational Law
Colum. L. Rev.	Columbia Law Review
Comp. L.Y.B. Int'l Bus.	Comparative Law Yearbook of International Business
Cornell Int'l L. J.	Cornell International Law Journal
Cornell L. Q.	Cornell Law Quarterly
Duke L. J.	Duke Law Journal
Emory J. Int'l Disp. Res.	Emory Journal of International Dispute Resolution
Geo. Wash. J. Int'l L. Ec.	George Washington Journal of International Law and Economics
Georgia Int'l & Comp. L.	Georgia Journal of International and Comparative Law
Hastings Int'l Comp. L. Rev.	Hastings International and Comparative Law Review
Harv. Int'l L.J.	Harvard International Law Journal

Harv. L. Rev.	Harvard Law Review
I.F.L.R.	International Financial Law Review
I.L.M.	International Legal Materials
I.L.R.	International Law Report
I.M.F.	International Monetary fund
ICC	International Chamber of Commerce
ICC Int'l Court Arb. Bull.	ICC International Court of Arbitration Bulletin
ICCA	International Council for Commercial Arbitration
ICSID	International Center for the Settlement of Investment Disputes
ICSID Rev. F.I.L.J.	ICSID Review - Foreign Investment Law Journal
Int'l Bus. Lawy. (I.B.L.)	International Business Lawyer
Int'l Tax & Bus. Lawy.	International Tax and Business Lawyer
Int'l Lawy.	International Lawyer
Int'l Comp. L. Q. (I.C.L.Q.)	International And Comparative Law Quarterly
Int'l Arb. Rep.	International Arbitration Report
J. Bus. L.	Journal of Business Law
J. Int'l Bus. L.	Journal of International Business Law
J. Int'l Arb.	Journal of International Arbitration
J. Int'l B. L.	Journal of International Banking Law
J. Marit. L. & Comm.	Journal Of Maritime Law and Commerce
J.T.	Journal des tribunaux (Belgium)
J. World Trade L.	Journal of World Trade Law
L. & Contem. Probs.	Law and Contemporary Problems
L. Q. Rev.	Law Quarterly Review
L. & Pol'y Int'l Bus.	Law and Policy in International Business
LCIA	London Court of International Arbitration
Lloyd's M. & C. L. Q.	Lloyd's Maritime and Commercial Law Quarterly
Lloyd's L. Rep.	Lloyd's Law Report
McGill L. J.	McGill Law Journal (Revue de Droit de McGill)
Mich. Y.B. Int'l Leg. Stud.	Michighan Yearbook of International Legal Studies
Netherl. Int'l L. Rev.	Netherlands International Law Review
Nw J. Int'l L. Bus.	Northwestern Journal of International Law and Business

Ohio State J. Disp. Res.	Ohio State Journal Dispute Resolution
Pace L. Rev.	Pace Law Review
Rev. arb. (Rda)	Revue de l'arbitrage
Rev. Crit. dr. int. priv.	Revue critique de droit international privé
Rev. dr. int. dr. comp.	Revue du droit international et du droit comparé
R.I.W.	Recht der internationalen Wirtschaft
Syracuse J. Int'l L & Com.	Syracuse Journal of International Law and Commerce
Texas Int'l L.J.	Texas International Law Journal
Transn'l Lawy.	Transnational Lawyer
Tulane L. R. (Tul. L.R.)	Tulane Law Review
Tulane Civil L. F.	Tulane Civil Law Forum
U. Chi. L. Rev.	University of Chicago Law Review
UCC	Uniform Commercial Code
ULIS	United Nations Law for International Sales
UNCITRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of Private Law
Va. L. R.	Virginia Law Review
Va. J. Int'l L.	Virginia Journal of International Law
W. L. R.	Weekly Law Reports (U.K.)
Y.B. Com. Arb.	Yearbook of Commercial Arbitration
Yale L. J.	Yale Law Journal

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INTRODUCTION

The idea of the "*new lex mercatoria*" has a rich historical background.[1] Its origin has been traced to the Roman *jus gentium* and also to the Middle Ages.[2] Following the Second World War international economic relations increased explosively and scholars of commercial law began to recognize the emergence of international business law and to stress that its autonomous and international nature should not be restricted to domestic jurisdictions.[3]

Traditionally, legal questions arising from international transactions were answered according to the classical view of conflict of law rules, which refers to a given national legal system (positivist approach). However, in practice, there were circumstances where national laws could not provide a definite answer for the dispute at hand; in part usually because of the fact that many developing countries had not yet developed a sophisticated body of law to govern transnational contracts. Even the law of industrial countries in this regard could not govern all aspects of such contracts. Responding to this deficit, scholars tried to find new sources for emerging international

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[1] See Chapter One for historical background.

[2] Some proponents of *lex mercatoria*, in particular Berthold Goldman, have stated that Roman *jus gentium* is the origin of the old *lex mercatoria*. Most scholars believe that the old *lex mercatoria* originated in medieval Europe. It is noteworthy that the concept of *lex mercatoria* was developed in the West. Yet, there are evidences that prove similar ideas were established by Oriental scholars, especially after the emergence of Islam in seventh century.

[3] See, *e.g.*, H. Kronstein, "Business Arbitration - Instrument of Private Government" (1944) 54 Yale L.J. 36 [cited from S.J. Toope, *Mixed International Arbitration* (London: Grotius, 1990) at 91, footnote 207]; *also see* L. McNair, "The General Principle of Law Recognized by Civilized Persons" (1957) Brit. Y.B. Int'l L. 1; P. Jessup, *Transnational Law* (New Haven: 1956); J. Honnold, "The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law" in Schmitthoff, ed., *The Sources of the Law of International Trade* (New York: Fredrick A. Praeger, 1964) at 74-76; Note, "United Nations Commission on International Trade Law: Will a Uniform law in International Sales Finally Emerge? (1979) 9 Cal. W. Int'l L.J. at 157-58.

business law all the while contesting the traditional perspective.[4] They argued that national commercial laws had been designed for domestic transactions, not for international ones. This led some scholars to talk about "a-national", "delocalized", or "transnational" law.[5] But, national judges, as servants of their states, were more comfortable applying their own domestic conflict rules rather than a "delocalized" law. As a result, arbitration mechanisms based on the principle of party autonomy became the main vehicle for the growth of delocalization.[6] Positivists ideologically opposed to such

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[4] R.B. Schlesinger, "Research on the General Principles of Law Recognized by Civilized Nations" (1957) 51 Am. J. Int'l L. 734; here, professor Rudolf B. Schlesinger in 1957 referred to a system of supranational legal principles for international commerce and for the facilitation of the settlement of commercial disputes:

"The amicable settlement of private disputes of a transnational character, especially of commercial disputes, might be facilitated if businessmen and their legal advisers in all countries become aware of a common core of rules and principles permeating the various legal systems. Such awareness will provide a common frame of reference when settlement negotiations are conducted by lawyers brought up under different system of law. The existence and availability of a statement of 'general principles' might also be expected to make the parties less hesitant to submit to arbitration. In transnational commercial arbitration, the proceedings usually must be conducted in a country and under a set of rules which, at least to one party, and sometimes to both, is a foreign country and a foreign set of rules. The natural reluctance engendered by this fact may well be minimized if it can be shown that the basic core of the foreign rules does not differ too drastically from the general principles recognized at home.

As soon as the 'general principles' are reduced to more certainty than they are now, the parties to a commercial dispute may, in addition, eliminate all problems of conflict-of-laws and of submission to a 'foreign' law by expressly stipulating that the arbitrators shall be guided by the general principles ... At the same time, the defects of some existing systems, stemming from their unilateral features, might be remedied in this way." *Ibid.* at 747 (footnotes omitted) cited from K.P. Berger, *International Economic Arbitration* (Deventer: Kluwer,1993) at 529.

[5] Albert Jan van den Berg defines an "a-national" or "delocalized" award as "an award resulting from an arbitration which is detached from the ambit of a national arbitration law by means of an agreement of the parties" A.J. van den Berg, *The New York Arbitration Convention of 1958: Towards a Uniform Judicial Interpretation* (Deventer: Kluwer, 1981) at 29.

For more detail on delocalization *see generally*: A.J. van den Berg, "When is an Arbitral Award Non Domestic under the New York Convention of 1958? (1985) 6 Pace L. Rev. 25; J. Paulsson, "Delocalization of International Arbitration: When and Why it Matters" (1983) 32 Int'l & Comp. L.Q. 53; F.A. Mann, "England Rejects Delocalized Contracts and Arbitration" (1984) 33 Int'l & Comp. L.Q. 193.

[6] Upon the rigid view of delocalization, the arbitral procedures are completely detached from the *lex loci arbitri*, and thus 'floating in the transnational firmament'. It has been said that this doctrine first was developed in France in 1960s when French Arbitration law was very strict which made it unsuitable for international arbitral procedures. See P. Fouchard, *L'Arbitrage Commercial International* (Paris: 1965)

growth resorted to comparative methods which, although successful to some extent, have proven insufficient.[7]

Parallel to this development, in 1961, Clive Schmitthoff, the doyen[8] of international commercial law scholars, introduced a new idea emphasising the latin expression "*lex mercatoria*" or "*law merchant*".[9] He declared:

> Complementary to the return to internationalism in the political and economic field is, in the legal sphere, the return to the international concept of commercial law, the emergence of a *new lex mercatoria* which tends to develop into an autonomous international business law, that is, a law of universal character that, though applied by authority of the national sovereign, attempts to shed the national peculiarities of municipal laws.[10]

The systematic debate on new *lex mercatoria* (or new law merchant) can be seen to have sprung from Schmitthoff's 1961 article.[11] To this day the lively and interesting debate on the sources of international business law, its scope, and its relation with domestic laws continues.[12] International arbitration specialists and conflict of laws

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at 22 and 48; cited from K.P. Berger, *supra* note 4, at 480. Recently the delocalization doctrine both in procedural and substantive aspects received an authoritative support by art. 6(1) of Resolution of the *Institute de Droit International*; see *infra* Chapter Three.

[7] The classical method that only one national law has to be determined as applicable law has been criticized notably when the national law was insufficiently developed.

[8] To use professor Roy Goode's word. R. Goode, "The Adaptation of English Law to International Commercial Arbitration" (1992) 8 Arb. Int'l 1 at 12.

[9] C.M. Schmitthoff, "International Business Law: A New Law Merchant" (1961) 2 Current Law & Social Problems 129.

[10] *Ibid.* at 132.

[11] It should be mentioned that at the same year the Yugoslav scholar Aleksander Goldstajn also wrote his article: "The New Law Merchant" (1961) J. Bus. L. 12; apparently a few months before Schmitthoff's article as Schmitthoff has cited him in the above mentioned article at 140, footnote 30.

[12] Even the harshest critic of the *lex mercatoria*, eminent English professor F.A. Mann, has stated: "the need for a commercial law of nations can no longer be denied. We are witnessing the growth of activities which occur in what to a considerable extent is a legal vacuum and for which the law remains to be found."

methodologists have offered different theories with the debate focusing primarily on the settlement of international commercial disputes (whether in national courts or international arbitral tribunals).

In the search for the applicable or proper law for transnational contracts, scholars have offered different solutions and theories, among them *dépeçage*,[13] substantive method,[14] comparative method,[15] *tronc commun*,[16] and *lex mercatoria*. The latter has received remarkably more attention than the others. After three decades, the controversy about *lex mercatoria* is still unsolved, albeit the concept is more developed, and it is still the "subject matter of academic chatting".[17] To many onlookers, the whole debate

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See F.A. Mann, "Reflections on a Commercial Law of Nations" (1975) 33 Brit. Y.B. Int'l L. 20.

[13] Under *dépeçage*, meaning cut to pieces, the tribunal may apply different portions of legal systems to different aspects of the contract at dispute.

[14] According to the substantive method when the national conflict of law rules can not provide a suitable answer for an international contract, transnational substantive rules or direct method may be used to settle the dispute. By this method the substance of the dispute is aimed instead of its localization.

[15] Here, the goal is not to create new legal rules but to utilize the comparative method for dispute settlement. *Tronc commun* theory can be categorized under this method as well.

[16] *Tronc commun* is a doctrine elaborated in 1987 by Mauro Rubino-Sammartano. When there is a negative choice of law or the parties have determined more than two national laws to govern their contracts, according to *tronc commun* doctrine the common part of their national laws should be determined as applicable law. The characteristics of this theory are that it is made of statutory provisions and does not ignore them and it applies according to an express or a tacit choice of the parties. In fact by this theory the parties eliminate those parts of the other parties foreign law which is unknown to them. For more considerations see M. Rubino-Sammartano, "Le *tronc commun* des lois nationales en présence (Réflections sur le droit applicable par l'arbitre international)" [The *Tronc Commun* of the National Laws of the Parties (Considerations on the Law Applicable by the International Arbitration)] (1987) Revue de l'Arbitrage 133; B. Ancel, "The *Tronc Commun* Doctrine: Logics and Experience in International Arbitration" (1990) 7 J. Int'l Arb. 65.

[17] B. Goldman, "Introduction" to T. Carbonneau, ed., *Lex Mercatoria and International Arbitration: A Discussion of the New Law Merchant* (New York: Transnational Juris, 1990) at *xvi*.

seems woolly and unfocussed.[18] It seems there should be an end to the debate, for as Lord Mustill has described it, "the blood temperature descended close to absolute zero".[19] Yet, there are still eminent scholars who look at *lex mercatoria* with scepticism or even deny its existence.[20] They see in it "the signs of uncertainty and the danger that each judge or arbitrator will distil - in the fog of his own subjective tendencies - his own personal formula for it".[21] Nevertheless, the reality is that the term "*lex mercatoria*" is gaining ground in the legal literature, and it is too late to deny its existence especially given a number of recent arbitral pronouncements on the subject.[22] At present, discussion is ongoing as regards its definition, scope, contents, rules, applicability, and enforceability. All of the seminars, conferences, articles and books, national and international judgments before us cannot simply be denied. Just as

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[18] M. Mustill, "Book Review" (1992) 8 Arb. Int'l 215 at 216 [Review of T.E. Carbonneau, *Ibid.*].

[19] *Ibid.* at 215.

[20] F.A. Mann, "Private Arbitration and Public Policy" (1985) 4 Civil Justice Quarterly 257; F.A. Mann, "*Lex Fact Arbitrum*" in P. Sanders, ed., *International Arbitration Liber Amicorum for Martin Domke* (The Hague: Martinus Nijhoff, 1967); F.A. Mann, "England Rejects Delocalized Contracts and Arbitrations" (1984) Int'l & Comp. L. Q. 193; E. Mezger, Comment, "The International Law Association Report of the 1982 Montreal Conference, London 1983; H. Grigera Náon, "Transnational Enterprises under the Pacto Andino and national Laws of Latin America" in N. Horn, ed., *Legal Problems of Codes of Conducts for Multinational Enterprises* (Deventer: Kluwer, 1980) 261; F. Pocar and F. Vitta, *infra* note 98, intervention during the discussion in Basle Symposium at 189 and 158.; G.R. Delaume, "The Myth of the *Lex Mercatoria* and State Contracts" in T.E. Carbonneau, *supra* note 17 at 77; K. Hight, "The Enigma of the *Lex Mercatoria*" in T.E. Carbonneau, *supra* note 17 at 99; J.L. Siqueiros, "Arbitral Autonomy and National Sovereign Authority in Latin America" in T.E. Carbonneau, *supra* note 17 at 195.

[21] M. Rubino-Sammartano, *International Arbitration Law* (Deventer: Kluwer, 1990) at 270; also A. Kassis, a Syrian lawyer who lives in France, have complained about the "darkness of uncertainty, indetermination and absolute unpredictability" and the "total legal insecurity" of *lex mercatoria*. A. Kassis, "L'arbitre, les conflits de lois et la *lex mercatoria*" in Antaki & Prujiner, eds., *Actes du ler colloque sur l'arbitrage commercial international* (Montreal: 1986) at 138.

[22] Some scholars have suggested that courts and tribunals should wait until the dispute on *lex mercatoria* is over and allow its scope and contents to be defined in international conventions or the like.

professor Berman has stated it is in front of our noses![23]

With legal scholars holding such different attitudes toward new *lex mercatoria*,[24] it is difficult to form a unified definition of the concept. This uncertainty and confusion has been exacerbated by the lack of consensus among supporters of *lex mercatoria* on its definition and content.

The theory of *lex mercatoria* is not an attempt to harmonise different national legal systems. That is one of the subject matters of comparative law. The idea of *lex mercatoria* is a challenge between two major schools of thought; one that supports national legal jurisprudence over the transnational contracts, and another that advocates an autonomous and self-regulatory character for the international commercial community based on its historical background. Mercatorists have examined the historical background of commercial law from its beginning and have come to the conclusion that there are similarities among the commercial relationships and activities of international merchants from centuries ago.[25] These similarities constitute some customs, usages of trade and contract practices which are developing continuously. In other words, it uncovers the difference between the classical concept of law which can be found in the law books, cases, and codes and the practical view of law or the "living law" that

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[23] H.J. Berman, "The Law of International Commercial Transaction (*lex mercatoria*)" (1988) 2 Emory J. Int'l Dispute Resolution 235, at 304.

[24] Some of them, like professor F.A. Mann, even deny the existence of such a self-regulatory system that can operate beside national legal systems. Some others believe in *lex mercatoria* but only to a limited extent within national legal systems. The third group advocate the idea of new *lex mercatoria* as an autonomous legal system which can even compete with national legal system. See *infra* Chapter Two.

[25] See Chapter One for historical background.

focuses on the legal norms which can be enforced in practice.[26]

In turn, the opponents of *lex mercatoria* have argued that *lex mercatoria* cannot give to the merchant community[27] anything more than what national legal systems are able to provide. The mercatorists have responded by discerning rules for international commerce that conform to parties' expectations, and by avoiding the trap created when the otherwise applicable national law appears uncertain, peculiar, dramatically amended since the date of the contract, or otherwise unpredictable and unjust in its application to foreigners.[28] The whole controversy is over the extent to which international business law can be autonomous and whether it can completely detach itself from national laws or must reconcile itself with them.

The fundamental question is how a system of transnational contracts should function. Should it be governed by the domestic laws of states or can it operate as a self-regulating mechanism? If it can so operate, where do its binding norms come from? Opponents of *lex mercatoria* believe that the effects of *lex mercatoria* can be achieved through national laws by enacting modern rules which fit these types of transactions. Thus, they hold there is no need for *lex mercatoria*.

It is noteworthy that greatest articulation of *lex mercatoria* has occurred in the

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[26] A. Goldstajn, "Reflections on the Structure of the Modern Law of International Trade" in P. Sarcevic, ed., *International Contracts and Conflict of Laws* (London: Graham & Trotman / Martinus Nijhoff, 1990) at 22.

[27] This includes states as well, because, at present, a state can conclude an international contract as a private party.

[28] W. Graig, W. Park, J. Paulsson, *International Chamber of Commerce Arbitration* (New York: Oceana, 1990) at 606.

area of international arbitration.[29] Not surprisingly, several awards have been rendered and enforced based on *lex mercatoria*. There are also cases where the applicability of *lex mercatoria* has been rejected and its existence had been questioned. The future of *lex mercatoria* is still questionable precisely because *lex mercatoria* is in the process of development, and this process depends to a great extent on the political and economic structure of the world and business communities.

The present study explains the recent development of the theory of *lex mercatoria* and demonstrates its impact on legal literature, national and international legislation, transnational practices, national court decisions, and arbitral awards. In Chapter One, the historical background will be examined. In Chapter Two the main approaches to *lex mercatoria* will be identified, in order to understand how many concepts do in fact exist. In this regard six major schools of thought will be examined. This analysis is important because of the ambiguity and uncertainty surrounding the debate. In Chapter Three the impact of *lex mercatoria* on national and international legislation and on transnational practices will be discussed. In Chapter Four, the applicability and enforceability of *lex mercatoria* in the case law (court decisions and international tribunal awards) will be traced. In conclusion, a general assessment of the theory will be presented.

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[29] The first scholars who discovered the potential of arbitration for development of *lex mercatoria* were professor Berthold Goldman and Professor Philippe Fouchard. See P. Fouchard, *supra* note 6 and also B. Goldman, "Arbitrage international et droit commun des nations" (1956) Rev. Arb. 115.

CHAPTER ONE

Historical Background

A. The Origin of *Lex Mercatoria* (*old lex mercatoria*)[30]:

It has been said that the latin phrase "*lex mercatoria*" first appeared in an English collection called the *Fleta* in which customs had been written down about 1290.[31] However, the first author who wrote an English book on the law merchant and used this latin expression was Gerard Malynes[32] in 1622. In the preface to his book *Consuetudo vel Lex Mercatoria, or the Ancient Law Merchant*,[33] he has stated:

> I have entitled the book according to the ancient name of *Lex Mercatoria* ... because it is customary law approved by the authority of all kingdoms and Commonweals, and not a law established by the sovereignty of any prince.[34]

As the proponents of *lex mercatoria* have put so much emphasis on the historical

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[30] For detailed historical background of Western commercial (mercantile) law *see generally*: H.J. Berman, *Law and Revolution, the Formation of the Western Legal Tradition* (Cambridge: Harvard University, 1983); L.E. Trakman, *The Law Merchant: The Evolution of Commercial Law* (Littleton, Colorado: Fred B. Rothman, 1983); R.S. Lopez, *The Commercial Revolution of the Middle Ages 950-1350* (Englewood Cliffs, N.J.: 1971); R.S. Lopez & I.W. Raymond, eds., *Medieval Trade in the Mediterranean World: Illustrative Documents with Introductions & Notes* (New York, n.d.); Raymond de Roover, *Business, Banking, and Economic Thought in Late Medieval & Early Modern europe* (Chicago: 1974).

[31] F. De Ly, *International Business Law and Lex Mercatoria* (Amesterdam: North-Holland, 1992) at 207.

[32] Lord Mustill introduces him: "Malynes, the first English author on the old *lex mercatoria*, was a merchant. His book, *Consueto, vel Lex Mercatoria* was addressed to a wide public. It was said to be of 'Necessary for Statemen, Judges, Magistrates, Temporal and Civil Lawyers, Mintmen, Merchants and all others negotiating in any parts of the World'. M. Mustill, "The New *Lex Mercatoria*: The First Twenty-five Years" (1988) 4 Arb. Int'l 86 at 119 [with minor amendments from the first edition in M. Bos & I. Brownlie, ed., *Liber Amicorum for Lord Wilberforce* (London: Oxford, 1987)].

[33] This book constitutes three sections. The first contains forty-seven chapters and deals mainly with commercial and maritime law. The second part deals with money. The final section discusses commercial paper, subpoenas, enforcement of judgment, and the nature of the courts in which the law merchant was applied. See, T.E. Carbonneau & M.S. Firestone, "Transnational Law-Making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication" (1986) 1 Emory J. Int'l Dispute Resolution 51, at 59.

[34] From the preface, "To the Courteous Reader" quoted in H.J. Berman, *supra* note 30 at 342.

background of the law merchant, and since they believe that it is the result of the continuous or revival of the cosmopolitan nature of commercial community, it seems to be helpful and necessary to have an overview of the relevance of the old *lex mercatoria* and the new one from the historical point of view.

It has been suggested that the origin of *lex mercatoria* dates back to Middle Ages.[35] A few others, mainly professor Berthold Goldman, the hero of *lex mercatoria*, have declared that *lex mercatoria* first was oriented in Roman *jus gentium*.[36] Of course, there is no unanimity among scholars regarding the historical analysis of *lex mercatoria*, and the way they have examined the historical facts sometimes differ, as discussed here after.

1. Roman *Jus Gentium*[37]

Goldman declares that *jus gentium* was constituted of customary rules[38] to govern economic relationships between Roman citizens and foreigners and it was

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[35] Most of the mercatorists adhere to this idea.

[36] B. Goldman, "*Lex Mercatoria*" 3 Forum Internationale at 3; J. Robert, *L'arbitrage, droit interne et droit international privé* (Paris: Dalloz, 1983) at 285; H. Batiffol & P. Lagarde, *Traité de droit international privé* (Paris: L.G.D.J., 1981) at 83.

[37] It should be mentioned that the *jus gentium* in the context of public international law is different from the concept of *jus gentium* in Roman law.

[38] Another French author who advocates this idea was P. Huvelin. He believe that *jus gentium* was really transnational law based on the customs which were developed particularly for transactions with foreigners in Roman market places and applied by the *praetor peregrinus* (the magistrate concerned with foreigners); therefore, the origins of these customs were not Roman nor foreign. P. Huvelin, Cours élémentaire de droit romain, I, 227; P. Huvelin, *Etudes d'histoire du droit commercial romain* (Paris: Sirey, 1929) 16-17; documented by F. De Ly, *supra* note 31 at 13.

autonomous from the traditional Roman law.[39] *Jus gentium* lost its distinction when the Antonian Constitution of 212 A.D. accorded Roman citizenship to all inhabitants (non-Romans) of the Empire. Goldman calls this event the first death of *lex mercatoria*.[40]

Some others have argued that *jus gentium* was part of the Roman law and not detached from it.[41] Mainly on the basis that at that time there were not any conflict of law rules and such a technical difficulty had resulted in the distinction between *jus civile* and *jus gentium*; therefore, the specificity of *jus gentium* should not be considered as the transnationalisation of Roman commerce. On the other hand, *jus civile* was very formal and its application was restricted to the Roman citizens, making it unsuitable for transnational commerce at that time. Finally, as Goldman himself also has admitted, this particularity of *jus gentium* gradually disappeared when the Roman Emperor Constitutio Antonian of 212 A.C. granted citizenship to all of the inhabitants of Roman empire.[42]

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[39] B. Goldman, *supra* note 36 at 3; B. Goldman, "La *lex mercatoria* dans les contrats et l'arbitrage internationaux: réalité et perspectives (1979) Clunet at 475; B. Goldman's previous opinion was that *jus gentium* was part of Roman law, see B. Goldman , "intervention during the discussions", in P. Level, "Le contrat dit sans loi" Trav. com. fr. dr. int. privé, 1964-66 (Paris: Dalloz, 1967) at 242.

[40] *Ibid.* note 36 at 3.

[41] One of the Canadian scholars Ian F.G. Baxter has states: "The Roman Empire had subject to its administration many non-Roman persons, who lived or may have lived under different customary systems, and the application of the *Jus Civile* to all was considered impractical and undesirable. So the *Jus Civile* was made to apply only to Roman citizens, and it become supplemented by legal principles of a more general nature, designed for issues involving non-Romans. These supplementary principles, however, were part of the whole body of Roman law as applied by Roman magistrates, and the Romans did not use choice-of-legal-system techniques in the settlement of disputes involving non-Romans. I.F.G. Baxter, "International Conflict of Laws and International Business" (1985) 34 J. Int'l Comp. L.Q. 538, at 545.

[42] For more details on the sources of *jus gentium* and its position in the Roman law see generally: F. De Ly, *supra* note 31 at 8-15.; F. Wieacker, "On the History of Supranational Legal System of Commerce" in *The Legal Organization of Commerce and its Relation to the Social Conditions* (Aarhus: Provinsbanken, 1979) 7-15; F.P. Walton, *Historical Introduction to the Roman Law* (Edinburgh: Green & Sons, 1912); A. Schiller, *Roman Law* (The Hague: Mounton Publishers, 1978); J. Crook, *Law and Life of Rome* (Ithaca: Cornell University Press, 1967); W. Buckland, *The Main Institutions of Roman*

2. Medieval *Lex Mercatoria*[43]

Most of the mercatorists have emphasized the existence of the law merchant in the Middle Ages as the origin of the new *lex mercatoria*. In the 11th and 12th centuries the economic and political situation in Europe changed mostly through the emergence of towns and cities as autonomous political units.[44] The commercial community created a set of rules based on customs to govern commercial transactions. They obtained a high degree of uniformity from market to market, fair to fair, city to city, and country to country. At this time there was no intervention by feudal Lords that merchants could establish their own laws and courts. There were special courts called "Piepowder courts"[45] composed of a merchant jury to settle disputes between merchants. In a sense

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Private Law (Cambridge: University Press, 1931); R. Lee, *The Elements of Roman Law* (London, Sweet & Maxwell, 1952); H. Yntema, "The Historical Bases of Private International Law" (1953) Am. J. Comp. L. 300; B. Nicholas, *Historical Introduction to the Study of Roman Law* (Cambridge: University Press, 1972); A. Prichard, *Leage's Roman Private Law* (London: Macmillan, 1961); W. Buckland & A. McNair, *Roman Law and Common Law* (Cambridge: University Press, 1936); W. Buckland, *A Text-Book of Roman Law from Augustus to Justinian* (Cambridge: University Press, 1975); W. Buckland, *A Manual of Roman Private Law* (Aalen: Scientia Verlag, 1981); P. Huvelin, *Etudes d'histoire du droit commercial romain* (Paris: Sirey, 1929).

[43] There are also other names for medieval law merchant or *lex mercatoria* such as: *jus mercatorum, jus mercatorium, jus mercati, jus fori, jus forense, jus negotiatorum, jus negotiale, stilus mercatorum, jus nundinarum*; see E. von Caemmerer, "The Influence of the Law of International Trade on the Development and Character of the Commercial Law in the Civil Law Countries" in C.M. Schmitthoff, ed., *supra* note 3 at 88.

[44] J. Honnold, *supra* note 3 at 70; H. Berman, *supra* note 30 Chapter 11 and 12.

[45] There are different explanations for the origin of the term "piepowder". J. Honnold and E. Farnsworth have mentioned that it drives from *pie poudre* (or *pes pulvericatus*) which means dusty foot (or feet) referring to the merchant who travel from fair to fair. J. Honnold & E. Farnsworth, Commercial Law: Cases and Materials (3rd ed. 1976) at 3; also L.H. Hayes, "A Modern *Lex Mercatoria*: Political Rhetoric or Substantive Progress?" (1977) 3 Brooklyn J. Int'l L. 210 at 213.

the law merchant become a sort of international law of merchant.[46] On the contrary, some have suggested that this distinction and self-regulation by merchants was because of economic and tax purposes by the authorities.[47]

3. Maritime Law (*lex maritima*)[48]

At this time (Middle Ages) there was a developed body of maritime law which dated back to about 900 B.C. to the Rhodian law.[49] Around the first crusade (1095) in Italy, the city states of Trani, Amalphi and Pisa adopted maritime codes which later influenced the western mediterranean countries. By the end of the 12th century, the *Rôles of Oléron*, the first formal source of present maritime law in both civil and common law tradition, came into existence and were influential later in the Baltic and Nordic

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[46] L.H. Hayes, *ibid.* at 212.; F. Sanborn, *Origins of the Early English Maritime and Commercial Law* (New York: 1930) at 197; W. Bewes, *The Romance of the Law Merchant, Being an Introduction to the Study of International and Commercial Law* (London: Sweet & Maxwell, 1923) at 94.

[47] B.M. Cremades & S.L. Plehn, "The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions" (1984) 2 Boston U. Int'l L.J. 317 at 318.

[48] For a comprehensive overview on historical background of maritime law see: W. Tetley, *Maritime Liens and Claims* (Montreal: Blais, 1989) 1-41 [hereinafter *Maritime Liens*]. and also W. Tetley, "The General Maritime Law - the *Lex Maritima*" (1994) 20 Syracuse J. Int'l L. Commerce [to be published by Fall 1994] [herein after *Lex Maritima*].

[49] The origin of the Rhodian sea law is debatable because of insufficient historical data; therefore, the authors differ as to the date of the laws. Some have suggested 300 B.C. but Professor William Tetley, the eminent Canadian maritime Scholar at McGill University, declares that it dates back to 800 or 900 B.C. which was an unwritten body of sea law stemming from the Island of Rhodes. According to Professor Tetley the first document in which there is a mention of such a law is the Digest of Justinian of the sixth or Seventh century A.D., when Eudaimon of Nicomedia complained to Constitutio Antoninus (the Roman Emperor who granted citizenship to all inhabitants of the Roman empire in 212 A.C., professor Tetley has dated the former event to 138-161 A.D.) that he had been plundered by tax gatherers after a shipwreck. Antoninus sentenced:

> I, indeed, am Lord of the world, but the law is lord of the sea. Let it be judged by Rhodian Law, prescribed concerning nautical matters, so far as no one of our laws is opposed.

Professor Tetley has considered this as an indication of early example of a conflict of maritime laws rule. See W. Tetley, Maritime Liens *ibid.* at 1-2; and *Lex Maritima ibid.* Sec. V.

countries.[50] The *Rôles* (Rolls[51] or Rules) regulated the responsibility and duties of the master, the crew, the shipowner and merchants.[52] By end of 14th century, in the western mediterranean (Barcelona, Valencia, and Marseilles) a collection of Consuls' decisions which called *Consolato del Mare* based on the previous customs of the sea were established.[53] Although these collections were exclusively dealt with maritime law, they also contained contracts of carriage of goods by sea.[54] Along with the development of maritime law, markets and fairs were developed without a highly developed legal order.[55]

4. The Absorbtion of *Lex Mercatoria* by National Laws

By the end of the 14th century the political structure of Europe changed from a feudal society to a capitalist structure. By 16th and 17th century transnational trade took place in far away areas, in the east and the west, in North America and Canada, in Latin America and all over the world, and in the 18th century England become a mercantilist

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[50] W. Tetley, Maritime Liens *ibid.* at 6.

[51] H.J. Berman, *supra* note 23 at 239.

[52] W. Tetley, Maritime Liens *supra* note 48 at 6.

[53] The *Consollato del Mare* contained some new provisions which were not found in the Rôles of Oléron such as: the rudiments of the law of prize, preference to seamen for their wages (art. 62, 93, 148) which can be considered as a possible source of the modern high ranking of the seamen's lien. See W. Tetley, *Ibid* at 13.

[54] H.J. Berman, *supra* note 23 at 239.

[55] H.J. Berman, *ibid.* at 240. Berman describes *lex mercatoria* in the middle ages as following: "The law merchant governed a special class of people (merchants) in special places (fairs, markets, and seaports). It was distinct from local, feudal, royal, and ecclesiastical law. Its special characteristics were that 1) it was transnational; 2) its principal source was mercantile custom; 3) it was administered not by professional judges but by merchants themselves; 4) its procedure was speedy and informal; and 5) it stressed equity, in the medieval sense of fairness, as an overriding principle."

nation. In this period the concept of the Nation-State was established[56] which changed the character of commercial law by its incorporation into the general law of the land. As result, foreign trade was no longer exclusively in the hands of a special social class of merchants. It became the life blood of the European trading nations with many groups directly and indirectly involved, including bankers, mariners, insurers, and merchants. The adoption and incorporation of law merchant to the new economic circumstances, occurred in England through judicial precedents[57] and in France by legislation.[58]

B. The New *Lex Mercatoria*[59]

The need for a concept such as the new *lex mercatoria* or modern law merchant

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[56] This notion was based on the theory of national sovereignty introduced by Hugo Grotius much earlier. See C.M. Schmitthoff, *Commercial Law in a Changing Economic Climate* (London: Sweet & Maxwell, 1981) at 5.

[57] The incorporation into the common law was carried out mostly by the Chief Justices, Sir John Holt (1689-1710) and Lord Mansfield (1756-1788). The formal codification occurred near the end of nineteenth century in England with the Bills of Exchange Act in 1882 and continued with the Sale of Goods Act 1893. See E. Farnsworth & J. Honnold, *supra* note 45 at 5; J. Honnold, *supra* note 3 at 73; C.M. Schmitthoff, *ibid.* 4-6; S. Bainbridge, "Trade Usages in International Sales of Goods: An Analysis of the 1964 and 1980 Sales Conventions" (1984) 24 Virginia J. Int'l L. 619, at 628.

[58] In France the codification of commercial law was accomplished first by the *Ordonnance de la commerce* of Louis XIV of 1673 and Colbert's *Ordonnance de la marine* of 1681. A revision was carried out in 1787 which was interrupted by French Revolution. Finally in 1807 the *Code de Commerce*, one of the five great codes of Napoleon, was enacted. See C.M. Schmitthoff, *ibid.*; W. Tetley, Maritime Liens, *supra* note 48 at 15; S. Bainbridge, *ibid.* at 628.

[59] There are some evidences that indicate the development of new *lex mercatoria* can be traced from approximately 200 years ago. For example, William Blackstone, wrote in the mid-eighteenth century:

> "The affairs of Commerce are regulated by the law of their own called the law Merchant or *lex mercatoria*, which all nations agree in and take notice of, and it is particularly held to be part of the law of England which decides the cases of merchants by the general rules which obtain in all commercial matters relating to domestic trade, as for instance, in the drawing, the acceptance, and the transfer of Bills of Exchange."

W. Blackstone, *Commentaries on the Laws of England I* (Portland, 1807) cited from H.J. Berman, *supra* note 30 at 342. Also Judge Story in 1842 in case of *Swift v. Tyson* described the understanding that: Commercial law "may be truly declared in the language of Cicero ... to be in great measure, not the law of a single country only, but the commercial world." 41 U.S. (16 Pet.) 1 (1842) cited from K.P. Berger, *supra* note 4 at 540.

can be traced back at least to the 1856 Brussels Free Trade Congress. The English representative stated:

> [C]onsidering that commercial courts judge commercial affairs with less delay, less expense, and a more perfect knowledge of commercial usages than the ordinary tribunals, the committee is of the opinion that it is desirable they should be established throughout Europe.[60]

In the twentieth century, international trade was massively expanded to the point that domestic contracts were distinguished from international ones according to the particularities that the latter have obtained.[61] Therefore, some scholars began to emphasize the need for a new mercantile law to regulate transnational commerce. One of the first scholars who declared the emergence of international business law was Edouard Lambert in the 1920's.[62] In such circumstances, Clive Schmitthoff began to introduce a concept of new *lex mercatoria* as an autonomous[63] source of international business law:

> The rediscovery of the new *lex mercatoria*, advocated by the author of this paper

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[60] H. Hutton, *Commercial Courts: Resolution and Explanatory Statement Submitted to the Brussels Free Trade Congress of 1856* (Dublin: 1857) at 4; Documented by L.H. Hayes, *supra* note 45 at 216.

[61] Article 1, footnote 2 of the UNCITRAL Model Law on International Commercial Arbitration implies that the term *commercial* covers innominate contracts as well, i.e., contracts unknown to municipal law such as factoring, leasing, construction of works, consulting, engineering, licensing, exploitation agreements or concessions, joint ventures and other forms of industrial or business co-operation (distribution agreement, commercial representation or agency, investment, financing, banking, insurance); see A. Goldstajn, "Reflections on the Structure of the Modern Law of International Trade" in P.Sarcevic, ed., *International Contracts and Conflict of Laws* (London: Graham & Trotman/Martinus Nijhoff, 1990) at 16.

[62] He pointed out that business community to a limited extent can make a law. He called his theory the *droit corporatif international* by which he aimed the universal forms of unification through the combination of trade usages, arbitration, and general conditions. E. Lambert, "Sources du droit comparé ou supranational, législation uniforme et jurisprudence comparative" in *Recueil d'études sur les sources du droit en l'honneur de François Gény*, III (Paris: Sirey, 1934) at 499; cited from F. De Ly, *supra* note 31 at 208.

[63] C.M. Schmitthoff, *supra* note 9.

> since 1957,[64] occurred as the result of several conferences arranged by the International Association of Legal Science between 1958 and 1964. At these conferences lawyers from the State-planned and market economies met and found, to their surprise, that international trade was transacted in the same manner in their respective countries and that the same legal techniques where employed, despite the different economic structure of those countries.[65]

In his article[66] of 1961, he used the expression "new *lex mercatoria*" as a synonym for the new emerging international business law, with the emphasis on its autonomous and transnational character.[67] He expanded his theory in other articles and received supportive opinions from many scholars all over the world. His idea can be considered as a prevailing one among the other mercatorists.[68]

In 1962, the International Association of Legal Science, with the financial support of the United Nations Economic, Social and Cultural Organization, gathered some salient legal scholars and reporters from East and West at the London Colloquium on the New Sources of the Law of International Trade.[69] Regarding the historical perspective, Schmitthoff himself believes that there are some fundamental differences between the

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[64] C.M. Schmitthoff, "Modern Trends in English Commercial Law" (1957) in C.J. Cheng, ed., *Clive M. Schmitthoff's Selected Essays on International Trade Law* (Dordrecht: Martinus Nijhoff/Graham & Trotman, 1988) 3.

[65] C.M. Schmitthoff, "The Legal Organization of Commerce and its Relation to the Social Conditions" (1979) in Schmitthoff's Selected Essays, *ibid.* at 96.

[66] C.M. Schmitthoff, *supra* note 9.

[67] In his historical analysis, in 1981 he states that: "International trade law has developed in three stages. The first was the period of the medieval law merchant, the old *lex mercatoria*. The second was the incorporation of the medieval *lex mercatoria* into the national systems of law in the seventeenth to nineteenth centuries. And the third period is the contemporary phase which began in earnest after the Second World War." C.M. Schmitthoff, *supra* note 56 at 19.

[68] For the comprehensive analysis of Schmitthoff's theory of *lex mercatoria* and the other scholars see Chapter Two.

[69] The compilation of articles, reports, and summaries of discussions were published in C.M. Schmitthoff, ed., *supra* note 3.

modern and the medieval *leges mercatoriae*, on two important grounds. First, the international character of the new *lex mercatoria* has to be reconciled with the concept of national sovereignty. Secondly, the old *lex mercatoria* was developing from customs and usages and was unplanned and customary, while the modern *lex mercatoria* (in his opinion) is based the international conventions or model laws or documents deliberated by international agencies.[70] Immediately after Schmitthoff, the eminent French scholar, Berthold Goldman, admired him for his invention of the new *lex mercatoria* expression and began to develop his idea of new *lex mercatoria*. Goldman was even more bold than Schmitthoff in the sense that his *lex mercatoria* not only was self-regulated but also has created an autonomous legal system completely separated from national and international legal orders.[71] During this period, many scholars introduced their opinions about the existence, scope, and contents of *lex mercatoria*, topics which will be examined in the

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[70] C.M. Schmitthoff, *supra* note 56 at 21.; He also has stated:
The new *lex mercatoria* of our time is very different in character from the old *lex mercatoria* of the middle ages which gave us such important institutions as the bill of exchange, the charterparty and the bill of lading ... [t]he decisive feature of the medieval *lex mercatoria* is that it developed from usage and practice in an unpremeditated and almost haphazard manner until it became generally accepted customary law. The decisive feature of the modern *lex mercatoria* is that it is largely the deliberate creation of formulating agencies, such as UNCITRAL, Unidroit, the International Chamber of Commerce, the Hague Conference on Private International Law, the Comité Maritime International, the International Law Association. The feature which the old and the new *lex mercatoria* have in common is that they both intend to have supranational effect, although the former derives it from international customs and the latter, as we have seen, in the last resort from national sovereignty.

C.M. Schmitthoff, "The Legal Organisation of Commerce and its Relation to the Social Conditions" (1979) in Schmitthoff's Selected Essays, *supra* note 64 at 98. He also agrees with Philippe Kahn in what he has stated in this regard:

> C'ast dire que l'existence et le contenu de la *lex mercatoria* sont variables et que la *lex mercatoria* est finalement un accident d'histoire du droit, celle correspondant á une periode de transformation des rapports entre Etats. Cela ne diminue ni son intérêt, ni son importance.

P. Kahn, "*lex mercatoria* et Euro-Obligations" in F. Fabricius, ed., *Law and International Trade* (Frankfurt: Verlag, 1973) at 241.

[71] For the analysis of Goldman's theory see *infra* Chapter Two.

course of the present study.

C. Conclusion

By reviewing the historical background one may conclude that the old and new *lex mercatoria* are different from each other. The main difference between the old and the new *lex mercatoria* is that with the old the feudal system allowed merchants to establish their own courts and settle disputes with their own laws. At that time transactions were not like present day, large scale transactions and there was no notion of state. Feudal lords were not interested in being involved in such transactions. Commerce was uniquely in the hands of merchants, who constituted a distinct social class. At present, the structure of the world has changed. The emergence of States, their involvement in international trade and their control mechanisms over domestic and foreign trade cannot be ignored. The fundamental rules may be rooted in the old *lex mercatoria* but they must be adapted to modern circumstances. The current role of the state in international transactions is very important. They act, mainly in developing countries, as the most powerful participants in international and domestic trade. It is almost impossible for states to leave international commercial solely in the hands of merchants. It is increasingly difficult to distinguish between merchants and states because even states may act as a private party.

It is true commercial customs in the West after Middle Ages were developed to the extent that they were regulating the transnational commercial activities of merchant community and the arising disputes were settled on their basis. Yet, the application of this custom has been changed through the ages, and some mercatorists such as

Schmitthoff have pointed out that the old *lex mercatoria* and the new one are different from each other.[72] In respect of maritime law, which is the main part of *lex mercatoria*, it became evident that through the centuries it has been more improved and developed; there were notions in *Consolato del Mare* which did not exist before them. At present, there are some advanced usages and customs which can not be traced in old maritime law, such as container revolution in carriage of goods by sea. Therefore, one may conclude that commercial customs are also subject to change according to many economic, political, technological factors. On the other hand, customs after a while are to be codified to be useful and determined. This is exactly what is happening to the common law tradition as well, they are codifying their rules to prevent the vague and abstract interpretation of judicial precedents.

The emergence of nationalism was a historical, political necessity which might have some imperfections that have to be fixed. But it is not incorrect to declare that the emergence of nationalism was mutually beneficial for states and the merchant community as well. The major advantage is more security for the participants in international trade regarding the enforceability of awards and judgments, which is the main reason for the settlement of disputes. The merchant community at present counts on the support of national courts to enforce the awards and judgments without which merchants will

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[72] He has made this distinction in many of his writings. See C.M. Schmitthoff, "the Unification of the Law of International Trade" (1964) in Schmitthoff's Selected Essays, *supra* note 64 at 171; C.M. Schmitthoff, *supra* note 56 at 21. He distinguishes them on the following grounds: first, the medieval *lex mercatoria* was separated from national law, when the new *lex mercatoria* is subject to the reception of national sovereign. Second, the old *lex mercatoria* was for a member of a particular class, namely, merchants, where as the modern international trade is not exclusively for merchants and there are other participants who may play an important role in transnational trade. Third, the old *lex mercatoria* was unwritten and unplanned whereas the new one is systematized and formulated by international agencies.

confront major difficulties to ensure their rights. Therefore, the reception of nationalism is not that unpleasant for the law merchant. Although Schmitthoff has said:

> The great task of the modern *lex mercatoria* is to correct, to some extent, the effect of European nationalism which, in the words of Professor André Tunc,[73] was "the unfortunate result of the French codification and of the German historical jurisprudence."[74]

[73] A. Tunc, "English and Continental Commercial Law" (1961) J.B.L. 237.

[74] C.M. Schmitthoff, *supra* note 66 at 98.

CHAPTER TWO

Schools of Thought and Approaches

In the course of this chapter the main approaches toward *lex mercatoria* will be discussed followed by the impact of *lex mercatoria* on the contemporary legal literature. The main goal here is to present an overview of the latest developments of this theory. Given that the theory of *lex mercatoria* is unfocussed, it is impossible to deal with all aspects of the debate in the thorough manner each requires. Thus issues like mandatory rules, public policy, state contracts, delocalization, *amiable compositeur*, substantive rules, procedural rules, conflict of laws which require independent research will be dealt with only in a cursory manner.

Until recently, in continental Europe, the controversy on the *lex mercatoria* has been concentrated principally on two important concepts: international commercial arbitration and choice of law. In 1980, the most eminent European scholars gathered in Switzerland for the Basle symposium on the Law Governing Contractual Obligations. The most important part of that Symposium concentrated on discussion about *lex mercatoria*. The Basle Symposium can be considered as the major turning point for the development of the theory of *lex mercatoria*. The debate between the opponents and proponents has been described as "trench warfare".[75] In the United States, the debate has only recently begun and is heated as well.[76]

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[75] P. Lagarde, "Approche Critique de la *lex mercatoria*" in P. Fouchard & P. Kahn, Lyon-Caen, eds., *Le droit des relations économiques internationales Études offertes á Berthold Goldman* (Paris: Litec, 1982) at 124. cited from H.J. Berman & F.J. Dasser, "The 'New' Law Merchant and the 'Old': Sources, Content, and Legitimacy" in T.E. Carbonneau, ed., *supra* note 17 at 31 footnote 30.

[76] In the United States the expression law merchant perhaps has been more favourable. Recently the discussion on *lex mercatoria* was expanded specially by two colloquia sponsored by the Eason-Weinmann Center for Comparative Law (Tulane Law School) one in 1988 on "The Internationalization of Law and

No matter what *lex mercatoria* means in theory, in the reality of the commercial world, its meaning is constituted through trade usages, contract practices, and customs which are respected and applicable among international merchants. These contract practices and trade usages are the consequences of the efforts of commercial enterprises which have developed a high degree of uniformity for the sale of goods contracts. The Yugoslav Professor, Aleksandar Goldstajn, almost 30 years ago said:[77]

> The law governing trade transactions is neither capitalist nor socialist; it is a means to an end, and, therefore, the fact that the beneficiaries of such transactions are different in this or that country is no obstacle to the development of international trade.[78]

More interesting is that these contract practices are based on some common understandings which are generally protected by the contract law of all countries, despite the deep diversities in their national legal systems.[79] In almost all countries the legal rules governing international trade terms relating to allocation of risk of loss or damage to goods, clauses in bills of lading, in marine insurance policies and certificates, and in letters of credit, arbitration clauses, and other devices used in export and import are the same.[80] Every international enterprise that participate in international trade

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Legal Practice" and the other in 1989 on "The New Law Merchant (*Lex Mercatoria*): Legal, Arbitral, and Comparative Perspectives." The papers presented are published in (1989) 63 Tul. L. Rev. 431-709 and in T. Carbonneau, ed., *supra* note 17.

[77] In his report at the colloquium of Experts on the New Sources of the Law of International Trade held in London (1962) within the framework of the International Association of Legal Science under the auspices of UNESCO.

[78] A. Goldstajn, "International Conventions and Standard Contracts as means of Escaping from the Application of Municipal Law" in C.M. Schmitthoff, ed., *supra* note 3 at 110.

[79] H.J. Berman, *supra* note 23 at 235.

[80] *Ibid.*

transactions[81] understands these contractual practices.

Once it has been accepted that the above similarities exist, one is inclined to ask the following: Are the parties to an international contract allowed to submit their contract to a legal system other than a national one? Do international trade practices and usages constitute such a legal system? When and how does an international business practice or custom actually become law?[82]

On one side, the mercatorists argue that national courts and national laws are designed by national governments for domestic purposes. As a result, it is argued that these institutions usually do not have the expertise to adjudicate transnational commercial disputes and are rarely suitable for international transactions.[83] Reaching to the reality that municipal judges are not familiar with technicalities and complexities of international trade and that their expertise are limited to municipal law, the business community began to settle their dispute in arbitration tribunals. Such tribunals allow the parties to choose arbitrators with special expertise in trade and industry or other related areas.[84]

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[81] Some of the main differences between domestic and foreign trade are: Foreign trade normally requires the carriage of goods over relatively long distances, often by sea. It usually involves several parties in different countries. It is very often large-scale transaction. It raise the possibility of suit in a foreign court or arbitration tribunal. It usually bear extra commercial risks (transportation, failure to pay, fluctuation of exchange rates, etc.). It also may face special risks of various kinds of governmental intervention; thus, the foreign trade contract may face the risk of denial or revocation of export or import licenses, withholding of permission to transfer foreign exchange, seizure of goods in the event of war, and other risks of administrative action.

[82] U. Draetta, R.B. Lake, V.P. Nanda, *Breach and Adaptation of International Contracts: An Introduction to Lex Mercatoria* (New hampshire: Butterworth, 1992) at 6-7.

[83] M.T. Medwig, "The New Law Merchant: Legal Rhetoric and Commercial Reality" (Globalization of Commercial Law) (1993) 24 Law & Policy in Int'l Business 589 at 597.

[84] *Ibid.* at 598. But of course there are objections to the some of characteristics that Medwig and others count for arbitration as advantageous. for example, speed in arbitration procedure, less cost and less formalities now are questionable issues. And also there is a possibility of appeal on arbitration awards upon

Here, the debate on *lex mercatoria* begins between the autonomists and the positivists. According to the positivists view, national law is the only source of law. This school of thought is founded on the classical theory that any contract which is not made between states, as subjects of international law, must be based on the municipal law of some state.[85] Therefore, law, according to this view, means national law (made by nation-states). Their objection to the autonomists is that law merchant or the rules accepted by merchants of all countries are uncertain, vague and barely complete to constitute an objective legal system.[86]

In turn, mercatorists have some major and legitimate objectives. They are trying to crystallize a body of rules for international commerce that conform to parties' expectations, and to prevent the trap created when the otherwise applicable national law appears uncertain, peculiar, dramatically amended since the date of the contract, or otherwise unpredictable and unjust in its application to foreigners.[87]

It should also be noted that the European scholars have taken a different approach than the American scholars. In the United States, the law merchant is nothing more than trade usages, and is not suppose to obtain the position of law. While in Europe, the mercatorists are trying to restore the credibility of *lex mercatoria* as a governing "law" not as a mere trade usage. This is why there is not much clamour in the United States

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the provisions of arbitration institutes.

[85] H.J. Berman & F.J Dasser, *supra* note 75 at 21.

[86] *Ibid.* at 22.

[87] W. Graig, W. Park, J. Paulsson, *supra* note 28 at 606.

on *lex mercatoria*. Another reason is that in Europe there is a strong hierarchy among the sources of law which lead the *lex mercatoria* to play a role only when it acquires the value of law. In Chapter Three it will be shown that the mercatorists have been successful in France in establishing *lex mercatoria* as an autonomous set of legal rules or perhaps even as a legal system.

Through the examination of the main approaches toward *lex mercatoria* which constitutes the remainder of Chapter Two, it becomes patently evident that according to each school of thought the concept of *lex mercatoria* will be different and consequently its sources, contents, scope, and applicability will be vary.

A. Major Approaches

To have a comprehensive understanding about the theory of *lex mercatoria*, its contents and its scope, it is necessary to first identify the original approaches. Discussing the ambit of *lex mercatoria* without knowing these approaches can be bewildering. The examination of the original approaches will be followed by a brief survey of other scholars attitudes towards these concepts, presented on a country by country basis. Regarding the varieties in approaches, there is no consensus among the mercatorists about the sources or contents of *lex mercatoria* or the rules derived therefrom.[88]

By way of introduction, it should be mentioned that the heroes of emerging or new *lex mercatoria* are Professor Clive M. Schmitthoff from England and Professor

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[88] The problem is that when the specialists argue about *lex mercatoria*, they often are not talking about the same thing. For those who see *lex mercatoria* as a gap-filling device, it is nothing more than applying the national law. Therefore, it is necessary to know what are the different conceptions of *lex mercatoria* and then discuss the ambit of each one.

Berthold Goldman from France. Goldman's theory has been very influential in France (among scholars and also on the French international arbitration law[89]) and Schmitthoff's theory has influenced much international commercial legislation and consequently has gained a worldwide following. It is noteworthy to mention that during almost four decades Schmitthoff and Goldman (1960's - 1990's) have developed their ideas about *lex mercatoria*. Emphasis will be placed on their more recent writings and commentary.[90]

Defining the approaches in a systematic way will be very helpful specially to discern which concept of *lex mercatoria* has been opposed by whom. Here I will examine six main approaches that have justified the existence of modern *lex mercatoria*. The emphasis will be to demonstrate the main idea and key issues of each approach, as a thorough consideration of all six lines of thoughts is out of the scope of the present study. After examining these approaches I shall review the attitudes of some other scholars on a country by country basis to assess the impact of these theories on the contemporary legal literature.

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[89] See *infra* Chapter Three: the impact of *lex mercatoria* on national legislations.

[90]For example, Schmitthoff in 1968, shortly after UNCITRAL, to whose creation he had a contribution, said:

> The concept of a global and universal code of international trade law introduced into the national laws of all countries of the world is not only unrealistic at the present juncture but might easily become a straitjacket which could slow down the growth of commercial practices and usages and could stifle the continued creation of customary law by the international business community. We have to face the fact that the new law merchant which is emerging before our eyes is an entirely new phenomenon. When trying to understand it we must forget the victorian predilection of orderliness but take it as what it was in the Middle Ages and what it will be again: unsystematic, complex and multiform, but of bewildering vigour, realism and originality.
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> C.M. Schmitthoff, "The Unification of the Law of International Trade" (1968) J.B.L. 105, at 109.

But in 1981, he changed his idea on the desirability of codifying international trade law. He said that "the realisation of this aim is not utopian ..." C.M. Schmitthoff, *supra* note 56, 30-31.

1. *Lex Mercatoria* as an independent branch of the national legal system

Since 1956, Schmitthoff has written many articles and books regarding the ambit and sources of the international trade law[91] and in fact the theory of new *lex mercatoria* has been coined in his name. In his view, *lex mercatoria* and international business law are synonymous and in fact *lex mercatoria* is the source of international commerce:

> The new *lex mercatoria* has developed in response to the great expansion and intensification of international trade which was the result of technological, economic and political influences in the 20th century. It was noticed that the practices of merchants conducting international transactions were similar in all countries of the world, irrespective of their economic or political structure. This phenomenon led to the recognition of the modern *lex mercatoria* as the source of this similarity.[92]

At first glance, the difficulty in characterizing Schmitthoff's theory is that he has utilized too many different terms to describe *lex mercatoria*.[93] The concurrent use of terms such as 'autonomous', 'legal system', 'legal order', 'rules of law', 'law', 'universal trade usage', and 'transnational' lead to confusion with other conceptions introduced by other approaches. Therefore, it is necessary to explain what he means by these terms. When he refers to the *autonomy* of *lex mercatoria* he does not mean that *lex mercatoria* is detached from national laws. It is a factual concept, it is autonomous but this autonomy is defined and located inside the national legal jurisdiction and one may prefer to describe it as an independent branch of national law. Schmitthoff

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[91] For a collection of Schmitthoff's articles see C.J. Cheng, ed., *Schmitthoff's Selected Essays, supra* note 64.

[92] C.M. Schmitthoff, *International Trade Usages* (Paris: ICC Publication No. 440/4, 1987) at 43.

[93] C.M. Schmitthoff, *supra* note 64 at 208; *supra* note 3 at 64; The Unification of the Law of International Trade (1968) J.B.L. 105; *supra* note 56 at 18; "Nature and Evolution of the Transnational Law of Commercial Transactions" in N. Horn & C.M. Schmitthoff, eds., *Transnational Law of International Commercial Transactions* (Deventer: Kluwer, 1982) at 19.

distinguishes *lex mercatoria* from national law: "One of the features of this emerging system of international trade law is that it tends to be autonomous, *i.e.*, to provide its own regulation as far as possible, which is independent from the solutions provided by the various national legal systems".[94] Then he defines the position of *lex mercatoria* inside the domestic jurisdictions:

> The modern law of international trade is of an entirely different character. It is not international law in the sense in which that term is used in the law of nations; in particular, it is not applied by virtue of a supra-national authority. *The modern law of international trade is applied in the municipal jurisdiction by authority of the national sovereign but its sources are of international character.* They are what for the sake of brevity rather than accuracy has been termed international legislation and international customs.[95] (*emphasis added*)

Here Schmitthoff's attempt is conflict avoidance[96] in dispute settlement of international commercial transactions. He justifies this avoidance on the rational that merchants consider conflict of laws issues an unnecessary legal complication.[97] On the other hand, he does not consider *lex mercatoria* as a completely developed body of law:

> [...] the *lex mercatoria* - the new *lex mercatoria* - is still in the stage of development. We have no world law on international trade. We are in the course of developing it.[98]
> [...] we are here dealing with a situation which is in the course of development

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[94] C.M. Schmitthoff, "The Unification or Harmonization of Law by Means of Standard Contracts and General Conditions" (1968) 17 Int'l & Com. L.Q. 551 at 564; also see A. Goldstajn, "Usages of Trade and other Autonomous Rules of International Trade According to the UN (1980) Sales Convention" in P. Sarcevic & P. Volken, eds. *International Sale of Goods* (New York: Oceana, 1986) 88-90.

[95] C.M. Schmitthoff, "The Unification of the Law of International Trade" (1964) at 6.

[96] C.M. Schmitthoff, "Conflict Avoidance in Practice and Theory" (1956) 21 L. & Contemporary Problems 429 at 462.

[97] *Ibid.* at 429.

[98] Intervention during Basle Symposium, in F.E. Klein & F. Vischer, ed., *Basle Symposium on the Law Governing Contractual Oligations* (Basle: Helbing & Lichtenhahn, 1983) at 144.

> and we have to reconcile that with the fact that our legal systems are still firmly founded on the national basis.[99]

His next aim was unification of laws through international legislations and comparative law method. He believes that the proponents are trying to provide an academic system for something that exists and in fact to provide a philosophy of the thing.[100]

He describes the international legislation as a manifestation of *lex mercatoria* such as the Hague-Visby Rules, Hamburg Rules on carriage of goods by sea, Warsaw Convention on air transportation, UNCITRAL, and the like[101] are the result of the *lex mercatoria* on international legislations. He argues that the institutional practices or international commercial custom formulated by ICC like UCP are applied when the parties have adopted them, but he thinks they should be applied by courts even if the parties have not adopted them. Another example is FIDIC (contract relating to the construction of works).[102]

Schmitthoff's ideal is harmonisation of commercial law by uniform custom.[103] His theory gained strong support in general even in Eastern European countries.[104] However, his theory has received rigorous opposition as well. Professor F.A. Mann, also

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[99] *Ibid.*

[100] *Ibid.* at 121.

[101] *Ibid.* 120-121.

[102] Standard contract of the Federation internationale des ingénieurs - conseils.

[103] Basle Symposium, *supra* note 98 at 121.

[104] See generally the articles in C.M. Schmitthoff, ed., *supra* note 3; also I. Gal, "The Commercial law of Nations and the Law of International Trade" (1972) 6 Cornell Int'l L. J. 55.

from England, opposes Schmitthoff's theory in the following terms:

> [Schmitthoff] also said (and I believe he has condemned himself by it) that the so-called *lex mercatoria* cannot be a substitute for private international law, that in a choice of law clause is necessary in every well-drafted contract and that the most that a contract can achieve is to say that its terms shall be self-regulating in accordance with generally accepted trade practice. Now, Mr. Chairman, what are we talking about? Insofar as the parties are at liberty to agree to terms, nobody has ever doubted that they can do so.[105]

Schmitthoff, in an intervention in Basle symposium 1980, tried to clarify his theory of *lex mercatoria*:

> [...] the expression *lex mercatoria* has been used here in several meanings, in particular in two entirely different meanings. Some speakers, ..., have attributed to the term *lex mercatoria* a supra-national character. Others like myself would be a little hesitant and, while not denying that such a supra-national character may exist, I personally understand by *lex mercatoria* something entirely different. *I understand by that the uniform rules used by the commercial community in the world*, and I think it is purely a matter of form, whether they are laid down in conventions which have become national law, or whether they have been adopted by the parties by virtue of party autonomy. This is a matter of form. We should instead look at the *substance* and, as far as the substance is concerned, the Hague Rules in their original form and the Hague-Visby Rules have been accepted by some 80 countries. As regards these rules, there has never been a conflict of laws case, only problems of interpretation. We have here an excellent illustration of what actually the *lex mercatoria* aims at as *conflict avoidance*. There are two sources of national law which admit the establishment of a *lex mercatoria*, i.e. the adoption by way of convention or uniform laws of what has been internationally agreed and secondly the party autonomy as far as non-conventional customs are concerned.[106] (*emphasis added*)

In Schmitthoff's opinion commercial customs, in order to be binding, should be distilled into formal enactments. Therefore, the binding character of private documents such, as Incoterms, must drive from their inclusion in contracts and according to the party autonomy principle which is adopted by both national and international legislation. To support this conception he relies upon his experience with the application of

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[105] Basle Symposium, *supra* note 98 at 124.

[106] *Ibid.* 188-189.

Incoterms:

> [R]ecently I was concerned as an arbitrator in a dispute between a British and a German company and, very much to my relief and pleasure, I found - and this is very unusual for a British company - that in the interpretation of trade terms (and the term in question was the term F.O.B.) they had in fact written into their general condition that the F.O.B. in Incoterms should be applied. That, I call *lex mercatoria*. It maid it unnecessary for me to decide whether F.O.B. had the implications which English or German law provide (which I think incidentally would probably have been the same.[107]

> The problem of a conflict of laws is incomprehensible to the businessman. We must not get away from that. I would like to say [...] that is not only in the area of arbitration that these mercantile customs can express themselves. As Professor Lando has very rightly pointed out - and I entirely agree with what he has said - very often arbitrators do apply what generally is accepted by honourable and straightforward businessmen in the would and do in fact use the as what Professor Lando called substitute law.[108]

In 1987, he qualified *lex mercatoria* as a transnational legal order, distinct from both national and international law. One wonders if his thinking has become much closer to Goldman's theory[109] when he talks about the transnationality of *lex mercatoria*:

> The *lex mercatoria* is not part of international law (*jus gentium*). In the first resort its existence and authority is derived from tacit acquiescence of all national sovereigns to allow merchants to develop their own legal order in a sphere of optional law (*jus dispositivum*) in which the State is essentially disinterested. In this sphere the merchants have created an anational legal order, divorced, as far as possible, from the systems of national commercial law. The aim of this development is the avoidance of the conflict of laws, or at least its reduction, because merchants consider conflict of laws issues as an unnecessary legal complication.
> The peculiar feature of the *lex mercatoria* as the universal custom of international merchants is that *in the legal hierarchy it is placed between international law in its proper meaning and the national systems of law. It is best described as transnational law.*[110] (emphasis added)

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[107] *Ibid.* at 144.

[108] *Ibid.* at 145.

[109] See *infra* the next approach.

[110] C.M. Schmitthoff, *supra* note 92 at 44.

According to this recent view, the ambit of the *lex mercatoria* has considerably expanded due to the role played by international arbitrators whose activities are guided more by a mercantile mentality than courts. Again one may wonder whether Schmitthoff is trying to align himself with Professor Goldman's theory of *lex mercatoria* when he implies that *lex mercatoria* has acquired the character of an *autonomous legal system*, or a universal trade usage in the last twenty years, and thus has developed definite rules of law. He names some of these rules:

> The first is the principle that merchants in their international dealings shall observe the demands of *good faith*. Secondly, the principle that contracts have to be performed unless there is a valid excuse for non-performance (*pacta sunt servanda*) is a clear rule of the *lex mercatoria*. Thirdly, the rules of interpretation *ut res magis valeat quam pereat* and *contra preferentem* fall into this category. Fourthly, the rule of *estoppel* or *venire contra factum proprium* has to be mentioned. Fifthly, there may be a principle of "*equilibrium of reciprocal endertakings*".[111]

From practical point of view, he refers to a number of national judgments briefly and concludes that "the courts of several countries have recognized the admissibility of parties and arbitrators to refer to the *lex mercatoria* as an autonomous legal system when determining the law governing the contract".[112]

In his theory, when an arbitrator apply *lex mercatoria* he is deciding according to the law. The arbitrator qualifies *lex mercatoria* as a law (or rules of law). Therefore, if an arbitrator has been empowered as *amiable compositeur* and applies *lex mercatoria*

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[111] *Ibid.* at 47.

[112] *Ibid.* at 45.

he is still applying rules of law not equity.[113] In fact they are not precluded from applying law, they have extra discretion to apply the rules of equity where required.

2. *Lex Mercatoria* as a Transnational Legal System

Berthold Goldman defines *lex mercatoria* as an autonomous legal system which should be regarded as the governing law in transnational contracts.

> A set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law.[114]

In his view there are three different legal orders: national, international (by which he means public international law), and transnational.[115] In this system of classification Goldman qualifies *lex mercatoria* as the "third legal system". One of the main characteristics of this transnational *lex mercatoria* is that it is open to adoption of general principles derived from national and international legal orders. Although the lacunae associated with the incomplete body of transnational *lex mercatoria* are greater than those associated with the national legal system, it nevertheless possesses the status of law. In his view *lex mercatoria* has law-creating sources which are binding by

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[113] Responding the Professor Mann's objection. When an arbitrator is empowered to decide on a dispute without reference to any fixed body of laws and instead by relying on equitable reasons that arbitrator is called *amiable compositeur*. It is noteworthy to mention that such an arbitrator is not forbidden to decide according to a law. This term usually is used in continental Europe. On *amiable composition*, see generally J. Lew, *Applicable Law in International Commercial Arbitrations* (New York: Oceana, 1978) 510-12; E. Loquin, L'amiable composition en droit comparé et international (1980); W. Graig, W. Park, J. Paulsson, supra note 28, 137-141.

[114] B. Goldman, "Applicable Law: General Principles of Law - the *Lex Mercatoria*" in J.D.M. Lew, Contemporary problems in International Arbitration (London: Queen Mary College, 1986) at 116; He has also described it as: "[...] un droit 'transnational', réceptacle des principes communs aux droits nationaux, mais creuset aussi des régles spécifiques ques qu'appelle le commerce international." B.Goldman, "Frontières de droit et *lex mercatoria*" (1964) in *Archives de Philosophie du Droit* at 189.

[115] B. Goldman, *supra* note 36 at 22.

themselves, not by virtue of national law.[116] Since these sources are non-national they create a non-national legal system.

Although he talks about *autonomous lex mercatoria*, his approach ultimately is a positivist's one. He states, "*lex mercatoria* today fulfils in an effective manner the function of positivist law, and that national courts of the highest level have recognized it as such".[117] He also implies that the arbitral awards are "sufficiently numerous to prove that arbitral tribunals apply *lex mercatoria* on being positive law".[118] The reason he takes a positivist approach might be the fact that in civil law tradition, the role of custom is not the same as statutory law and custom is an subsidiary means of law which can not overrule legislation. Therefore, he tries to qualify *lex mercatoria* as the law that has a binding force. Goldman has made a great contribution to the development of this new emerging theory through many case notes and articles and still believes that *lex mercatoria* is an incomplete legal system which is developing.

3. Legal Pluralism

Some of the proponents of *lex mercatoria* have looked at it from the perspective of legal pluralism, a jurisprudential theory according to which any social group or community can create legal rules. From a legal pluralism point of view, the *lex mercatoria* can be considered as a legal system. Among the scholars who has taken this

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[116] B. Goldman, *supra* note 114 at 189.

[117] B. Goldman, *supra* note 36 at 7.

[118] *Ibid.*

approach is François Regaux from Belgium.[119] He believes that international commercial relations take place at a transnational level where multinational enterprises operate. Therefore, public international law and national law cannot effectively regulate them. In his view, the debate on *lex mercatoria* is something like a no-man's land where there exists ample room for self-regulation. In this way parties can avoid mandatory rules of national law as well as the conflict of laws associated with the rules through the arbitration clauses and choice of law.[120] Rigaux, however, admits that *lex mercatoria* is an incomplete legal system.[121] He doubts that trade usages and general principles of law can be formal sources of law and, thus, they should be applied by virtue of the applicable law.[122] He believes that comparative law is an important method in the formation of general principles of law. In Rigaux's view this method has four stages. First, collection of the information. Second, comparison of the legal systems. Third, identifying the similarities. Finally, a general principle can be produced from these similarities.[123]

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[119] See generally F. Rigaux, "L'internationalisation du droit étatique" (1983) Rev. Dr. Int. Comp. 97.; F. Rigaux, "Souveraineté des Etats et arbitrage transnational" in Le droit des ralations économiques internationales, Etudes offertes à Berthold Goldman (Paris: Litec, 1982) 277-278; F. Rigaux, Examen de quelques questions laissées ouvertes par la Convention de Rome sur la loi applicable aux obligations contractuelles, Cah. Dr. Eur., 1988, 318-319; F. Rigaux, Droit public et droit privé dans les relations internationales (Paris: Pedone, 1977).

[120] F. Rigaux, Droit public et droit privé dans les relations internationales (Paris: Pedone, 1977) at 350 and 399.

[121] *Ibid.*

[122] F. Rigaux, Examen de quelques questions laissées ouvertes par la Convention de Rome sur la loi applicable aux obligations contractuelles, Cah. Dr. Eur., 1988, 318-319.

[123] F. Rigaux, "Le râle de la comparaison dans la préparation de la réglementation juridique internationale" 334-346; see also R. Schlesinger, "The Common Core of Legal Systems, An Emerging Subject of Comparative Study" in XXth Century comparative and Conflicts Law, Legal Essays in Honour

Philip Kahn also takes this approach. In his theory of the *Société internationale des commerçants* (international commercial community), he emphasizes the sociological dimension of international business law which is capable of creating its own law. According to his sociological theory of law, any organized community is capable to create legal rules. Therefore, rules formed by the international business community are legal rules[124] and apply to international business community's players.[125] In this perspective, both the international community of States and the international business community generate law. Analysing N.I.E.O. (New International Economic Order), Kahn has come to the conclusion that the N.I.E.O. and *lex mercatoria* both constitute a legal system and might be reconciled.[126] He reconciles both theories on a jurisprudential basis (*i.e.*, the legal theory of legal pluralism). He concludes that the international community of buyers and sellers is well organized and has sufficient homogeneity and solidarity.[127] The same observation can be made for the banking

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of Hessel E. Yntema, Leyden, Sijthoff, 1961, 65-79.

[124] Kahn, *La vente commerciale internationale* (Paris: Sirey, 1961) 36 & 42.

[125] P. Kahn, *supra* note 70 at 224.

[126] For literature on the N.I.E.O. see N. Horn, "Normative Problems of a New International Economic Order" (1983) J. World Trade L. 338.

[127] P. Khan, *supra* note 124, 2 and 15; Khan, P., "La Convention de la Haye du 1er juillet 1964 portant loi uniforme sur la vente internationale des objects mobiliers corporels" Rev. Trim. Dr. Com. 1964 689 at 700; Khan, P., La Convention de la Haye sur la loi applicable aux ventes á caractére international d'objects mobiliers corporels, Clunet (1966) 301; P. Khan, " L'essor du non-droit dans les relations commerciales internationales et le contrat sans loi" in L'hypothése du non-droit, Commission Droit et Vie des Affaires, ed., (Liége: 1978) 231.

community in relation to the euro-bond markets.[128] However, in Khan's theory the autonomy of *lex mercatoria* might be restricted in case of international public policy and the *jus cogens*.[129]

4. *Lex Mercatoria* as a Judicial Process

Ole Lando introduces a different approach, one which is more practical. He argues that even the most developed legal system is imperfect in the sense that it does not provide a predictable answer to many legal questions. Therefore, the application of *lex mercatoria* should not be discounted or ruled out simply because of its lower degree of perfection. He emphasizes that national law are also unpredictable at times, the difference being the degree of unpredictability.[130] Lando describes *lex mercatoria* as modern 'judicial process' which is at the developing stage and arbitrators by inventory techniques and assistance of national laws can develop an advanced judicial mechanism.

In Lando's eyes, *lex mercatoria* is an autonomous body of rules recognized by State authorities. It is autonomous but made and promulgated by State authorities.[131] Although Lando advocates non-national awards based on *lex mercatoria*, he believes that there is an organic relation between *lex mercatoria* and national law. In fact, *lex mercatoria* operate as part of the national judiciary system. He has stated:

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[128] P. Kahn, *supra* note 70, 224-225; P. Kahn, "Lex mercatoria et practique des contrats internationaux: l'expérience française" in *Le contrat économique international* (Brussels: Bruylant, 1975) 173-176.

[129] P. Kahn, *supra* note 70 at 240; P. Kahn, *ibid.* at 266.

[130] O. Lando, "The Law Applicable to the Merits of the Dispute" in P. Sarcevic, ed., *Essays on International Commercial Arbitration* (London: Graham & Trotman/Martinus Nijhoff, 1989) 129 at 153.

[131] *Ibid.* at 147.

> By choosing the *lex mercatoria*, the parties oust the technicalities of a national law which they - or one of them - do(es) not know. Moreover, they avoid rules which are unfit for international contracts and, finally, those involved in the proceedings - parties, counsels, and arbitrators - plead and argue on an equal footing: nobody has the advantage of having the case pleaded and decided by his own law and nobody is handicapped by having it governed by a foreign law.[132]

He responded to the objection that *lex mercatoria* is too vague, incomplete, and ambiguous when he entered into the discussion at the Basle Symposium in 1980:

> Today it is not so shocking as it was once to acknowledge that when deciding a case the judge does not *apply* the law; he also *creates* new law, sometimes for the instant case and sometimes also for the future. Now we all agree that in any legal system - even in the most developed ones - there are contingencies and problems which the legislators have not thought of. When such cases come up the judge has to act like a social engineer and create new law. Therefore, it is not a valid objection that the is not a complete system in the sense that it does not give an answer to all problems, that it forces the arbitrator to add something to it when he "applies" it. Among the more than two hundred legal systems of the world there are several the commercial law of which is not as developed as *lex mercatoria*. The answer to the objection that the *lex mercatoria* is undeveloped is, as has already been said: let us then develop it![133]

Professor Ole Lando believes that a "stateless" award does not necessarily mean a "lawless" award and should be enforceable under the New York Convention.[134]

5. *Lex Mercatoria* as a Historical Jurisprudence

Professor Harold J. Berman has introduced a new more conservative approach. He insists on the historical background of commercial law and declares that *lex mercatoria* is an autonomous body of law which has an ongoing character and which has been developing continuously since the Middle Ages. Although he also emphasizes the

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[132] O. Lando, "European Contract Law" in P.Sarcevic, ed., *International Contracts and Conflict of Laws* (London: Graham & Trotman/Martinus Nijhoff, 1990) at 7.

[133] Interventions at Basle Symposium, *supra* note 98 at 141.

[134] O. Lando, "The Lex Mercatoria in International Commercial Arbitration" (1985) 34 Int'l Comp. L.Q. 761-763.

autonomous character of *lex mercatoria*, his perspective is completely different from Schmitthoff and even from Goldman. In Berman's view, even Goldman has taken a positivist approach to justify *lex mercatoria* as an autonomous body of law.[135] Berman tries to find a safer ground between these two schools of thought. To do so he introduces *lex mercatoria* as *customary law*, not as a legal system. On the other hand, for two main reasons he rejects the positivist rationale that a law should be created by nation-states. First, he argues that historical facts indicates that *lex mercatoria* antedates the national laws. Second, in merchant communities this body of rules seems to be binding *per se*[136] which is a "principal source of the law governing export and import transactions".[137] He states:

> Nobody denies that there is a body of international rules, founded on the commercial understandings and contract practices of an international community principally composed of mercantile, shipping, insurance, and banking enterprises of all countries. That body of rules antedates the emergence of strictly separated national legal systems, it has never ceased to exist; moreover, it is continually being developed. It shall be recognized by national legal systems as *customary law* and, together with legislation, precedent or doctrine, and equity, as one of the four main sources of the national law itself.[138] (*emphasis added*)

He emphasizes importance of custom as a source of law among others (legislation, equity, and precedents). Yet, he believes that in case of conflict statutes must prevail

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[135] According to the personal notes based on the interview that I had with Professor H.J. Berman in February 1994.

[136] H.J. Berman, *supra* note 23 at 302. He also has referred to C.K. Allen, *Law in the Making* (Oxford, 1964)

[137] *Ibid.*

[138] H.J. Berman & F.J Dasser, *supra* note 75 at 32.

over custom.[139] Therefore, in Berman's theory national law is respected and prevails in case of conflict. In reality, when a dispute arises merchants themselves count on the help of a national legal system.[140] As Berman writes, "custom and contractual agreement cannot regulate all questions which may arise from a commercial transaction and merchants welcome the backing of a national law when *lex mercatoria* fails to give clear and satisfying answers".[141] In his theory there is a hierarchy in which legislation is the superior source and custom can play a role when legislation leaves room for it.

He believes that the universality of international commercial law derives not only from the common problems of the international merchants, but also from the fact that the participants in international transactions (merchants, shipowners, insurance underwriters, bankers and others) whether they act as individuals, corporate entities or as state agencies, form a *transnational community* which has had a more or less *continuous history* for some nine centuries.[142]

According to this historical perception, mercantile law has over time been generated by the mercantile community. And consequently this same community continues to develop present day mercantile law through their contract practices, the common understandings on which they are based, through regulations of self-governing trade associations, and through decisions of arbitral tribunals to which their disputes are

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[139] H.J. Berman, "Toward an Integrative Jurisprudence: Politics, Morality, History" (1988) 76 Calif. L. Rev. 779

[140] H.J. Berman, *supra* note 23 at 304; H.J. Berman & F.J. Dasser, *supra* note 75 at 32.

[141] *Ibid.*

[142] H.J. Berman, *supra* note 23 at 236. See also H. Berman, *supra* note 30 Chapter 11 (Mercantile Law).

submitted. These contract practices, understandings, regulations, and decisions constitute a body of *customary law*[143] which is the foundation on which national and international commercial legislation has been and continues to be built.[144]

He blends three schools of thought, legal positivism, natural-law theory, and the historical school, as he believes that each of them has isolated a particularly important dimension of law and puts them together into a common focus. He calls this combination "*integrative jurisprudence*".[145] According to his theory (historical jurisprudence) the customary norms and practices of the mercantile community constitute the principal source of national and international commercial legislation which should be understood to have had a legally binding force prior to their incorporation into legislation.[146]

> A second reason why the law merchant continues to thrive even under the theory of supremacy of national law is that national commercial law is itself built historically on the foundation of the law merchant and continues to adjust itself, albeit often very slowly, to the changing patterns and norms of behaviour of the international mercantile community. Both national and international legislators have recognized the need to accept *international rules* concerning instruments of transnational commerce such as bills of lading, marine insurance policies and certificates, bills of exchange, and letters of credit as well as concerning contract

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[143] Professor Goldman defines *lex mercatoria* as "customary transnational law" and states that "[t]he criterion for determining (its) ambit does not solely reside in the object of its constituent elements, but also in its origin and its customary and thus spontaneous nature." B. Goldman, *supra* note 36 at 6.

[144] H.J. Berman, *supra* note 23 at 237. The influence of the customs and practices of the international community of merchants on the development of national and international commercial law was the subject of a 1976 conference sponsored by the International Institute for the Unification of Private Law. 1 & 2 UNIDROIT, *New Directions in International Trade Law* (1977).

[145] H.J. Berman, *supra* note 139 at 779.

[146] H.B. Berman & F.J. Dasser, *supra* note 75 at 26. This is completely different from Schmitthoff's view when he says: "modern *lex mercatoria* is the deliberate creation of formulating agencies and is expressed in international conventions or model laws or in documents published by such bodies as the International Chamber of Commerce." C.M. Schmitthoff, *supra* note 56 at 21.

terms such as arbitration clauses, and, of course, price, delivery, and other terms of international sale. In addition, international treaties have codified much of this law.

6. *Lex Mercatoria* as Gap-Filling Method

The most popular view of *lex mercatoria* has been introduced by three ICC arbitration specialists W. Lawrence Graig, William W. Park, and Jan Paulsson. In their recent book[147] they have grouped proponents of *lex mercatoria* under three headings; first, those who advocate *lex mercatoria* as an autonomous legal order, second, those who see *lex mercatoria* as a body of rules, and third, *lex mercatoria* as usages in international trade whose function is gap filling. They themselves belong to the third line of thought which appears to be more practical than the others. In their view, *lex mercatoria* is "a complement to otherwise applicable law, viewed as nothing more than the general consolidation of usages and settled expectations in international trade".[148] Therefore, in this modest sense, *lex mercatoria* is seen essentially as an expansion of the concept of usages to encompass particular contracts whose specificity is located in the fact that they are transnational.[149]

Although one chapter of their book is the analysis of the *lex mercatoria*, unfortunately they do not specify which line of thought belongs to whom. Their views are constituted to a large extent as analysis of Lord Justice Mustill's article.[150] Their

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[147] W. Craig, W. Park, J. Paulsson, *supra* note 28 Chapter 35, 603-641.

[148] *Ibid.* at 603.

[149] *Ibid.* 614-615.

[150] M. Mustill, *supra* note 32.

category is so general that one who is not familiar with the subject may have difficulty identifying different theories. For example, it is difficult to categorize whether Schmitthoff fits in the first group or the second one.

According to them, the ICC has had a great contribution to the development of *lex mercatoria*. They have listed several principles applied by ICC arbitration tribunals which are more in conformity with the parties' expectations than the specific national laws.[151] Finally they have made some important remarks on the concept of "arbitral justice" with the emphasis on party autonomy or freedom of contract:

> When private parties regulate their own legal relationships, the State has in essence delegated to individuals the power to establish law, within certain limits. Party autonomy allows the international business community to create its own regulatory environment through contractual interaction, minimising the impact of national law. Moreover, by means of contract, the business community can establish adjudicatory bodies both to interpret and apply a supplementary law based on non-national commercial custom.[152]

Then they become more supportive to *lex mercatoria*:

> ICC arbitration seems particularly well suited to application of the new *lex mercatoria*. Drawn from a variety of countries, arbitrators are less preoccupied with national concerns than judges, and may be expected to possess a less parochial perspective, emphasizing good faith, general principles of law and the particular equities of the situation.[153]

It should be mentioned that in practice their point of view seems to be prevailing.

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[151] They have listed 18 principles which mostly are the ones Lord Mustill has discussed in his article, except two principles: 1) Exceptions to *pacta sunt servanda*. 2) *Culpa in contrahendo* (wrongful acts while entering into a contractual relationship). In their opinion, these two principles seem to be more problematic, whether they are fuzzy or because they are likely to be neutralized by conflicting norms. For details see *supra* note 28, 621-632.

[152] *Ibid.* 639-640.

[153] *Ibid.* at 640.

B. The Impact of the *Lex Mercatoria* on the Contemporary Legal Literature

After the above observations on the approaches towards the new *lex mercatoria*, it becomes clear that to form a unified definition is almost impossible, because we are not talking about one *lex mercatoria*. Therefore, discussing the sources, contents, and ambit of *lex mercatoria* will be different according to each of the above schools of thought. Before making any conclusions, a brief survey of other scholars' opinions of the *lex mercatoria* will be presented. It will be especially useful to observe the impact of this theory on the legal literature. In the next chapters its impact and influence will be examined on legislation and case law.

1. *England*

It is interesting to mention that the leader of opponents, Professor Frederick Alexander Mann who even rejects the existence of *lex mercatoria*, and Professor Clive M. Schmitthoff who first announced the emergence of the "new *lex mercatoria*", are both from England. The majority of other English scholars can be categorized in between the two, but the prevailing opinion is a scepticism of *lex mercatoria* among English scholars. Some of the English scholars who have positive attitude towards *lex mercatoria* are Alan Redfern, Martin Hunter, Lord Mustill, Julian D.M. Lew. Here some remarks will be made as to Professor Goode, Mann, and Lord Mustill.

Professor Roy Goode from Oxford Law School in a 1992 article,[154] demonstrates another dimension of the debate. While he is not opposed to *lex*

[154] R. Googe, "The Adaption of English Law to International Commercial Arbitration" (1992) 8 Arb. Int'l 1. [The article is a revised and slightly expanded reproduction of his lecture at Queen Mary and Westfield College, University of London, on 5th June 1991.]

mercatoria, he is trying to reconcile *lex mercatoria* with the "domestication" of international contracts.[155] He argues that the duty of an arbitrator is to apply a national law as if he were a judge. Regarding the English judicial attitude toward transnational contracts he states: "when English lawyers speak of international trade law they do not mean the *international* law of trade, they mean the *national law* governing international trade transactions". *Lex mercatoria* in his vision needs the formal blessing of the national law. *Lex mercatoria* as international trade usages are facts which, when they are adopted, become normative rules.[156] He opposes the popular opinion "which holds that even without the authority of the contract an arbitrator is free to apply the conflict rules he considers appropriate and to disregard the curial conflict rules" by referring to the Rome Convention on the law applicable to contractual obligations. The Rome Convention mandates the application of national law (unless the parties otherwise agree) and the utilization of Conventions themselves to form part of transnational commercial law. In fact he is following the path of Lord Mansfield who absorbed *lex mercatoria* into

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[155] Yet, he opposes Goldman's theory of *lex mercatoria* as a third legal system. He states: "Let me say at once that I do not myself believe in a body of customary international commercial law as an independent legal norm 'floating in the transnational firmament' to use the graphic words of Sir Micheal Kerr when rejecting the concept of a stateless arbitration procedure." ibid at 12. For the case see Bank Mellat v. Helleniki Techniki S.A. [1984] Q.B. 291, at 301 and also *infra* Chapter Four.

[156] He states: "It is clear that uncodified international trade usages, so far as identifiable, are capable of being given normative force by a national or supranational legal system and to that extent constitute a modern *lex mercatoria*. But the usages which are said to constitute the *lex mercatoria* do not penetrate a contract or a legal system merely by being there. They have to be triggered by a legally adoptive act - express or implied contractual incorporation, adoption by legislation or self-executing Convention or reception by the courts of a national or supranational legal system. Until so adopted they exist merely as facts, not as normative rules. No party can be required to have imposed upon him rules for which he has not contracted and which neither emanate from a national or supranational legal system nor have received the imprimatur of that system. Even the normative effect of the old law merchant was dependent upon its acceptance into national legal systems, an acceptance everywhere qualified by certain preconditions grounded on public policy. *Ibid* at 13.

common law tradition in 17th century.[157]

Professor Frederick Alexander Mann, who can be considered as the leader of opponents of the *lex mercatoria*, rejects the whole idea of new *lex mercatoria* on the basis of the strict positivist approach. He argues that the purposes of this doctrine are (1) to eliminate the search for the proper law of the contract or generally the conflict of law rules, (2) to substitute "equity" for rules of law, to rely on that which is considered fair and conforms to usage. Thus, he states:

> It is difficult to imagine a more dangerous, more undesirable and more ill-founded view which denies any measure of predictability and certainty and confers upon parties to an international commercial contract or their arbitrators powers that no system of law permits and no court could exercise.[158]

In his opinion the truly international arbitrations are different from *lex mercatoria* or floating arbitration. In fact truly international arbitrations are arbitrations between States and other international persons.[159] He believes that there should be a direct link between the international commercial arbitration and the seat of arbitration (*lex loci arbitri*). In his opinion the arbitrators should apply the law of place of arbitration. If

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[157] He concluded: "I believe it to be important that as part of the European market we do not allow ourselves to become isolated from current thinking merely because ours is a common law tradition. When our courts decide to jettison a long hallowed principle as running counter to generally modern thinking, then, while in form they merely declare what the law is now seen to be , the reality is that they are exercising a power to create a new rule. Similarly, when they reach out to the doctrine or jurisprudence of other jurisdiction to find a solution to a problem which our own case law has not had occasion to address, they are acting creatively in admitting into English law that which has become received wisdom elsewhere. In so doing they are not applying English law as reinterpreted in the light of internationally recognised principle and practice. And if it is open to a national judge to draw on external influences to interpret national law, why should it not be equally open to an arbitrator, whose function is to apply a national law as if he were a judge? *Ibid* 13-14.

[158] F.A. Mann. "England Rejects 'delocalized' Contracts and Arbitration" (1984) 33 Int'l & Comp. L.Q. 193 at 197.

[159] F.A. Mann, *Studies in International Law* (1973) at 256.

they apply *lex mercatoria* in fact they have acted as *amiable compositeurs* (or *ex aequo et bono*) without having been authorized by the parties to do so.[160] He has stated:

> What this so-called *lex mercatoria* is or should be is a complete mystery. It is usually said that it comprises uniform law embodied in or derived from international conventions, trade usages, custom and ideas of business fairness, efficacy or reasonableness. The object frequently is to dispense with the conflict of laws which is said to create insoluble problems and to lead to artificial and unrealistic results. It is hardly necessary to emphasise that no such body of law exist.
> Nor does custom, trade usage or business practice such as the international chamber of Commerce's code of rules on documentary credits exist otherwise than within the ambit of a given national system of law.[161]

In another place he addresses *lex mercatoria* as a "curious animal" which makes its appearance in order to justify a decision which is without a legal basis and which may be contrary to law.[162] During the interventions at Basle Symposium, Mann describes a case he was involved with and concludes that it demonstrates the uselessness and danger of the application of *lex mercatoria*:

> I had the following case which I can summarise very shortly. A Belgian firm had appointed an English firm its sole agent. It terminated the contract. The English firm brought a case before a very distinguished arbitration tribunal, consisting of a Parisian *avocat* as chairman, a Belgian *bâtonnier* (not M. van Hecke) and an English lawyer of great distinction. The question was: was the contract subject to Belgian law or English law. If it was subject to English law, the English agent, the plaintiff, was entitled to nothing. If the contract was subject to Belgian law, he was entitled to very large amount of compensation. So we argued the case before these arbitrators at great length about the applicable law and, a fortnight later, we got an award. The award was conceived in the following terms: the facts are as follows; the parties have argued what law should apply; we need not decide the question; we apply the *lex mercatoria* and award the English plaintiff one million Belgian Francs. Now,..., both parties were absolutely furious. The English agent was furious because he said, "either I'm entitled to nothing or to many million: I'm not in a position where I need a tip

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[160] F.A. Mann, "The Proper Law in the Conflict of Laws" (1987) Int'l & Comp. L.Q. 448 at 448.

[161] F.A. Mann, "Private Arbitration and public policy" (1985) 4 Civil Justice Quarterly 257 at 264.

[162] *Ibid.* at 265.

> of a million Francs". The Belgian was furious and resisted the application for an *exequatur* before the *Tribunal de Commerce* in Brussels. He lost. He appealed to the *Cour d'Appel* in Paris. He lost again. That is the *lex mercatoria* in practice.[163]

Lord Justice Mustill wrote a vital article in 1987 which attracted remarkable attention among commentators. Although at the first glance it appears that he criticizes the theory of *lex mercatoria*, he himself contributes to the concept and tries to discern the principles derived from this new emerging idea. On several occasions, he has supported *lex mercatoria*, but with his particular English intelligence that always is surrounded by ambiguity. In 1987, he stated:

> [T]he rules of the *lex mercatoria* have a normative value which is independent of any one national legal system. The *lex mercatoria* constitutes an autonomous legal order.[164]

In 1993, writing for the majority of the House of Lords, in the Channel Tunnel case he stated: [i]t is by now firmly established that more than one national system of law may bear upon an international arbitration".[165]

2. *France*

In France the prevailing opinion is in favour of the *lex mercatoria*. In fact the proponents of *lex mercatoria* under the auspices of Professor Goldman have influenced the international arbitration law of France to the point that in 1991 the Supreme Court of France upheld the application of *lex mercatoria*[166] - a decision which has been

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[163] F.A. Mann, intervention during the Basle Symposium, *supra* note 98, 174-175.

[164] M. Mustill, *supra* note 32 at 88.

[165] [1993] 2 W.L.R. 262 at 281; see *infra* Chapter Four, *Channel Tunnel* case.

[166] See *infra* Chapter Four, *Valenciana* case.

interpreted as putting an end to the debate surrounding *lex mercatoria* in France.[167]

The theories of Goldman and Kahn were examined in the above. Among the other French scholars[168] who support the theory of *lex mercatoria* are Fouchard, Loquin, Loussouarn, Rubellin-Devichi, Toubiana, Deby-Gérard, Leymarie, Leboulanager, Simon, Oppetit, Jacquet, and Derains.[169]

However, other French Scholars opposed *lex mercatoria* such as Batiffol, Lagarde, Mayer, Béguin, Delaume, and Kassis.[170] Kassis and Delaume have strongly opposed to mercatorists from different perspectives. Delaume considers the legal nature of state contracts and come to the conclusion that *lex mercatoria* is a myth.[171] Kassis opposes Goldman concerning the legal nature of trade usages and customs. He argues that trade usages can not have a binding force unless they are incorporated into the contract.[172]

3. *Switzerland*

Among the Swiss proponents of *lex mercatoria* Professor Pierre Lalive is the most

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[167] Judge Jean-Pierre Ancel (*Cour de Cassation*); see, J.P. Ancel, "French Judicial Attitudes Toward International Arbitration" (1993) 9 Arb. Int'l 121, at 128.

[168] As Goldman and Kahn have worked at the University of Dijon, their ideas influenced Motulsky, Stoufflet, Fouchard, Jacquemont, Loquin, and Jehl. For their Publications see F. De Ly, *supra* note 31 at 220-221 footnotes 67-70.

[169] For the list of their publications refer to the bibliography.

[170] *Ibid.*

[171] G. Delaume, *Law and Practice of Transnational Contracts* (New York: Oceana, 1988); G. Delaume, "The Myth of the *Lex Mercatoria* and State Contracts" (1990) in T.E. Carbonneau, ed., *supra* note 17 at 77; G. Delaume, "The Proper Law of State Contracts and the *Lex Mercatoria*: A Reappraisal" (1988) 3 ICSID Rev. F.I.L.J. 79.

[172] A. Kassis, *Théorie Général des Usages du Commerce: droit comparé contrats et arbitrage internationaux lex mercatoria* (Paris: L.G.J., 1984)

famous. His point of view is more practical and he sees *lex mercatoria* as general principles of international commercial law:

> There is little doubt that a number of essential principles of the international law of arbitration have acquired the character, or the "dignity", of general principles of the law of international trade; arbitrators no longer hesitate to apply them as a common law (and the terminology they use appears of little relevance, *e.g.*, a substantive private international law common to several States or common to both international law and the private international law of the States, or "*lex mercatoria*", etc.).[173]

Accordingly, he argues that it is no matter if the *lex mercatoria* constitutes a legal system or not as the main reason for its existence is its applicability:

> It has been contended by some writers, mostly specialists of public international law, that the "usages of international trade", the general principles, "transnational law or the *lex mercatoria*, do not constitute *per se* a "legal system". This objection is hardly convincing: on the one hand, neither the parties, nor the arbitrators, nor state judges care very much in practice whether or not the rules of principles applied in arbitration do constitute "a system" or not. On the other hand, and more decisively, it is irrelevant ,..., whether the *lex mercatoria* does constitute or not a "system" or a *complete* whole, inasmuch as the domestic legal order itself cannot be considered as "complete" either.[174]

Felix J. Dasser,[175] who has followed Professor Harold Berman's ideas, deserves to be mentioned. Dasser has made a distinction between American and European approach towards *lex mercatoria*.[176] In the first category, today's *lex mercatoria* is a continuation of the medieval law merchant and therefore, it falls in the scope of

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[173] P. Lalive, "Transnational (or Truly International) Public Policy and International Arbitration" in P. Sanders, ed., *Comparative Arbitration Practice and Public Policy in Arbitration* (Deventer: Kluwer, 1987) 257.

[174] *Ibid.* at 312.

[175] F.J.Dasser, *Incoterms and Lex Mercatoria: Applicability of incoterms in the absence of express party consent?* (LL.M. Thesis Harvard University, 1990) [unpublished].

[176] He introduces this distinction as "American law merchant versus European *lex mercatoria*". *Ibid.* at 35.

commercial law, not of choice of law.[177]

On the other hand, Frédéric-Edouard Klein[178] and Frank Vischer,[179] Professors at Basle Law School are sceptical of the theory of *lex mercatoria* having criticized it during interventions at the Basle Symposium in 1980. In the same vein, Professor Klein writes in a 1982 article that:

> [I]t (*lex mercatoria*) poses serious problems, notably as to whether, by referring to this "transnational customary law", the parties to a contract may avoid the application of the mandatory rules of municipal legal systems. The question was the object of interesting discussions in the course of a recent symposium organized by the Institute of International Law and International Relations of the University of Basle, from which it emerged that the *lex mercatoria* is far from being universally accepted.[180]

4. *The Netherlands*

The most famous proponent of *lex mercatoria* in the Netherlands is professor Pieter Sanders[181] who influenced the new Dutch international Arbitration Act.[182] Another Dutch mercatorist is P. Wery. Among the critics of *lex mercatoria* are P. Vlas,

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[177] He mentions that the major treatises on American choice of law do not even mention *lex mercatoria* or law merchant. *Ibid.* at 36.

[178] F.E. Klein, "The Law to Be Applied by Arbitrators to the Substance of the Dispute" in J.C. Schultsz & A.J. van den Berg, eds., *The Art of Arbitration* (Deventer: Kluwer, 1982) 189.

[179] F.E. Klein, & F. Vischer, eds., *Basle Symposium on the Law Governing Contractual Obligations* (Basle: Helbing & Lichtenhahn, 1983)

[180] F.E. Klein, *supra* note 178 at 196.

[181] Among his publications are: P. Sanders, "The Introduction of UNCITRAL's Model Law on International Commercial Arbitration into German Legislation" in Glossner, ed., (1991) 4 J.P.S. Heidelberg 121; P. Sanders, "The New Dutch Arbitration Act" (1987) 3 Arb. Int'l 194; P. Sanders, "The New Dutch Arbitration Act of 1986" (1987) 42 Bus. Lawy. 321 & 403; P. Sanders & A.J. Van den Berg, *The Netherlands Arbitration Act 1986* (Deventer: 1987).

[182] See *infra* Chapter Three, under the Netherlands legislation.

A.V. Struyken, Robert van Delden[183].

5. *Belgium*

It has been mentioned that the French speaking authors in Belgium have advocated Berthold Goldman's theory but in the Dutch speaking regions the prevailing opinion is against *lex mercatoria*.[184] Among the proponents are François Rigaux, Edouard Lambert, Lambert Matray. Among the Dutch speaking who have criticized *lex mercatoria* are G. Van Hecke, Hans Van Houtte, J. Limpens, E. Wymeersch. The approach of François Rigaux was discussed in first part of this chapter. Filip De Ly can also be regarded as opponent of *lex mercatoria*. He undertook a comprehensive study on the sources of international business law and examined the recent theories in this regard. After examining all the recent theories on the sources of international business law, he rejects the theories of Schmitthoff and Goldman on the basis that *lex mercatoria* has insufficient rules of its own (including conflict rules), cannot define its scope, has hardly any sources, cannot fill its own gaps and has hardly any mandatory rules. In his view, references to *lex mercatoria*, general principles of law, or transnational rules in contracts should be interpreted as rules incorporated into the contract which may be applied by virtue of the applicable national law.[185]

6. *The United States*

In the United States the debate on *lex mercatoria* has been informed by the work

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[183] R. van Delden, *Lex Mercatoria of Jus Commune*? (Deventer: Kluwer, 1986)

[184] F. De Ly, *supra* note 31 at 240.

[185] F. De Ly, *supra* note 31 at 320.

of Professor Thomas E. Carbonneau, the Director of the Comparative Law Institute of Tulane University. Among the United States proponents are Harold J. Berman, Thomas E. Carbonneau, Arthur Taylor von Mehren, Andreas F. Lowenfeld, and among the critics are professor John Honnold, Keith Highet, William Park, Hans Smit. The theories of professor Berman and Park were discussed in the first part of this chapter. Here some observations will be made on the opinions of Professors Lowenfeld, Von Mehren, Carbonneau.

Lowenfeld, with reliance on his own experience, believes that *lex mercatoria* supplies the solution to a particular issue, without necessarily governing all aspects of the transactions.[186] He further expresses that:

> *Lex mercatoria*, as I see it, can furnish an alternative to a conflict of laws search which is often artificial and inconclusive, and a way out of applying rules that are inconsistent with the needs and usages of international commerce and which were adopted by individual states with internal, not international transactions in mind.[187]

He does not agree with Professor Goldman's theory on *lex mercatoria* which he calls "abstract justice", nor does he see *lex mercatoria* as *amiable compositeur*.[188] He expresses the opinion that in most cases the choice of law is clear, either because the parties have specifically supplied it or because one state simply has the closest and most real connection (English formulation) with the particular transaction. Lowenfeld states that he had never sat on a case in which the parties have chosen *lex mercatoria* to govern

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[186] A.F. Lowenfeld, "*Lex Mercatoria*: An Arbitrator's View" in T. Carbonneau, ed., *supra* note 17 at 50 [first appeared in (1990) 6 Arb. Int'l 133].

[187] *Ibid.*

[188] *Ibid.* at 46.

their contract. In his experience, agreement without a choice of law clause are common (negative choice). He argues that whatever the reason, usually unknown, it can not be interpreted that the parties intended to withdraw their relationship from national law, or that they meant that *lex mercatoria* should apply.[189]

> My view is that *lex mercatoria*, derived from the law of many states and international conventions (in both senses of that word), is a useful tool for arbitrators (and I would add for judges) when faced with dissatisfying answers from their initial inquiries. It is, in other words, an additional option in the search for the applicable law, not an alternative to that search.[190]

Professor A.T. Von Mehren is a conflict of law methodologist who is not in complete agreement with Goldman. While he suggests that in time a lex mercatoria of conflict of laws may develop, he rejects the application of anational substantive rules in international commercial arbitration.[191] Professor J. Honnold adopts the unification of laws approach and believes the idea of *lex mercatoria* is still "fuzzy".[192]

Professor Thomas E. Carbonneau who is one of the eminent scholars in arbitration field is more bold than the other American mercatorists in advocating the idea of anational arbitration. He calls arbitration "the vehicle for the rebirth of justice (and of itself) in the next modern world".[193] According to him, application of international

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[189] This is totally different from Goldman's theory.

[190] A.F. Lowenfeld, *supra* note 186 at 51.

[191] A.T. von Mehren, "To What Extent is International Commercial Arbitration Autonomous?" In B. Goldman, ed., *Le droit des relations économiques internationales* (Paris: Litec, 1982) at 226-27.

[192] According to my interview with professor John Honnold in February 1994.

[193] T.E. Carbonneau, "National Law and the Judicialization of Arbitration: Manifest Destiny, Manifest Disregard or Manifest Error" in R.B. Lillich & C.N. Brower, eds., *International Arbitration in the 21st Century: Towards "Judicialization" and Uniformity?* (New York: Transnational, 1994) 114 at 115.

trade usages by most of the arbitration rules and some national laws and also the notion of *amiable composition* "invite international arbitrators to devise rules for international commercial justice that are entirely independent of governing national laws. They permit arbitrators to find and impose commercially-adapted solutions to transnational contract disputes".[194] Following this invitation, the ICC arbitrators, in his view, have applied "international arbitral *lex mercatoria*".

He concludes that there is a unanimity among the arbitrators who have applied *lex mercatoria* in arbitral awards about the concept of basic principles such as *pacta sunt servanda*, mitigation of damages, and *force majeure*.[195] In determining the position of *lex mercatoria*, he adopts *lex mercatoria* in the perspective of anationalism as a third legal system which is transnational and has its own characteristics:

> The critic's opposition to basic arbitral autonomy - in the form of *lex mercatoria* and a-national arbitration - largely is grounded in sophistic arguments. Surely, the new law merchant is as real and as discernible as public international law. General legal principles do exist and serve as the basis for adjudicatory determinations. International commerce does have a *sui generis* character that warrants a special, separate regime of governance. It is indeed perplexing to see distinguished international lawyers demand that international phenomena satisfy the requisites of domestic legality in order to qualify as jural. The systemic differences between international, transnational, and national processes are patent. Domestic requirements simply are too ensconced in national habits and culture to serve as the governing predicate for non-national relationships.[196]

Professor Carbonneau explains why the attitudes of civilian scholars towards *lex mercatoria* are generally different from the common law jurists:

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[194] *Ibid.* at 122. Also see T.E. Carbonneau, "Rendering Arbitral Awards with Reasons: The Elaboration of a Common Law of International Transactions" (1985) 23 Colum. J. Transnational L. 579.

[195] *Ibid.*

[196] T.E. Carbonneau, "The Remaking of Arbitration: Design and Destiny" in T.E. Carbonneau, *supra* note 17 at 14.

> It is not surprising that the strongest advocates of the new law merchant are from civil law jurisdictions where general legal principles constitute the primary source of law and specialized courts have long handled commercial disputes at an intermediary level of the legal system. Nor is it astonishing that the most virulent critics of *lex mercatoria* and delocalization are steeped in the common law tradition of narrow rules and holdings, where decisional law is the foremost source of law and courts are its oracles. Because arbitral tribunals have become a substitute vehicle for law, the critics argue that courts must preserve some basic role and guarantee that the tribunals follow ritualistic patterns and are guided by agreed-upon legal rules.[197]

According to him, arbitration is based on the principle of party autonomy or the freedom of contract. In light of this concept, he introduces a new emerging notion of international arbitration which not only is stateless but might also be lawless as well.[198] He believes that international arbitration and adjudication are two different institutions which may not produce the same outcome. The purpose of the former is to comply with the parties expectations, while the purpose of the latter is to serve the national judicial system.

7. *Canada*

In Canada, the debate concerning *lex mercatoria* is less vigourous than that in Europe or even in the United States, simply because Canada until recently has not been widely involved with international commercial transactions (outside the North American context) which may result in dispute settlements. Therefore, I have been unable to find any Canadian case relating to *lex mercatoria*.[199] However, Canadian scholars have also

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[197] *Ibid.* at 15.

[198] Course materials and notes from his Arbitration Class held at McGill Law School summer 1994.

[199] This assertion is based on the research that I made through the computerized legal research data base called "Quick law". There were only two maritime cases in which the lawyers had cited from Professor's William Tetley's book "*Maritime Liens and Claims*". Even then, these cases quotes the term "*lex mercatoria*" as part of the citation used without any relevance.

contributed to the debate. Several opinions will be discussed as there is no prevailing view.

Professor William Tetley, maritime law scholar at McGill Law School, introduces the idea of "general maritime law"[200] or *lex maritima* and argues that conflict of maritime laws is the result of nationalism that occurred three or four centuries ago. He believes that maritime law (*lex maritima*) was the main part of *lex mercatoria* in the sense that it was a truly international law used to avoid conflict of laws. He concurs with Graveson, the English conflict of laws scholar, when he stated:

> But even in Admiralty there was no conflict of laws because, in cases to which the law merchant applied, there was only one law. And when, in the sixteenth century, the law merchant was taken over and administered in the courts of common law, it was applied on the theory that it was part of the common law, and not a law foreign to the court.[201]

Then he claims that such a unification of laws is necessary for the present-day international commercial transactions:

> Unfortunately for us today, we have retreated into nationalistic shells; the great international codes are almost forgotten. the *lex mercatoria* and the *lex maritima* as international maritime codes have lost much authority. Unfortunately, as well, modern international conventions do not cover all the subjects of maritime law nor have the conventions been ratified by all the world's maritime nations. The result is conflict of maritime laws, a subject which has been dealt with only sporadically and occasionally and which would fill many volumes.[202]

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[200] He defines the general maritime law as following:
"The general maritime law is a *jus commune*, is part of the *lex mercatoria* and is composed of the maritime customs, codes, conventions and practices from earliest times to the present, which have had no international boundaries and which exist in any particular jurisdiction unless limited or excluded by a particular statute." W. Tetley, *Lex Maritima, supra* note 48 at Section *IV*.

[201] R.H. Graveson, *Conflict of Laws* (7 ed., 1974) at 33-34.

[202] W. Tetley, Maritime liens, *supra* note 48 at 523.

In his latest book[203] of 1994, *International Conflict of Laws*, he addresses the *lex mercatoria* as a modern international commercial law which arbitrators may apply in international arbitration. Nevertheless, he suggests that its application should be under careful supervision, otherwise it may become troublesome to the application of national laws.

> Finally, it would seem there is a new *lex mercatoria* for international commercial arbitration. One nevertheless should be careful in the acceptance and development of such a *lex mercatoria*, because it could displace a whole body of accepted national commercial law. As Montesquieu said, "On ne touche aux lois, que d'une main tremblante".[204]

Professor Tetley also in his up-coming article of Fall 1994,[205] declares that at least in maritime law matters, there is a *lex maritima*. In this article, he demonstrates that the *lex mercatoria*, and in particular *lex maritima*, is a *jus commune*[206] and analyzes how such a *jus commune* developed in maritime law. He shows that it developed orally at the beginning and then was codified, and still exists and thrives today as the general maritime law in Canada, the United States, and the United Kingdom.

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[203] W. Tetley, *International Conflict of Laws: Common, Civil & Maritime* (Montreal: Blais, 1994); at the time of compilation of the present study the above mentioned book was not resealed from the publication and professor Tetley had kindly given me the permission to cite from the pre-published version of his book.

[204] *Ibid.* Chapter XII (Arbitration), Section XIV (Conclusion). As the page numbering of the final text may differ from the version I used, reference has been made to the relevant section to avoid probable confusion.

[205] W. Tetley, *Lex Maritima, supra* note 48. This article is based on the lecture professor Tetley presented at Annual Meeting of the American Society of Comparative Law at Syracuse University on November 12, 1993 and is going to be published by Fall 1994. Once again I am thankful to Professor Tetley for his kind permission of citing his article before publication.

[206] He defines *ius commune* or *jus commune* as a law common to a whole jurisdiction or more than one jurisdiction. It is composed of broad, general principles and is usually unwritten at first and then often codified.

Supporting this idea, he has cited a case in maritime law matters which refers to the *lex mercatoria*. In this case, on February 5, 1991, the French *Cour de Cassation* upheld[207] the unreported decision of the *Cour d'Appel de Versailles* of May 19, 1988. The Court of Appeal held that seven Institute clauses (including the Institute Cargo Clauses, War Clauses and War Cancellation Clauses) in a marine cargo insurance policy were : "a compilation of often ancient maritime usages, developed by the community of merchants without distinction of nationality, a true *lex mercatoria* to which marine transportation professionals ordinarily refer; ..."[208]

Dean Stephen J. Toope, also from McGill Law School, discusses the theory of *lex mercatoria* in his recent book *Mixed International Arbitration* from a different perspective. He describes the emergence of *lex mercatoria* as a different approach towards delocalization which came into being as a result of the failure to find effective "stabilisation" and the theoretical difficulties raised by such attempt.[209] His concern is mostly State contracts, the arbitrations involving states and foreign private parties. A thorough study of the both legal literature and case law has led him to conclude that case law is insufficient to prove the applicability of *lex mercatoria*.[210]

Although he does not deny the applicability of trade usages and general principles

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[207] [1991] D.M.F. 292, with the note of R. Achard. Cited by Professor William Tetley, *Lex Maritima, supra* note 48 at footnote 158.

[208] Translation by Professor Tetley in *ibid.* He has also cited a 1993 case, *Polish Ocean Line* case, in which arbitrator applied *lex mercatoria*. *Ibid.* at endnote 164. *Cour de Cassation*, March 10, 1993, [1993] Clunet at 360, with note by P. Kahn.

[209] S.J. Toope, *Mixed International Arbitration* (Cambridge: Grotius, 1990) at 90.

[210] *Ibid.* at 92-93.

of fairness between two private parties in a transnational contract, he opposes such a reference in state contracts especially when the they are investment or concession contracts because it concerns the important ends of state policy:

> The so-called *lex mercatoria* can have little application to state contracts because the assumptions upon which it is based simply do not mesh with the reality of such contracts. States should not be *presumed* to intend to apply any law but their own. Moreover, the needs and imperatives of states are often entirely different from those of the "community of international merchants".[211]

He concurs with some opponents of *lex mercatoria* to warn of its possible threat:

> Other distinguished commentators have also drawn attention to the potential damage that can be done to the structure of international law through the unthinking invocation of the *lex mercatoria*. The traditional understanding of objects and subjects of the law must not be overthrown without serious thought. Short-term commercial expediency is not a sound grounding for law reform. [...] The situation might, of course, be different if the arbitration involved a state trading agency and a foreign party and concerned simply the breach of a sales contract. A stronger may then be made out to support the application of trade usages and general principles. Even here, however, if the abrogation of the contract was due to a shift in state policy based upon rational public policy evaluations, ir is difficult to see how the *lex mercatoria* could react with any sophistication.[212]

Then he argues that the participants in the present-day international business are by no means united in their objectives or in their understanding of appropriate norms of conduct and this fact has led some commentators to suggest a regional, *i.e.*, European, *lex mercatoria*, or "micro" *lex*. In his opinion, this approach would destroy the moral foundation of the *lex mercatoria* with its supposed universality.[213] He implies "[i]t would appear that the so-called *lex mercatoria* is largely an effort to legitimise as 'law'

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[211] *Ibid.* at 94.

[212] *Ibid.*

[213] *Ibid.* at 95-96.

the economic interests of western corporations". Regarding the relationship between the principle of party autonomy and *lex mercatoria*, while he does not deny the choice of delocalized law, he recommends that the rubric *lex mercatoria* not be chosen:

> The parties to a state contract are free to choose any proper law, including a proper law that is in some manner delocalised. They would be wise not to choose a largely fictitious *lex mercatoria*. Failing such a choice, no delocalisation of the substantive law should be presumed. This admonition does not in fact cause great hardship to foreign private parties because recent arbitral practice reveals that neither the invocation of "general principles" nor of international law *per se* can effectively accomplish the primary goal of proponents of delocalised substantive law, which is to "stabilise" the contractual relationship to prevent unilateral modification or termination of the contract by the state.[214]

At the end he addresses the effect of delocalisation on the developing countries:

> recognising the implied delocalisation of all state contracts and the international personality of multinational corporations would deprive developing nations of their only effective means of control over economically powerful foreign investors. It could potentially deprive such nations of their justly valued sovereignty over indigenous resources.[215]

Therefore, he rejects *lex mercatoria* as law:

> Having raised the fundamental objection to the application of the *lex mercatoria* in arbitrations involving states and foreign private parties, it remains to detail a further concern which has been more widely noted, and that is the very real doubt whether there actually exist any body of law within the rubric "*lex mercatoria*".[216]

Ian F.G. Baxter, another Canadian scholar from University of Toronto, advocates for the idea of *lex mercatoria* as a conflict avoidance device which is more suitable for the transnational contracts. In his view, *lex mercatoria* should not be separated from national laws. He has examined the history of *lex mercatoria* and has come to the

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[214] *Ibid.* at 96-97.

[215] *Ibid.* at 97.

[216] *Ibid.* at 95.

conclusion that:

> Surely the time has come for the legal systems of the leading commercial countries of the world to develop legal rules that are custom-made for international commerce and for adjudication of disputes involving foreign elements. International business has now grown too big and too important to have to make do with choice-of-legal-system rules created essentially for interstate (and not international) litigation or developed from nineteenth century European conceptualism (such as Savigny's "natural seat" of an obligation). It is time for the great legal systems to cease applying choice-of-legal-system "shunting" techniques, and instead to permit variations and exceptions to their domestic commercial rules, appropriate to issues with foreign elements.[217]

8. *Germany*

Recently, the theory of *lex mercatoria* has been examined by many German scholars. Professor Norbert Horn seems to be the most well known mercatorist in Germany. He has defined *lex mercatoria* as follows:

> This phenomenon of uniform rules serving uniform needs of international business and economic co-operation is today commonly labelled *lex mercatoria*.[218]

Other commentators who have contributed to the *lex mercatoria* are Kurt Siehr, Paul-Frank Weise, Christoph Stoecker, and Klaus Peter Berger. Also among the critics of the *lex mercatoria*, mention should be made of Eugen Langen,[219] and Bernd von

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[217] I.F.G. Baxter, "International Conflict of Laws and International Business" (1985) 34 I.C.L.Q. 538, at 540.

[218] N. Horn, Introduction to *The Transnational Law of International Commercial Transactions* (Deventer: Kluwer, 1982)

[219] Eugen Langen believes: "transnational commercial law denotes rather a working-method than a new legal order, indeed it can be said here and now that it does not constitute a system of law, such as continental jurists would prefer." E. Langen, *Transnational Commercial Law* (Leiden: Sijthoff, 1973) at 32. Langen has divided scholars on the idea of autonomy of *lex mercatoria*: those who "utterly reject", those "radicals" who espouse the idea, and finally those "cautious well-wishers" (that he seems to be one of them) who hope that such an autonomous body of law is gradually coming into being. *Ibid* 11-12.

Hoffmann.[220]

Although Stoecker criticizes the *lex mercatoria*, rejecting the strongly legalistic view, that rules can only have a binding force when enacted by State authorities.[221] He analyzes *lex mercatoria* in three different areas: conflict of laws, procedural rules and substantive rules, concluding that *lex mercatoria* exists in the third category only to a limited extent.[222] He believes that it is not at present being applied in the national courts and should not be in the future. He also rejects the idea that arbitral awards can be regard as a source of the *lex mercatoria*.

> [T]he unification of the law of the international trade has to be achieved on a national level. Uniform laws and conventions should be adopted by nations and incorporated into their national laws. Parallel to this development, international commercial arbitration is a valuable alternative for the international trading community to resolve their disputes. *Modi* of doing business can thus be accepted and confirmed by arbitral tribunals thereby contributing to the development of the *lex mercatoria*. However, arbitral awards as a source of the *lex mercatoria* are of doubtful validity.

Another German scholars who supports the ideas of *lex mercatoria* and delocalization is Klaus Peter Berger.[223] In his view, transnational substantive law has achieved significant development toward an autonomous legal system. He has observed a set of transnational legal principles to which the parties or arbitrators may refer in choosing or determining the law applicable to the merits. Then he concludes that modern

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[220] B. Von Hoffmann, "International Construction Arbitration" in P. Sarcevic, ed., *Essays on International Commercial Arbitration* (London: 1989).

[221] C.W.O. Stoecker, "The *Lex Mercatoria*: To What Extent does it Exist?" (1990) 7 J. Int'l Arb. 101 at 119.

[222] *Ibid.* at 124.

[223] K.P. Berger, *supra* note 4.

domestic laws and domestic courts are increasingly acknowledging the existence of this autonomous transnational legal system. In response to the positivist approach which is sceptical in the existence and the application of an a-national legal system, he states: "[t]his attitude is regrettable given that these rules are increasingly sophisticated and the weaker party is protected through the application of the *lois d'application immédiate* and the *ordre public international.*" He has formulated 36 transnational principles as constituent elements of this legal system.[224]

9. *Developing Countries*

Various attitudes have been taken by the scholars of developing countries regarding the theory of *lex mercatoria* during the last three decades. Most of them have been sceptical of the *lex mercatoria*, believing that *lex mercatoria* is emerging to protect the interests of industrialized and huge western enterprises. Further, they argue that developing countries have not had the opportunity to contribute to its structure. A few of them remain optimistic as to the development of *lex mercatoria* on the success of developing parties in some ICC arbitration cases which have favoured them when they were trapped by the unexpected domestic provisions of the other party. However, until recently the prevailing opinion has been against *lex mercatoria*. Perhaps this is the why developing countries have been reluctant to endorse arbitration clauses in their large scale contracts during last three decades.[225]

They argue that *lex mercatoria* as international trade usages means whatever the

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[224] *Ibid.* at 544-553.

[225] Perhaps this reluctance is much less at least in commodity transactions.

multinational and huge enterprises consider trade usage, which developing countries had not participated in forming. Some of the following observations concern international arbitration in general, some of them regarding a-national and delocalized arbitration, and some specifically on *lex mercatoria*.

It should be noted that sometimes comments have been offered by officials which account for their non-academic nature. To have a general idea some of their opinions will be discussed.

Dean Nous-Eddine Terki of Algiers Law School has stated:

> The *lex mercatoria* ... was, in fact, elaborated at a time when the majority of developing countries were still colonized. Therefore, it was elaborated without their participation. This means that if we really want developing countries participating truly voluntarily in arbitration, they have to be allowed to effectively participate in the elaboration of that *lex mercatoria*.[226]

Another opinion has been stated by Mr. Narayanaswami Krishnamurthi, the former executive director of Indian Council of Arbitration and vice-president of International Council for Commercial Arbitration:

> In international commerce and business, trade usages and customs familiar to the parties and accepted by them must retain the primacy of place and consideration. Any guidelines will be in line with and tune with such usages. The harmonization of laws in international trade and practices in international arbitration will be the greatest factor, which will help the movement of arbitration and its adoption by trade in every country and region of the world. What is required in international trade is not laws tied to national or different systems of laws, but a legal system based on international trade laws and usages, customs and practices conducive to the development of a *lex mercatoria* for worldwide acceptance and practice.
> The development of a *lex mercatoria* with international competence and validity

[226] Unpublished communication at the ICC Stockholm symposium of Oct. 8, 1982; copies available at ICC, Paris. Documented by F.J. Dasser, *Incoterms, supra* note 175 at 34 footnote 127.

> will help the smooth flow of trade and also facilitate settlement if disputes arise.[227]

Another recent opinion has been forwarded by Argentinean scholar, Horacio A. Grigera Naón[228], who wrote his S.J.D. thesis at Harvard Law School on the conflict of law methodology.[229] In his dissertation he describes the prevalent idea of *lex mercatoria* among the scholars and case law as the gap filling method when there is a lacuna in national law.[230] Then he tries to explain the contents of *lex mercatoria* very briefly. He goes on to criticizes the isolation of the *lex mercatoria* from national legal systems. He argues:

> Very importantly, advocates of *lex mercatoria* are not always coherent in their conception of the isolation of *lex mercatoria* from national legal systems. In many cases, one has the impression that they believe that this should be one-way isolation, that is, that State law is not to interfere in formation and application of *lex mercatoria* by international arbitrators, but State courts should nevertheless accept the rules of *lex mercatoria* as found in the arbitral awards embodying them.[231]

Finally, he concludes that international commercial arbitrations should be based on a choice-of-law methodology as a means for selecting the applicable substantive law

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[227] N. Krishnamurthi, "Some Thoughts on a New Convention on International Arbitration" in J.C. Schultsz & A.J. van den Berg, eds., *The Art of Arbitration: Essays on International Arbitration* (Deventer: Kluwer, 1982) at 211.

[228] He previously had defined *lex mercatoria* as:
[...] an anational *lex mercatoria* [...] a hybrid legal system finding its sources both in national and international law and in the vaguely defined region of general principles of law called "Transnational Law". H.A. Grigera Naón, "The Transnational Law of International Commercial Transactions" in N. Horn, ed., Introduction to Transnational law (1984) at 89.

[229] His thesis has been published as H.A. Grigera Naón, *Choice-of-law Problems in International Commercial Arbitration* (Tübingen: Mohr, 1992)

[230] *Ibid.* at 26.

[231] *Ibid.* at 32.

and cannot be denationalized and governed by anational *lex mercatoria*.[232] In challenging the idea of delocalization, he argues that "the issue is to determine who is to prevail in the creation and application of law in the transnational space: it is a battle as to the sources of international commercial and economic law, a social and political battle, rather than a merely legal one".[233] He declares that the key issue in the debate on *lex mercatoria* is that of "who should retain control over the sources of international trade and economic law". Then, he rejects recourse to conflict between national and anational legal forces for the control of such legal sources.[234] He continues that "international commercial arbitration should thereby seek to contribute substantially to the attainment of a pacific coexistence which allows for the coordination of private and State adjudicators and national and international sources of law".[235] In another part of his book, he emphasizes the role of national laws in the process of the truly international tribunal:

> [A]s members of a truly international tribunal [arbitrators] must take into account .... the national legal systems connected with the dispute and the interests and public policy which those systems and their choice of law and substantive rules seek to advance. All this is of course opposed to the belief that arbitral awards are completely international and for that reason totally disconnected from national legal orders being based fundamentally on the parties' will which is seen in itself as endowed with law-making powers.[236]

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[232] He cites also A.T. von Mehren as a support. See A.T. von Mehren, *supra* note 191 at 226.

[233] H. Grigera Naón, *supra* note 229 at 33.

[234] *Ibid.* at 291.

[235] *Ibid.*

[236] *Ibid.* at 85.

Grigera Naón in another article,[237] advocates the ICC arbitration mechanism for resolving disputes between parties coming from developing and developed world. He invokes Article 2 of the ICC Rules of Conciliation and Arbitration, January 1, 1988 version,[238] (the ICC Rules) allows the ICC International Court of Arbitration (the Court) to designate chairmen of arbitral panel well known for their experience and reputation as arbitrators, expertise in the field in which the arbitral dispute arises, impartiality and, in many cases, and who come from developing countries. As further evidence he mentions the important ICC awards which have decided in favour of developing countries or dismissed claims against them.[239]

He examines eight recent reported ICC cases in which the parties had not expressly chosen the applicable law, and he mention that just in one of them (Case No. 5717 (1988)) the application of *lex mercatoria* is refused. In this case, the tribunal applied Swiss law according to the conflicts of law rule whereby "the arbitrator selects the substantive rule of the jurisdiction that has the greatest connection with the dispute". In the rest of the cases they applied national laws or international conventions.

Regarding the fact that developing countries had been reluctant to international arbitration in the past he states:

Precisely one of the main objections of developing countries to international

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[237] H.A. Grigera Naón, "ICC Arbitration and Developing Countries" (1993) 8 ICSID Rev. F.I.L.J. 116.

[238] The 1988 version of ICC Arbitration Rules are published in [1988] 13 Y.B. Com. Arb. 185; and (1989) 28 I.L.M. 236. For additional references, see Ziadé, "Selective Bibliography on the International Chamber of Commerce's Dispute Settlement Mechanisms" (1990) 5 ICSID Rev. F.I.L.J. 186.

[239] *Ibid.*, also J. Paulsson, "Third World Participation in International Investment Arbitration" (1987) 2 ICSID Rev. F.I.L.J. 19, 25-31.

> arbitration has traditionally been that it permits adjudicators coming from the developed world to resort to general legal principles primarily originated in trade or business usages created in commercial circles of developed countries or to their own subjective views without taking into account relevant mandatory national laws or regulations also aimed at governing international transactions. The prudent action of the Court helps to avoid this danger without, however, paying undue attention to parochial domestic law provisions the application of which might interfere with the international character of arbitral adjudication. This balanced attitude is certainly one of the reasons why ICC awards are to a large extent voluntarily compiled with by the parties and, even when favouring the claims of the developing country party, are enforced by national courts of developed countries.[240]

C. Conclusion

Despite the variety of opinions among scholars, some observations can be drawn from the above.

The classical method of determining the law applicable to the substance of a contractual dispute is to choose a national system of law by identifying and applying the relevant "conflict" rules of private international law. This law is regarded as the "proper law" of the contract.[241] Yet, this approach has been considered to be out of touch with the realities of modern international business. Therefore, it has been suggested that what is needed is not a particular national system of law, but a modern international law merchant.[242] This concept of the new law merchant is described as "transnational law", "the international law of contracts", "international *lex mercatoria*", "general principles of commercial law" and so on. Whatever the description, the purpose is clear. It is to regulate international commercial transactions by a system of law which avoids

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[240] *Ibid.* at 121.

[241] M. Hunter,"Case and comment" (1987) Lloyd's Mar. Com. L.Q. at 227.

[242] *Ibid.* at 278; also see A. Redfern & M. Hunter, *Law and Practice of International Commercial Arbitration* (London: Sweet & Maxwell, 1991) at 117.

the vagaries of different national systems.[243]

The battle for finding the new sources of international business law and the applicability of *lex mercatoria* indicates that national laws need a quick reform to adjust themselves with this trend to supply international contracts which can be considered as the most important lucrative incomes for the states. This is why states are favouring international arbitration as a substitute for their national adjudication system, not to lose the business.

As Professor Carbonneau has pointed out, from the mid-eighties, arbitration as an advanced alternative mechanism for dispute settlement based on the principle of party autonomy or freedom of contract is growing increasingly. Here, the main distinction is between the notion of arbitral justice and judicial justice. The former is insisting on the elements of fairness and equitable justice which is not necessarily derived from the strict notion of national law while the latter tries to provide a justice that derives from the formal sources of law made by nation-states.

The growth of international commercial arbitration is much faster than the conformity of the national laws towards transborder contracts. Therefore, it is expected that this method of dispute resolution will become more popular than domestic adjudication. Yet, international arbitral tribunal's first duty is to settle disputes whether through the application of transnational rules or domestic laws, not to create new legal rules. This view is contrary to some mercatorists who want to emphasize on the inventory function of arbitral tribunals which may cause arbitrary decisions.

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[243] *Ibid.*

The importance of custom cannot be denied as it is a formal source of law which can be a source for *lex mercatoria* as well. The only mercatorist who has discussed the relation of custom with the other sources of law is Professor Harold J. Berman. As he has rightly pointed out, the supremacy of legislation cannot and should not be ignored and custom can play an important role only when the legislation has left a room for it.

The relation of *lex mercatoria* with general principles of law is not clear and deserves comprehensive research. In fact, the mercatorists do not agree about the meaning, scope, and contents of these principles. Here, Lagarde has criticized these principles as either sources of public international law or of national law. Therefore, they cannot be a formal source of *lex mercatoria*.[244] As an element of universality hardly exists in these principles, the question arises whether such a uniformity is required for transnational practices. Another issue is the selection of these principles so as to avoid arbitrary decisions. There should be some methods to guide this process.[245]

One may level the criticism that national laws are not in harmony with the developmental process of international trade which requires speed and efficacy. It can also be argued that they are not suitable to deal with the technicalities associated with international trade. While these two objections might be true to some extent, it does not mean that national legal systems should be ignored completely. The solution should be

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[244] P. Lagarde, *supra* note 75 at 131-132.

[245] F. De Ly concludes that few transnational principles of law exist and as they are sufficiently precise to be practicable, they seems to be mere guidelines operating as interpretive elements within a legal system; therefore, the principles of law cited by the mercatorists belong to that category. Finally he qualifies the general principles of law as the consequence of the comparative method used in arbitral adjudication than a formal source of *lex mercatoria*. F. De Ly, *supra* note 31 at 284.

found elsewhere. We are living in a time when the notion of state sovereignty plays a very important role in the global economic and political structure. The isolation of *lex mercatoria* from national and international legal orders seems artificial in this regard. There seem to be two possible solutions. First, one may wish to establish a World Trade Court to settle transnational commercial disputes. Second, one might wish to develop more uniform laws in international trade complying with the understanding of the international merchant community. The latter option is more possible given that the first option will need more time to develop.

The only country in which the theory of *lex mercatoria* currently prevails is France. In other countries, the proponents and opponents of *lex mercatoria* are in a state of equilibrium, or at least, there is no prevailing opinion.

CHAPTER THREE

Impact of *Lex Mercatoria* on National and International Legislations and Practices

In previous chapters, it was argued that the growing volume of transnational sales confronts problems resulting from the diverse and restricted nature of national commercial codes.[246] To fill this gap national and international legislation has begun to keep abreast of the latest developments in the field of international trade. The debate on *lex mercatoria* has not been limited to legal literature; recently its influences can be traced in national and international legislation and practices as well. However, despite the fact that national laws appear to share some basic principles in international trade,[247] there are still considerable differences in their substance and application which serve to create difficulties in negotiation and the resolution of international sales contract disputes.[248] It is said that these difficulties present obstacles to the further growth of international trade.[249] As a consequence, many scholars have called for the unification of international trade law through a universal international commercial code,[250] while

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[246] Note, "United Nations Commission on International Trade Law: Will a Uniform law in International Sales Finally Emerge? (1979) 9 Cal. W. Int'l L.J. at 157-58; See also J. Honnold, *supra* note 3 at 74-76.

[247] H.J. Berman, "The Uniform Law on International Sales of Goods: A Constructive Critique" (1965) 30 Law & Contemp. Probs. 354 at 354-55; Berman & Kaufman, "The Law of International Commercial Transactions (*lex mercatoria*)" (1978) 19 Harv. Int'l L.J. 221, at 224-29; Gal, "The Commercial Law of Nations and the Law of Int'l Trade" (1972) 6 Cornell Int'l L.J. 55, at 65; C.M. Schmitthoff, "The Law of Int'l Trade, Its Growth, Formulation and Operation" in Schmitthoff, ed., *supra* note 3 at 3; Note, "Contracts for the Int'l Sale of Goods: Applicability of the United Nations Convention" (1983) 69 Iowa L. Rev. 209.

[248] H.J. Berman, *Ibid.* at 355.

[249] Sutton, "The Hague Conventions of 1964 and the Unification of the Law of International Sale of Goods" (1971) 7 U. Queensland L. J. 145. Cited from *ibid.*.

[250] S.M. Bainbridge, *supra* note 57 at 619-620.

other commentators have argued for anational or delocalized arbitration mechanisms. Recently, the idea of a transnational legal system has achieved relatively significant success in some national legislation, international conventions, and transnational practices. The mercatorists have interpreted these provisions as the formal approval of the *lex mercatoria*. Yet, some have claimed that these achievements should be considered without the existence of *lex mercatoria*. The major developments in domestic laws, international conventions, institutional arbitration rules and transnational practices will now be examined.

A. National Legislation

1. *France*

In France, a new article of the Code of Civil Procedure on international commercial arbitration, seems to permit the parties and arbitrators to subject an international dispute to norms and rules other than those provided by a given national legal system. Rather than searching for "the proper law" of contracts through the conflict rules, Article 1496 of the New Code of Civil Procedure of 1981 provides:

> The arbitrator shall decide the dispute according to the *rules of law* chosen by the parties; in the absence of such a choice, he shall decide according to those he deems appropriate.
> He shall in all cases take into account *trade usages*. (*emphasis added*)

According to the latest French precedents,[251] the expression *rules of law* in this article gives the authority to the arbitrator to apply *lex mercatoria* when the parties have not chosen a specific national law. Most of the French scholars have interpreted the above provision as the recognition of *lex mercatoria* in the French international arbitral

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[251] See Chapter Four.

dispute resolution. Some authors argue that the proponents of *lex mercatoria* have given too extensive interpretation to this article.[252] However, the prevailing opinion in France is in favour of *lex mercatoria* in international arbitral cases taking place in France.[253]

2. *The Netherlands*

In the Netherlands, article 1054 of the Dutch Code of Civil Procedure[254] is the same as article 28 of UNCITRAL Model Law; it is influenced by French international commercial reform and the ideas of Professor Pieter Sanders. It reads:[255]

> (1) The arbitral tribunal shall make its award in accordance with the *rules of law*.
> (2) If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the rules of law chosen by the parties. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the rules of law which it considers appropriate.
> (3) The tribunal shall decide as *amiable compositeur* if the parties by agreement have authorised it to do so.
> (4) In all cases the arbitral tribunal shall take into account any applicable trade usages. (*emphasis added*)

The interesting point is that the explanatory report to the arbitration bill explicitly confirmed that the arbitrators can apply *lex mercatoria* in international cases when either of the parties have authorized them to do so, or absent choice of law. The report, which

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[252] P. Lagarde, *supra* note 75 at 148-149.

[253] Professor Lando states: " This provision gives recognition to French and foreign awards based upon the *lex mercatoria* or other non-national sources of law even when the parties have not agreed on a decision based upon these sources." O. Lando, *supra* note 134 at 756; P. Fouchard, "L'arbitrage international en France apres le décret du 12 mai 1981" (1982) 109 J.D.Int'l (Clunet) 374, at 395; and J. Robert, *L'arbitrage, droit interne, droit international privé* (Paris: Dalloz,1983) 330.

[254] The 1986 Netherlands Arbitration Act inserted a new section on arbitration into the Code of Civil Procedure (Book Four).

[255] English translation from P. Sanders & A.J. van den Berg, *The Netherlands Arbitration Act 1986* (Deventer: Kluwer, 1987) at 11. Cited from K.P. Berger *supra* note 4 at 887.

makes reference to Professor Goldman, defines *lex mercatoria* as *generally accepted usages in international trade* which are autonomous from national law.[256] Some Dutch scholars, like Robert van Delden, have argued that the debate regarding the *lex mercatoria* is not over; therefore, the legislators should not yet take a position one way or the other.[257] Moreover, the Dutch government in its second report extended the notion of *lex mercatoria* to encompass transnational rules and principles of law.[258]

Furthermore, again under the influence of the professor Pieter Sanders and the French arbitration reform, Article 46 of the "Netherlands Arbitration Institute" arbitration rules also provides:

> If a choice of law is made by the parties, the arbitral tribunal shall make its award in accordance with the *rules of law* chosen by the parties. Failing such choice of law, the arbitral tribunal shall make its award in accordance with the *rules of law which it considers appropriate*. (Article 46) (*emphasis added*)
> In all cases the tribunal shall take into account any applicable *trade usages*. (Article 47) (*emphasis added*)

3. *Belgium*

In Belgium, under the new Belgium Statute of March 27, 1985 (*Code Judiciaire*) the international commercial arbitral awards can no longer be set aside if all parties are non-Belgian.[259] Article 1717 of the Belgian Code judiciaire provides:

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[256] Explanatory Report, Document No. 18464, Tijdschrift voor Arbitrage, 1984, No. 4, 40 . Cited from F. De Ly *supra* note 31 at 250, footnote 227.

[257] R. van Delden, *supra* note 183 at 18-23.

[258] Second Report, Tijdschrift voor Arbitrage, 1986, No. 2, 83-84.

[259] See generally A. Vanderelst, "Increasing the Appeal of Belgium as an International Arbitration Forum? - The Belgian Law of March 27, 1985 Concerning the Annulment of Arbitral Awards" (1986) 3 J. Int'l Arb. 77.

> Courts of Belgium may hear a request for annulment only if at least one of the parties to the dispute decided by the award is either a physical person having Belgian nationality or residence, or a legal entity created in Belgium or having a Belgian branch or other seat of operation.[260]

This provision is mandatory and the parties cannot opt for domestic judicial review. Some commentators have come to the conclusion that the Belgian provision allows the parties and arbitrators to have a "totally unbound" arbitration.[261] Others have characterized this provision as a "paradise for international commercial arbitration",[262] and as a recognition of the ability to choose and apply *lex mercatoria* in Belgium.[263] On the contrary, some have doubted if the new law presents "a real attraction".[264] It has been argued that arbitration in Belgium is *not* totally delocalized because, for example, Belgian courts may intervene at pre-award stages to assist the arbitration in matters such as nomination of arbitrators, gathering evidence and provisional measures to preserve property.[265]

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[260] The French text of the art. 1717 reads:

> Les tribunaux belges ne peuvent connaître d'une demande en annulation que lorsqu'au moins une partie au différend tranché par la sentence arbitrale est soit une personne physique ayant la nationalité belge ou une résidence en Belgique, soit une personne morale constituée en Belgique ou y ayant une succursale ou un siége quelconque d'opération.

[261] J. Paulsson, "Arbitration Unbound in Belgium" (1986) 2 Arb. Int'l 68, at 73.

[262] M. Storme, "Belgium: A Paradise for International Commercial Arbitration" (1986) 14 Int'l Bus. Lawyer 294.

[263] J. Verhoeven, "Arbitrage entre etats et enterprises e'trangéres: des regles spécifiques? 630-631, Cited from F. De Ly *supra* note 31 at 251, footnote 231.

[264] C. Hampton, "Belgium's Radical Move on Arbitration" Financial Times (Aug. 1, 1985) Business Law, col. 1.

[265] W.W. Park, "National Law and Commercial Justice: Safeguarding Procedural Integrity in International Arbitration" (1989) 63 Tulane L. Rev. 647, at 695.; another point is that awards rendered in Belgium continue to benefit from recognition and enforcement under the New York Convention. The Belgian Commentator, A. Vanderelst, states: "International arbitral awards rendered in Belgium are foreign

4. ***Switzerland***

In Switzerland, Article 187(1) of the Swiss Federal Statute on Private International Law[266] provides that the arbitrator can apply *rules of law* (*régles de droit*) in the absence of a choice of law or the rules of law agreed upon by the parties.

> (1) The arbitral tribunal shall decide the case according to the *rules of law* chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection. (*emphasis added*)
> (2) The parties may authorize the arbitral tribunal to decide *ex aequo et bono*.

Given to the drafting history of this article, it is generally thought that this provision allows of the application of *lex mercatoria.*[267]

The Arbitration Act of 1979 in England, permits the parties to limit judicial review of the arbitration award by means of an *exclusion* agreement. This provision has been interpreted by some commentators as permitting the application of *lex mercatoria* in the English jurisdiction. Moreover, the UNCITRAL Model law has been adopted in the national laws of Canada, in some states in the United States, and with minor amendments, in Scotland and Germany. In Scotland, the proposal of the Scottish "Advisory Committee on Arbitration Law" to adopt a revised version of the UNCITRAL Model Law has been adopted by the Scottish Lord Advocate, Lord Dervaird.[268] The

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awards within the meaning of the New York Convention because they are still, to a large extent, governed by Belgian law." *Supra* note 259 at 85.

[266] Chapter 12 of the Federal Statute on International Private Law (SIPL) constitutes the Swiss law on international arbitration which contains 19 articles; in force as of January 1, 1989.

[267] P. Lalive, "The New Swiss Law on International Arbitration" (1988) 4 Arb. Int'l 2, 29-30.

[268] (1990) Arb. Int'l at 63.

Model Law took effect (with minor amendments) in Scotland as of January 1, 1991.[269] In Germany, after unification in October 1990, the working group of the German Institute for arbitration has adopted the Model law with minor amendments.[270]

B. International Conventions and Arbitration Laws

The proponents of *lex mercatoria* have considered the following provisions in international conventions as recognition of the theory of *lex mercatoria*: Article 9 ULIS, article VII (1) of the European International commercial arbitration Convention, Article 42 of ICSID, Article V of Iran-U.S. tribunal agreements (Jan. 19, 1981), and Article 28 (1) of UNCITRAL Model Law. There are also some other international conventions in which the issue of *lex mercatoria* has been raised during the drafting but at the end of the discussions, the issue was set aside and no express provision were provided.

1. *UNCITRAL Model Law, Article 28 (1)* [271]

UNCITRAL Model Law has been incorporated into many national laws. It is law in Canada for example and therefore has the effect of legislation. Article 28 deals with the rules applicable to the substance of disputes.

> (1) The arbitral tribunal shall decide the dispute in accordance with such *rules of law* as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules. (*emphasis added*)
> (2) Failing any designation by the parties, the arbitral tribunal shall apply *the law* determined by the conflict of laws rules which it considers applicable. (*emphasis added*)

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[269] [1992] 17 Y.B. Com. Arb. at 460.

[270] K.P. Berger, *supra* note 4 at 50.

[271] The UNCITRAL Model Law on International Commercial Arbitration was promulgated by UNCITRAL on June 21, 1985, consisting of 36 articles.

> (3) The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.
> (4) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the *usages of the trade* applicable to the transaction. (*emphasis added*)

As indicated in the above, Article 28(1) provides that arbitrators may apply the *"rules of law"* chosen by the parties. Schmitthoff believes that this article can be considered as permissive or suggestive of the *lex mercatoria* because the draftmen worded the expression "*rules of law*" instead of "*law*".[272] Of course, Article 28(2) has restricted the freedom for arbitrators and mentions "*the law*" in the absence choice of law. In addition, Article 28(4) points out the role of trade usages which can be interpreted as *lex mercatoria*. Following the drafting of UNCITRAL Model Law, many international arbitration rules have utilized the same wording which will be discussed in the following paragraphs.

2. *Hague Convention on the law Applicable to Contracts for the International Sale of Goods (1986)*

There is no express provision on the *lex mercatoria* in this Convention. The debate on *lex mercatoria* arose in connection with Article 15 of this Convention which provides that "in the Convention law means the law in force in a State other than its choice-of-law rules". This article excludes the doctrine of *renvoi* but could be interpreted as prohibiting the application of *lex mercatoria* or general principles of law since they are not rules of law in force in a state. In the drafting process, the applicability of general principle of law and of *lex mercatoria* was a major topic of discussion.

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[272] C.M. Schmitthoff, *supra* note 92 at 48-49.

However, the drafters of the convention could not agree on the application of *lex mercatoria*.[273]

The Swedish delegation demanded a change in the wording of this article to permit the *lex mercatoria* and general principles of law. However, the German (F.R.) delegate declared that he would not care to have German courts recognize an applicable law such as ancient Roman law or other similar law which the parties might choose. After a heated debated, the Swedish proposal was rejected in a close vote. During the Plenary Session the issue of applicability of *lex mercatoria* came up again but the Conference generally agreed that Article 15 excludes *renvoi*, not other matters. Therefore, the application of *lex mercatoria* is still debatable under the Hague Convention.[274]

3. *Institut de Droit International (1989)*

The Institute in its latest resolution has recognized the delocalization doctrine concerning arbitration with state parties.[275] Under Article 6, Section 1, the parties are allowed to choose the substantive and procedural rules from *non-national* sources such as "*principle of International law*" or "*general Principles of International Law*". In absence of an agreement between the parties Article 6(2) in connection with Article 4

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[273] For details, see A.T. von Mehren, *Explanatory Report to the Hague Convention on the Law Applicable to Contracts for the International Sale of Goods* (The Hague: 1987) 745-747.

[274] *Ibid.* at 46-49.

[275] Resolution *Institut de Droit International*, "L'arbitrage entre États et enterprises étrangéres", adopted at its Santiago de Compostela Session, September 4-14, 1989. (1990) ICSID Rev. FILJ 139; see also A.T. von Mehren, "Arbitration Between States and Foreign Enterprises: The Significance of the Institute of International Law's Santiago de Compostela Resolution" (1990) 5 ICSID Rev. FILJ 54.

provides that the tribunal may apply "*general principles of public or private international law*" or "*general principle of international arbitration*". Of course, under article 2 the power of the arbitrator is subject to the "*principles of international public policy as to which a broad consensus has emerged in the international community*".

4. *UNIDROIT Draft "Principles for International Commercial Contracts" (1990)*

The *UNIDROIT Draft of "Principles for International Commercial Contracts" (1990)* seem to allow the parties to agree on the application of the "*General Principles of Law*" or "*the lex mercatoria*" or the like.[276]

5. *ICSID Convention*

Article 42 of the Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965, also known as the Washington Convention, stipulates:[277]

> (1) The Tribunal shall decide a dispute in accordance with such *rules of law* as may be agreed by the parties. In the absence of such agreement, the Tribunal shall apply the law of the Contracting State party to the dispute (including its rules on the conflict of laws) and such *rules of international law* as may be applicable. (*emphasis added*)
> (2) The Tribunal may not bring in a finding of *non liquet* on the ground of silence or obscurity of the law.
> (3) The provisions of paragraphs (1) and (2) shall not prejudice the power of the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree.

According to its commentators, the reference to the more flexible term "rules of Law" in this Convention gives the parties an opportunity to choose a-national law or

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[276] UNIDROIT "Principles For International Commercial Contracts", Study L-Doc. 40 Rev. 5 (seventh consolidated version), Art. 1.1 Sec. (4)(a),(b); at its session of January 6 to 10, 1992 at the University of Miami, the Working Group was able to agree on the substance of the provisions to be included in the introductory chapter dealing with the scope of the Principles, see *UNIDROIT Bulletin d'Informations*, No. 89/90, January/April 1992, at 2; Cited from K.P. Berger, *supra* note 4 at 537.

[277] ICSID Basic Documents, ICSID Doc./15, at 11, 22 (January 1985);

general principles of law which can encompass *lex mercatoria*.[278]

6. *Iran-U.S. Claims Tribunal*

Article V of the Iran-U.S. Claims Settlement Declaration as an amendment to Article 33 of UNCITRAL Arbitration Rules[279] contains a broad provision on applicable law:

> (1) The arbitral tribunal shall decide all cases on the basis of respect for law, applying such choice of law rules and *principles of commercial and international law* as the arbitral tribunal determines to be applicable, taking into account relevant *usages of trade*, contract provisions and *changed circumstances*. (*emphasis added*)
> (2) The arbitral tribunal shall decide *ex aequo et bono* only if the arbitrating parties have expressly and in writing authorized it to do so.

7. *MIGA Operational Regulations*

Regarding the law applicable to MIGA Insurance contracts negotiated between the Agency and the holder of the investment insurance guarantee, Para. 2.17 of the MIGA Operational Regulations provides that "the arbitral tribunal apply the contract of guarantee, the [MIGA] Convention, *general principles of law*".[280]

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[278] Aron Broches, "Convention on the Settlement of Investment Disputes Between States and Nationals of other States of 1965, Explanatory Notes and Survey of its Application" (1993) 18 Y.B. Com. Arb. 627 at 666. Also see ICSID Ad Hoc Committee in *Klöckner v. Cameroon* of may 3, 1985, (1986) ICSID Rev. FILJ 89, 112; also Broches, Liber Amicorum Domke, at 12, 13. for the application of international law in this concept.

[279] Article 33 of UNCITRAL Arbitration Rules provided:
(1) The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.
(2) The arbitral tribunal shall decide as *amiable compositeur* or *ex aequo et bono* only if the parties have expressly authorized the arbitral tribunal to do so and if the law applicable to the arbitral procedure permits such arbitration.
(3) In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the *usages of the trade* applicable to the transaction. (*emphasis added*)

[280] I.F.I. Shihata, *MIGA and Foreign Investment* (Dordrecht: 1988) at 458.

C. Transnational Practices

The impact of *lex mercatoria* on the transnational practices is hard to determine because of the difficulties in obtaining related documents. Expressions of these practices are found in codified trade usages, arbitration rules of international institutes, general conditions, codes of conduct, and international contracts. In most of these documents there is no express indication of *lex mercatoria* but the references made to trade usages and general principles of law have been interpreted by mercatorists as references to *lex mercatoria*.[281] In this regard Article 13(5) of ICC Arbitration Rules, Article 33 of UNCITRAL Arbitration Rules, and Article 9 of UN Sales Convention (1980) can be mentioned, as well as most of the Institutional Arbitration Rules provisions regarding the application of trade usages. Nevertheless, the most significant transnational practices are found in the *Uniform Customs and Practices for Documentary Credits (UCP)*[282] and the *Incoterms*[283] as created by International Chamber of Commerce. These documents are almost universally accepted.

1. *Incoterms*

In 1920, the ICC appointed a commission to examine and codify the most important trade terms. As a result in 1923, the commission compiled six trade terms with their customary interpretation in thirteen countries (ICC Digest No. 43). It was

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[281] F. De Ly, *supra* note 31 at 267; He believes that one should be aware of different concepts of *lex mercatoria* and that it may not be necessarily interpreted the same as expected.

[282] On January 1, 1994, the ICC Publication No. 400 (UCP 400, revised in 1983) was replaced by UCP 500 (revised in 1993).

[283] ICC Publication No. 460, last revision in effect July 1, 1990.

revised in 1928 (ICC Brochure No. 68) and 1953 (ICC Doc. No. 16).

The Trade Terms of 1953 are different from the Incoterms 1953. *Incoterms* stand for *International Commercial Terms* and its function is to determine the rights and duties of parties under each trade term. It helps business people to be aware of the other party's understanding of a given term. They are a set of uniform rules codifying the interpretation of trade terms defining the rights and obligations of both Buyer and Seller in an international transaction.[284]

These terms were first published in 1936 (ICC Brochure No. 92). They have been described by the ICC as the "Esperanto of International Trade" (ICC, World Trade, June-July 1953, at 29). Incoterms were revised in 1953 by delegates from 17 countries (ICC Brochure No. 166) and again in 1980. The revision was amended recently and has been in effect since July 1, 1990 (ICC Publication No. 460); it is debatable whether new rules stipulated into the Incoterms actually reflect existing trade usages from the moment of the promulgation of the new version or whether it takes some time to have the new provisions develop into trade usages.[285] When the parties have not referred to Incoterms in their contract, Trade Terms help them to determine the applicable rules. However, the legal nature of trade terms is still debated.

2. *UCP*

The position of UCP is different from Incoterms. The prevailing opinion is that

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[284] J.W. Richardson, ed., *The Merchants Guide: A Guide to Liabilities and Documentary Problems, (New International Edition)* (London: P & O Containers, 1994) at 7.

[285] K.P. Berger, *supra* note 4 at 575.

Incoterms are contractual usages.[286] Some countries have incorporated Incoterms into their statutes.[287] Yet, the UCP has obtained its binding nature by its own regulation[288] not through statute.[289] It has been described as a text created by an "international corporation of merchants" which accurately reflects the usages, and it is considered to be applicable to documentary credits all over the world.[290]

As Schmitthoff views the UCP as universal trade usages having a normative character,[291] he concludes that:

> [I]t is the wide acceptance of these formulations which reveals their true character. This significant feature makes it clear that, in truth, we are dealing here with manifestations of the modern *lex mercatoria*.[292]

3. *Institutional International Arbitration Rules*

The following arbitration rules also encompass the term "*rules of law*", such provisions being interpreted as recognition of *lex mercatoria*:

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[286] C.M. Schmitthoff, *supra* note 92 at 38.

[287] For example: Spain, Italy, Iraq.

[288] Article 1 of UCP 500 (1993 revision) Provides:
"The Uniform Customs and Practice for Documentary Credits, 1993 Revision, ICC Publication No. 500, shall apply to all Documentary Credits (including to the extent to which they may be applicable, Standby Letter(s) of Credit) where they are incorporated into the text of the Credit. They are binding on all parties thereto, unless otherwise expressly stipulated in the Credit."

[289] C.M. Schmitthoff, *supra* note 92 at 39.

[290] M. Kurkela, *Letters of Credit Under International Trade Law: UCC, UCP and Law Merchant* (New York: Kluwer, 1985) 11-21.

[291] C.M. Schmitthoff, *supra* note 92 at 39. In 1981 also Schmitthoff said: "As banks in more than 170 countries operate letters of credit under this document, the Uniform Customs and Practice for Documentary Credits has become world law." C.M. Schmitthoff, *supra* note 56 at 28 cites Harfield who believes that they should be applied as trade usage even if not expressly agreed upon; H. Harfield, *Letters of Credit* (1979) at 3.

[292] C.M. Schmitthoff, *supra* note 92 at 41.

1. Article 21(1) of the Arbitration Court Berlin Arbitration Rules (ACB-Arb.R.) provides:[293]

> [T]he arbitral tribunal shall decide the dispute according to the *rules of law* which the parties have agreed should apply to the matter in dispute between them. The reference to the rules of law of a particular jurisdiction, insofar as the parties have not expressly agreed otherwise, is to be understood as a direct reference to the substantive law of that jurisdiction and not to its conflict of law rules.

2. Article 21(1) of the Arbitration Rules of the German Institute of Arbitration states:[294]

> The arbitration tribunal shall decide in accordance with the *general provisions* agreed upon by the parties. A reference to a particular national law without further specifications by the parties shall be understood as a direct reference to the substantive law of that state and not to its conflict of laws rules. (*emphasis added*)

3. Article 29(1) of the International Arbitration Rules of the AAA (American Arbitration Association) stipulates:

> The tribunal shall apply the substantive law or laws designated by the parties as applicable to the dispute. Failing such a designation by the parties, the tribunal shall apply such law or laws as it determines to be appropriate.
> (2) In arbitration involving the application of contracts, the tribunal shall decide in accordance with the terms of the contract and shall take into account *usages of the trade* applicable to the contract.
> (3) The tribunal shall not decide as *amiable compositeur* or *ex aequo et bono* unless the parties have authorized it to do so. (*emphasis added*)

4. Article 13(1)(a) of London Court of International Arbitration regarding the additional powers of the tribunal reads:

> 13.1 Unless the parties at any time agree otherwise, and subject to any mandatory limitations of any applicable law, the Tribunal shall have the power, on the application of any party of its own motion, but in either case only after giving the parties a proper opportunity to state their views, to:

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[293] Amended on 11 October, 1990 which Berger, Annex 3 at 827.

[294] Deutsche Institution für Schiedsgerichtsbarkeit e.V. (DIS). K.P Berger, *Supra* note 4 annex 3 at 816.

> (a) determine what are the *rules of law* governing or applicable to any contract, or arbitration agreement or issue between the parties. (*emphasis added*).

Canadian common law provinces which have adopted the UNCITRAL Model Law also comply with the Article 28(1) of Model Law. Contrary to this trend, article 4 of International Arbitration Rules of Zurich Chamber of Commerce stipulates:[295]

> The arbitral tribunal decides according to the substantive law declared applicable by the parties.
> If the parties have not chosen an applicable law, the Arbitral Tribunal decides the case according to the law applicable according to the *rules of the Private International Law Statue*.

4. *Rules of Operation of Belgian State Credit Insurance Agency*

The only place that a direct reference to the *lex mercatoria* has been appeared is in the Article 21 of the Rules of Operation of Belgian Credit Insurance Agency *(Office National du Ducroire)*. It provides that a tender for a procurement contract should make a reservation against clauses which would derogate from transnational usages. Absent such a clause, the Agency might refuse to intervene under its cover relating to a request for payment under a bid bond, provided the demand under the bid bond is related to the non-conclusion of the contract. In turn, the non-formation of the contract must have been caused by the refusal of the Export Credit Agency to give cover under the contract because of clauses which derogate from international trade usages.

According to commentary accompanying the Operational Rules, the exporters are deemed to know the *lex mercatoria* and are obliged to conclude contracts which are

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[295] *Ibid.* at 849.

consistent with *international usages*.[296]

[296] National Credit Export Agency, Rules of Operation (652- 1985), contact No. 50, February 1985, 96. Documented by F. De Ly, *supra* note 31 at 268, footnote 299.

CHAPTER FOUR

Assessment of *Lex Mercatoria* in Case Law

Twenty years ago, Eugen Langen said that "the courts are solidly opposed to *lex mercatoria*".[297] The situation so described has changed to the extent that a number of national courts have rendered decisions on the basis of the *lex mercatoria*. In this chapter the influence of the theory of *lex mercatoria* on both national judgments and arbitral awards will be examined.[298] Two facts need to be mentioned at the outset. First, it should be emphasized that international arbitration has facilitated the growth and development of the *lex mercatoria* through arbitrators who are not responsible to any given domestic law and who unlike judges cannot be considered as the servants of their national legal system. Further, the principle of party autonomy, which is the corner stone of arbitration, has facilitated the development of *lex mercatoria*. Another factor that has facilitated the emergence of the *lex mercatoria* is historical. Four decades ago the national laws of developing countries were not sophisticated enough to govern international contracts and even the national laws of industrial countries were not able to govern all aspect of them. As a result, arbitrators began to resort to *delocalization* methodology and render anational awards.[299]

The reluctance of national judges towards the application of *lex mercatoria* is not difficult to explain. In fact, national judges have been accustomed to basing their

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[297] E. Langen, *Transnational Commercial Law* (The Netherlands: A.W. Sijthoff, 1973) at 12.

[298] Other Cases: *Naviera Amazonica Peruana S.A. v. Compania Internacional de Seguros del Peru* (1988) (England); *Home Insurance v. Mentor Insurance* (1989) (England).

[299] For delocalization see *supra* note 5.

judgments in national conflict of law rules. It is difficult for a national judge to ignore his national legal system. Even when a judge can be seen to have applied a foreign law or to recognize it, he is in fact complying with his national conflict of law rules, rather than out of a desire to favour a foreign law. Professor Rubino-Sammartano has stated that: "he (the national judge) is not the most suitable person to face the situation of a *vacuum*, *i.e.*, that sort of *legal desert* which the *lex mercatoria* has tried to fill."[300]

However, in most cases, trade usages and customs have been taken into consideration only as a means to fill the contractual gaps, not as the governing law of the contracts.[301] Some commentators believe that cases which have been rendered according to equity and equitable principles, rather than strict rules of law, can also be considered as the approval of *lex mercatoria*. For example in the *Eagle Star* case[302] the English Court of Appeal in 1978 upheld an arbitration clause which provided:

> (the arbitrators should) not be bound by the strict rules of law but ... settle any difference referred to them according to an *equitable* rather than a strictly legal interpretation of the provisions of this contract.

The court found this provision "entirely reasonable". It did not oust the jurisdiction of the courts but only removed "technicalities and strict constructions". In Lando's opinion this judgment also covers *lex mercatoria*[303] especially when the

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[300] M. Rubino-Sammartano, *International Arbitration Law* (Deventer: Kluwer, 1990) at 271.

[301] For example in ICC case No. 5485 (1987), a dispute between a Spanish and a Bermudian company, the arbitral tribunal considered the reports of experts in business and financial matters, in order to issue a decision that would fill the existing gap contained in the express covenant between the parties. See [1989] 14 Y.B. Com. Arb. 156-173.

[302] *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.* [1978] 1 Lloyd's Rep. 357 (CA).

[303] O. Lando, *supra* note 130 at 152.

English Arbitration Act solved the problem by allowing the parties to exclude the right to bring questions of law before the court even after the dispute has arisen through the *exclusion agreement*.

I have attempted to examine major decisions in which the theory of *lex mercatoria* has been considered. The impact of *lex mercatoria* on the case law will be examined in two parts; first, the cases in favour of *lex mercatoria* and then cases against *lex mercatoria*. Since some of the cases have been involved both in international (mostly ICC) arbitrations and national courts, they cannot be examined independently in different sections.

A. Cases in Favour of *lex mercatoria*

1. *Channel Tunnel v. Balfour Beatty (1993)*[304]

Recently, the Channel Tunnel Group company (the consortium which is owner of the tunnel) employed several English and French contractors for the construction of a tunnel under the English Channel between England and France. According to the Clause 67 of their contract any dispute arising from the contract should be settled by ICC arbitration in Brussels, Belgium. Clause 68 stipulated that:

> The construction, validity and performance of the contract shall in all respects be governed by and interpreted in accordance with the principles common to both English and French Law, and in the absence of such common principles by such *general principles of international trade law* as have been applied by national and international tribunals. Subject in all cases, with respect to the works to be respectively performed in the French and in the English part of the site, to the respective French or English public policy (*ordre public*) provision. (*emphasis added*)

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[304] *Channel Tunnel Group Ltd. v. Balfour Beaty Construction Ltd.* [1993] 2 W.L.R. 262; 8 Int'l Arb. Rep. E-1 (Feb. 1993) for English House of Lords; for Appeal Court in *Channel Tunnel Group Ltd. and France Manche S.A. v. Balfour Beaty Construction Ltd. and others* [1992] 2 All E.R. 609.

A dispute arose between the employers and the contractors regarding the sums payable for the cooling system to the contractors. When parties could not agree on the price of that work, the contractors threatened to suspend the work, alleging that the employers were in breach of contract. The employers issued a writ in England seeking an injunction to restrain the contractors from suspending the work. The trial court did not grant an injunction against the contractors, but made no order on the contractor's undertaking not to suspend the work without notice to the employers in the period of 14 days. The court also dismissed the contractors's summons to stay the employers' action in favour of arbitration under section 1 of the Arbitration Act 1975. The contractors appealed to the Court of Appeal. The Court of Appeal granted the contractors a stay in action and also declined to issue a pre-arbitration injunction. The employers appealed to the House of Lords, claiming a pre-arbitration injunction on the grounds of Sec. 12(6)(h) of the English Arbitration Act 1950[305] (special power) and also in virtue of Sec. 37(1) of English Supreme Court Act 1981.[306]

In this case, Lord Mustill, writing for the majority of the House of Lords, stated that "[i]t is by now firmly established that more than one national system of law bear upon an international arbitration".[307] He distinguished between the substantive law which was determined by the contract and the procedure or "curial law" which in his

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[305] Sec. 12(6)(h): "The High Court shall have, for the purpose of and in relation to a reference, the same power of making orders in respect of ... interim injunctions ... as it has for the purpose of and in relation to an action or matter in High Court."

[306] Sec. 37(1): "the High Court may by order (whether interlocutory or final) grant an injunction in all cases in which it appears to the court to be just and convenient to do so."

[307] [1993] 2 W.L.R. 262 at 281.

opinion was the seat of arbitration, Belgian law. Therefore, he rejected the injunction on the first ground. Although the Lords stated under Sec. 37 of the English Supreme Court Act 1981, that the English Courts had the power to grant the pre-arbitration injunction sought by the employers, they refused to issue the injunction on the grounds that the grant of the injunction would largely pre-empt any decision ultimately to be put to the panel of experts or the arbitrators under clause 67 of the contract. According to Lord Mustill, "to order an injunction here would be to act contrary both to the general tenor of the construction contract and to the spirit of international arbitration".

There are two important points about this case. First, the contract itself had provided the applicability of the *general principles of international trade law* to govern the contract. Second, the English House of Lords in this case made it clear that the New York Convention does not bar the English courts from granting pre-arbitration injunctions or other interim measures in support of arbitration.[308]

2. *Valenciana v. Primary (1990)*[309]

Valenciana and *Primary* concluded several contracts, under which *Primary* was to deliver certain quantities of South African Coal to Valenciana's cement plant in Spain for a period of three years. One of the contracts, dated 8 January 1985, contained an ICC arbitration clause which did not contain a choice of law clause. A dispute arose

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[308] M. Jalili, "House of Lords Supports Pre-arbitration Interim Measures under New York Convention" (1993) 8(6) Mealey's Int'l Arb. R. 14, at 17.

[309] ICC Case No. 5953 (1990); *Compania Valenciana de Cementos Portland S.A. (Spain) v. Primary Coal Inc.* (U.S.A); The award is published originally in French in (1992) Revue Critique de Droit international Privé (1992) 113-114 with note by B. Oppetit 114-116; (1992) Journal du Droit International 177-178 with note by B. Goldman 178-186; (1992) Revue de l'arbitrage 457-458 with note by Paul Lagarde 458-461; [1990] Revue de l'arbitrage 701-712; The English version in [1993] 18 Y.B. Comm. Arb. 137 & [1991] 16 Y.B. Com. Arb. 142.

concerning the execution of the contracts, and was referred to ICC arbitration in 1988. The ICC sole arbitrator found that neither the U.S. nor Spanish law were relevant and as there was no choice of law in their contract, the parties intended to exclude both national laws. Therefore, in an interim award he held that the dispute was to be decided "*solely in accordance with the usages of international trade, otherwise known as lex mercatoria*".

Court of Appeal of Paris (1989):[310]

Valenciana sought to have the partial award set aside (*recours en annulation*) under Art. 1502 (3) and (4) of the New Code of Civil Procedure.[311] The Court of Appeal rejected the challenge, holding that (1) the ICC Rules do not require the arbitrator to refer to a "rule of conflict" found in a given legislated text, (2) the arbitrator had made the "sovereign" determination that the dispute was not sufficiently connected to either Spanish or US law, and should therefore appropriately be decided by reference to "*the body of principles and usages known as lex mercatoria*", and (3) he thus had acted within the scope of his authority.

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[310] *Compania Valenciana de Cementos Portland S.A. v. Sté. Primary Coal Inc.* The judgment of the Cour d'Appel and a comment by Goldman in 1990 Clunet 430-442.

[311] Art. 1502 of the New French Code of Civil Procedure reads in relevant part:
"An appeal against a decision granting recognition or enforcement may be brought only in the following cases:
1. (...)
2. (...)
3. If the arbitrator decided in a manner incompatible with the mission conferred upon him;
4. Whenever due process has not been respected;
5. (...) ....

Cour de Cassation (22 October 1991):[312]

The *Court of Cassation* affirmed that the arbitrator, in applying the *lex mercatoria*, had not violated the Terms of Reference and that it was not necessary that the Court of Appeal examine how the arbitrator had determined and implemented the applicable law. Therefore, the *Cour de Cassation* upheld the lower court's decision and recognized *lex mercatoria* as the law (*régles de droit*):

> [...] by relying upon *the body of international commercial rules consecrated by the practice and approved by national courts*, the arbitrator made a legal ruling as he was required to do, consistent with the task entrusted to him, and it is not the role of the Court of Appeals, which was petitioned to reverse the award on the basis of Article 1504 and 1052, (3'), of the Revised Code of Civil Procedure, to review the manner in which the arbitrator identified and applied the appropriate rule of law.[313] (*emphasis added*)

3. *ICC Case No. 3267 (1979 and 1984)*[314] (Power of *amiable compositeur)*

In 1976 a Saudi Arabian Government entity entered into an agreement with a Belgian Consortium concerning the construction of a large building project in two Saudi Arabian cites. In 1977, the defendant Belgian company (a member of a consortium) subcontracted part of the project to the claimant, a mexican construction company. Difficulties arose between the parties, prompting the claimant to terminate the contract.

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[312] *Court of Cassation* (22 October 1991), Civil Division 1, n. 1354 PRF, Revue de Jurisprudence de Droit des Affaires, 1/1992, n. 107.

[313] English translation by Judge Jean-Pierre Ancel, *supra* note 167 at 128. He has concluded that this case has ended the debate on *lex mercatoria* in France and states: "[t]hus, the law merchant is recognized as a source of international arbitration law, and a French court reviewing arbitral awards is not entitled to interfere in the arbitrator's decision to apply these transnational rules, nor to examine the way in which they were applied, provided that, in relying upon these rules, the arbitrator complied with the task entrusted to him by the parties". Judge Ancel was Chief Divisional of Paris Court of Appeals and recently has been elevated to the Cour de cassation.

[314] Extract in 107 Journal de droit international (Clunet) 1980, no. 5 , 962-966 with comment by Yves Derains, 966-970. Also in (1982) 7 Y.B. Com. Arb. 96. (Original in English). This case is connected with the ICC Case No. 3316 (1979) published in (1982) 7 Y.B. Com. Arb. 106-116.

Arbitration was initiated in 1977 at the ICC Court of Arbitration. Arbitrators[315] held that according to the facts there was no choice of governing law in the contract and that the arbitrators were empowered as *amiable compositeurs*. They decided not to apply any specific national law and held that: "..., the Arbitral Tribunal will apply the *widely accepted general principle governing commercial international law* with no specific reference to a particular system of law".[316] (*emphasis added*). In 1984, the case was reviewed by the same arbitrators on other grounds in which they confirmed their previous opinions:

> In the first award, the arbitral tribunal decided to determine the issues under generally accepted legal principles governing international commercial relations, without specific reference to a particular system of law, which was qualified by a learned commentator[317] as a reference to *lex mercatoria*. In the second phase of this arbitration non of the parties did require the application of any particular system of law, nor did they rely on any specific provision of any municipal system. The arbitral tribunal sees no reason therefore to depart from the view expressed in its first award on this aspect of the cases. Indeed, as it will appear later, all legal issues in this arbitration depend on the construction and system of the contractual documents.[318]

4. *Norsolor* [319]

This case has been the most controversial decision in which the *lex mercatoria*

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[315] The arbitrators were C. Reymond (Switz), F. Duhot, P. Chatenet.

[316] The award made 14 June 1979.

[317] Y. Derains, "Chronique des sentences arbitrales" (1980) J.D. Int'l 961, 966-969.

[318] [1987] 12 Y.B. Com. Arb. at 89. Furthermore, they stated: " On the other hand, it was forcibly argued by defendant that, irrespective of the legal principles governing the contract, the power to act as amiable compositeur entitled the arbitral tribunal to modify or disregard the provisions of the Contract, when its application would lead to results contrary to natural justice, or to the principles of equity within the meaning of this award in Civil Law countries."

[319] *Pabalk Ticaret Limited Sirketi v. Norsolor S.A.*; ICC Case No. 3131, Claimant: *Pabalk* (Turkey), Defendant: *Norsolor* (France).

was applied by the arbitrators when there was no choice of law in the contract and where the arbitrators were not empowered as *amiable compositeurs*. As many national courts were involved in the case it has received a remarkable attention from scholars.[320] The case has been discussed by Goldman[321] as well as many other scholars.

On June 1, 1971, Norsolor concluded an agency agreement with Pabalk under which Pabalk was to receive commissions for the delivery of a product called acrylonitrile to the Turkish company Aksa. As a result of difficulties which had arisen between Norsolor and Aksa, Norsolor terminated the agency agreement with Pabalk. Following the dispute, Pabalk initiated arbitration against Norsolor at ICC in Paris on the basis of the arbitral clause in the contract between parties, claiming unpaid commissions and damages. Pabalk was partly successful with its claim for unpaid commissions and partly successful with its claim for damages caused by the termination of the contract. Pabalk sought enforcement of the award in both France and Austria. In France it was granted *exequatur* by ordinance on February 5, 1980 of the president of the Paris *Tribunal de Grande Instance*.

No applicable national law was agreed upon by the parties, nor were the arbitrators empowered under art. 13(4) of the ICC Rules to act as *amiable compositeurs*. The arbitral tribunal applied no single national law, whether French, Turkish, or

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[320] This award had various phases of which are marked by five French decisions (Paris Court, Court of Appeal Paris, Court of Appeal Paris again, Order of the President of the Tribunal de Grande Instance, Court of Cassation) and by three Austrian judgments (Handelsgericht Wien, Oberlandesgericht Wien, Oberster Gerichtshof).

[321] B. Goldman, "Une bataille judiciaire autour de la *lex mercatoria*" (A legal battle around *lex mercatoria*), (1983) Rev. Arb. 378; the judgment of the French Cassation is published in (1985) Rev. Arb. 431.

Austrian, but simply based its decision on *lex mercatoria* and on the principles of good faith dealings and mutual trust in business relations.

The arbitrators affirmed that they understood *lex mercatoria* to include *a rule* that *damages are payable if a contract is wrongfully terminated causing loss to the innocent party*. In the award the word "*equity*" was relied upon in two instances.

> Faced with the difficulty of choosing a national law the application of which is sufficiently compelling, the Tribunal considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legislation, be it Turkish or French, and to apply the international *lex mercatoria*.

Norsolor tried to set aside the order, reasoning that liability and damages had been decided on equity and according to Article 1028 of the *Ancien Code de Procédure Civile* and therefore, in violation of the arbitrators' jurisdictional mandate. The *Tribunal de Grande Instance* rejected this challenge on March 4, 1981 and stated that the arbitrators, in selecting *lex mercatoria*, had acted within the scope of their mandate, not as *amiable compositeurs*. The *Cour de Cassation* of France upheld the enforcement.[322]

Appeal to Austrian courts:

Simultaneously, Norsolor tried to set aside the award by the Austrian courts. First, it was dismissed by the *Commercial Court* of Vienna in June 1981. Later in January 1982, The *Court of Appeal* of Vienna set aside a portion of the award (on Damages), reasoning that the arbitrators had failed to conform to the second sentence of

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[322] [1985] XXIV I.L.M. at 360.

art. 13(3)of the ICC Rules.[323] The Court of Appeal deemed this sentence to require the arbitrators to ground their decision in a national law determined by a conflict-of-law analysis. It was not permissible to refer to *lex mercatoria*. As the arbitral tribunal had not succeeded in showing that French and Turkish laws were identical with respect to the principal issues of the case, while the Court of Appeal felt that the arbitrators had had a duty to determine which of the two laws was applicable. The Court of appeal characterized the *lex mercatoria* as global uncertainty which does not have any connection to any national legal order. Court of Appeal of Vienna:[324]

> The Court set aside part of the award for breach of Art. 13 of ICC Rules, since the arbitrators had not determined the applicable national law by confining themselves to apply *lex mercatoria*, "*a world law of questionable validity*".

Supreme Court of Austria:

The *Supreme Court* of Austria reversed the decision and re-established the award in November 1982.[325] It held in particular that the arbitrators had not violated any imperative norms of law. Furthermore, the Supreme Court rejected the argument that the arbitrators had exceeded their jurisdictional powers. Although it recognized that the arbitral tribunal had applied principles of equity in reaching the sum of 80,000 French Francs, and that the parties had not given to the arbitrators the power of *amiable compositeurs* under art.13(4) of the ICC Rules, the arbitrators' action was not in excess

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[323] Article 13(3) of ICC Rules provides:
> In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate.

[324] *Pabalk Ticaret Limited Sirketi n. Norsolor S.A.*, Court of Appeal, Vienna, January 19, 1982, [1983] 8 Y.B. Com. Arb. at 365.

[325] [1984] 9 Y.B. Com. Arb. at 159.

of their jurisdiction. The decision had merely disposed of issues within the scope of the agreement to arbitrate. In this case the Supreme Court of Austria and France (*Cour de Cassation*) recognized *lex mercatoria* as a valid and enforceable body of law.[326]

5. *Fougerolle*[327]

A dispute arose between Fougerolle (a French company) and a Lebanese bank (Proche Orient) concerning commission fees. Under a public procurement procedure, the bank was an intermediary for Fougerolle in relation to public works to be undertaken in Syria. The contract provided that it would be terminated if no contract with the Syrian state were concluded before June 30, 1976. The French Company terminated the contract before the claimant had completed the mission. The arbitral tribunal in Geneva based its award of partial remuneration for services on "*principles of obligation generally applicable in international trade*". They were not empowered as *amiable compositeurs* and the arbitrators did not base their decisions on a specific national law. The losing party (Fougerolle) contested the enforcement of the award before the Court of First Instance. Fougerolle argued that according to Article 1028(1) of the Ancient Code de Procédure Civile, under which awards could be invalidated if they were rendered

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[326] P. Fouchard regarding the *Norsolor* case (ICC proceedings No. 3327 (1981) quoted: "Recourse to the *general principles of law* is the most frequent attitude of arbitrators in international trade. It is to be found in awards whether they base themselves or not on international law; this is sometimes expressed and more frequently tacit. The general principles are deducted by a comparative analysis of various legal systems by starting from an abstract reasoning where the legal culture of the arbitrator obviously plays an important role. The formation of a common law of the nations directly arises from this arbitral method. It is mainly in contractual disputes that the arbitrators have tried to identify general principles. A general doctrine of contracts has been elaborated which creates a really international common law..."; P. Fouchard *supra* note 6 at 427, translated by M. Rubino-Sammartano *supra* note 300 at 217.

[327] *Fougerolle (France) V. Banque du Proche Orient (Lebanon)*; *Cour de cassation*, 9 Dec. 1981, [1982] J.D.I. 931; (1982) Rev Arb. 183.

"beyond the scope of the submission", the arbitrators have wrongly acted as *amiable compositeurs* where they were not authorized to do so. Therefore, the award exceeded the scope of submission and was thus invalid. The court rejected the challenge and its decision was confirmed by the Court of Appeal[328] which held that,

> [I]t follows from the reasoning of the award the (the arbitrators) implicitly but necessarily referred to a usage of international trade that has evident force and that thus based on *rules of law*, the arbitrators' decision was within the scope of the submission.[329]

In the final appeal, the French Supreme Court[330] held,

> [I]n referring to "*general principles of obligation generally applicable in international trade*" the arbitrators only conformed to the duty imposed upon them by Article 8 of the Terms of Reference to define *the law applicable* to the agreement.[331] (*emphasis added*)

6. *R'as Al Khaimah Oil Co. or Rakoil*[332]

In 1973, a concession agreement was concluded between the Government of R'as Al Khaimah and an exploration company to explore for oil and gas in the territorial waters of R'as Al Khaimah. The Exploration work was carried out by the "consortium", a group of companies, to which contractual rights had been assigned by the operator. DST succeeded the exploration company as operator on January 1, 1979. As the

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[328] Decision of 12 June 1980.

[329] English translation by B. Goldman, *supra* note 36 at 15.

[330] The Second Civil Chamber of the Cour de Cassation, decision of 9 December, 1981.

[331] Translation from B. Goldman, *supra* note 36 at 15.

[332] ICC Case No. 3572 (1982); *Deutsche Shachtbau-und Tiefbohrgesellschaft mbH* (DST)(from Germany) *v. Ras Al Khaimah National Oil Co.*(Rakoil)(from UAE) and *Shell International Petroleum Co. Ltd.*(UK); published in [1987] 2 Lloyd's L. Rep. 246; [1988] 13 Y.B. Com. Arb. 522; [1989] 14 Y.B. Com. Arb. 111-122 and 737-750. ; [1990] 1 A.C. 295, C.A. The judgment was reversed on a different issue, *ibid.* at 329.

government stopped all payments of its share of the exploration costs, DST (as agent for the group of companies) filed a request for arbitration at the ICC against the Government and Rakoil in 1979 based on the arbitration clause contained in the concession Agreement and the 1976 Operating Agreement asking to be awarded damages of US$ 3,220,070 plus costs and expenses and interest.

An ICC arbitration held in Geneva. In the contracts there was no choice of law clause, the applicable law was at issue. It was argued that the law of R'as al Khaimah should be applied as it was the place of performance. However, the arbitrators applied "*internationally accepted principles of law governing contractual relations*" as the applicable law. On this basis they concluded that the agreements were valid and that the Government was also a party to those agreements. They awarded the claimant (DST) US$ 4,635,664 which included accrued interest, and arbitration costs.[333] Rakoil succeeded in the litigation, and DST were held liable to Rakoil in the sum of US$ 1,424,891,23 and Dirhams 110,687,839,61. The winner sought the enforcement of the award. The Court of Appeal gave leave to enforce an ICC award rendered in Geneva where it was argued that the award is contrary to English public policy. In rejection of this submission it held (Sir John Doaldson, Master of the Rolls):

> By choosing to arbitrate under the Rules of the ICC and, in particular, art.13(3), the parties have left proper law to be decided by the arbitrators *and have not in terms confined to national systems of law*. I can see no basis for concluding that the arbitrator's choice of proper law - a common denominator of principles underlying the laws of the various national governing contractual relations - is outwith the scope of the choice which the parties left to the arbitrators.

English Court of Appeal in this case admitted the arbitrators' choice of an

[333] The arbitration award was rendered on 4 July 1980.

anational law.[334] However, the House of Lord upheld the case when Shell International Petroleum Co. appealed.[335]

7. ***ICC Case No. 3540 (1980)***[336] (Power of *amiable compositeurs)*

In 1975, a French enterprise (claimant) concluded a construction project with a Yugoslav subcontractor (Defendant) under which the Yugoslav company was to construct a project in the USSR for a Soviet principal. The project was subject of a contract between the Soviet principal and the French enterprise. A dispute arose out of unsatisfactory performance of the defendant. Under the arbitration clause,the dispute was referred to ICC arbitration which took place in Geneva where procedure was subject to the law of the Canton of Geneva, *i.e.*, the Swiss Concordat on Arbitration. The arbitrators were empowered as *amiable compositeurs*. The parties had not determined any national law to govern their contract.

The arbitrators[337] in determining the applicable law reasoned that the most recent and authoritative doctrine in international arbitration as well as the jurisprudence

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[334] Jan Paulsson, "*lex mercatoria* as Governing Law in Arbitration" (1990) 18 Int'l Bus. Lawyer 4; also for the discussion of the award see W. Craig, W. Park & J. Paulsson, *supra* note 28 at 299; and also (1987) J. Bus. L. at 168. North has concluded that the English court has permitted the choice of *lex mercatoria*, P. North, *Private International Law Problems in Common Law Jurisdictions* (Dordrecht: Martinus Nijhoff, 1993) at 109-110. Jan Paulsson in regard of this case stated: "Even if it were thus accepted that the arbitral tribunal's failure to specify a governing national law would provide no defence against enforcement under the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, the question remained whether the courts at the place of arbitration should entertain actions to set aside such awards."

[335] [1988] 3 W.L.R. 230-264; [1988] Int'l Legal Materials 1032; (1988) 3 Int'l Arb. R. 3-4 and A1-39; (1989) 14 Y.B. Com. Arb. 737-750.

[336] Original in French; published in Journal du droit international (Clunet) 1981, no. 4, 914-921; with commentary by Yves Derains 921-927; English version in [1982] 7 Y.B. Com. Arb. 124.

[337] The arbitrators were M. Besarovic, J. Guillermain, J. Guyet.

of arbitrators in determining the substantive law, arbitrators may choose not to apply the rules of conflict of the forum, especially when they have the power of *amiable compositeurs*. In this regard they cited scholars such as Lalive, Goldman, Derains and concluded that in practice, one of the methods used by international arbitrators is the "direct approach" (*voie directe*), either by the direct determination of an applicable national law, or by basing themselves uniquely on the contract and the *general and common legal principles*. They stated that: "the arbitral tribunal, upon careful consideration, holds that this latter principle, that is, the application of the '*lex mercatoria*', should be use here,...,". However, the arbitrators implied that,

> [T]he arbitral tribunal, holding it appropriate not to avoid all references to a national law, will examine whether the solution contained in its award based on the *lex mercatoria* and the application of the maxim *pacta sunt servanda* - leaving aside the international public policy - would be fundamentally different from that resulting from national law (...) or, rather, from the two national laws invoked by the parties.[338]

At the end once more they insist on the application of *lex mercatoria* as the *generally recognized principles of commercial law*.[339]

8. ***Mechema v. MMM (1977)***[340] (Power of *amiable compositeur*)

The Belgian company (hereafter called MMM) was the exclusive world distributor of company E's products. In 1966, MMM concluded a contract with the English

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[338] [1982] 7 Y.B. Com. Arb. at 129.

[339] *Ibid.* at 132.

[340] Ad Hoc Arbitration: *Mechema Ltd. (England) v. S.A. Mines, Minérais et Métaux (Belgium)* (Hereinafter MMM); Published in 1980 Revue de l'arbitrage, 560-568 with note by Jean Schapira. The Revue de l'arbitrage incorrectly addressed this award as an ICC award. It is ad hoc award, and just the president of the ICC Court of Arbitration appointed the third arbitrator, Me Ph. Gastambide. English version in [1982] 7 Y.B. Com. Arb. 77-81.

company Mechema by which MMM granted its distributorship to Mechema for the United Kingdom and Ireland. In the contract there was an arbitration clause, empowering arbitrators to decide as *amiable compositeurs*. There was no choice of law in the contract. In 1973, MMM terminated the contract, thus Mechema resorted to arbitration. In 1975, they signed the submission agreement (*acte de compromis*). Mechema argued that MMM by its termination of contract has violated the principle of good faith and that the contract had been terminated without sufficient notice, and thus claimed damages to the amount of Belg. F 10,000,000,00. MMM responded that the termination was the result of Mechema's competing industrial activities and its lack of interest in the contract.

The arbitrators,[341] in order to determine the applicable law, presumed the negative choice of the parties and the resort to *amiable compositeur* indicated that the parties had intended to escape from any national law. Moreover, they expressed that in an arbitration of this nature "the arbitrator is not necessarily obliged to determine a national law applicable to the substance". Therefore, they held,

> Having established that the character of the contract, and the place where it has its effect, necessarily exclude an obligatory application of either Belgian or English law, it is for the above-mentioned reasons that the arbitrators will abide by the "*lex mercatoria*" in the exercise of their power as *amiable compositeurs*.[342]

The Court of First Instance of Brussels enforced the award in 1978. MMM lodged an appeal against this decision with the Court of Appeal of Brussels, which

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[341] The arbitrators were M. Jean Dassesse, Francis Vallet, and Philippe Gastambide.

[342] [1982] 7 Y.B. Com. Arb. at 79.

confirmed the decision in the first instance in 1980 and held that the arbitrators had remained within the terms of the arbitral clause.[343]

9. *ICC Case No. 1859 (1973)*[344]

In this case the contract was suppose to be performed in several countries and the arbitrator decided not to apply a specific national law:[345]

> The contract was to be performed in three different countries ... it was clear that the parties intended to refer to the *general principles and practices of international trade.*

10. *ICC Case No. 4761 (1984)*[346]

The arbitral Tribunal, which was hearing a dispute between an Italian enterprise and a Libyan party, held in a partial award:

> If Libyan law will not be proven, according to Art. 8 of the Terms of Reference, this arbitral tribunal will apply *lex mercatoria, i.e., the general principles of the law. Lex mercatoria* shall equally apply if Libyan law, as established by one of the other parties, were manifestly incomplete on one or more aspects of dispute.

11. *ICC Case No. 1512 (1980)*[347]

In this case Professor Pierre Lalive was the sole arbitrator between an Indian plaintiff and a Pakistani respondent. He regarded the arbitration rules as an independent legal order which govern the arbitration which lead to the *delocalization* of the arbitral proceedings. He stated:

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[343] *Cour D'Appel* of Brussels (1st Chamber) October 14 1980. See [1982] 7 Y.B. Com. Arb. 316-318.

[344] [1973] Rev. Arb. 133.

[345] Cited from W. Graig, W. Park, J. Paulsson, *supra* note 28 at 615 footnote 31.

[346] Y. Derains & S. Jarvin, *Chronique des sentences arbitrales*, Clunet (1984) at 1137; also M. Rubino-Sammartano *supra* note 300 at 272.

[347] [1980] Y.B. Com. Arb. 174 at 176.

> [...] *international commercial arbitration may be entirely "detached" or separated from the "national" laws of the parties*: it shall be governed by the rules of arbitration chosen by the parties or referred to by the parties in their agreement ...
>
> One thing is clear beyond all question: *once the parties have chosen a law to govern the arbitration proceedings, there is no room for the laws of the country of the parties*. In other words, once the parties have agreed to submit to international arbitration under the ICC Rules, there is no possibility to rely, against the ICC rules, upon any provision of the law of pakistan or the law of India. Under the international law of arbitration, as it now stands and as it is recognized in most or all civilized states ..., I must find that the ICC rules, expressly accepted by the parties, constitute the law governing the objection raised by the defendant.

12. *Fratelli Damiano v. Tröpfer (1982)*[348]

A dispute arose between an Italian and a German company when the former (Damiano) refused to deliver 4,000 tons of sugar. The arbitration Clause of their contract had provided the resolution of future disputes to the Arbitration Board of the Sugar Association of London. Tröpfer initiated arbitration at the Association Board. The arbitrators awarded Tröpfer the difference between the contract price and the price of sale to third parties, being DM 304,000, plus 6.75% interest until the date of payment.

As Italian company refused to pay, Tröpfer sought the enforcement of the award through the Italian Court of Appeal of Messina. In turn, Domiano objected to the enforcement on the ground that the award did not contain reasons and that is contrary to the article VIII of the European Convention on International Commercial Arbitration

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[348] *Fratelli Damiano S.N.C. (Italy) v. August Tröpfer & Co. (Germany)*; [1984] 9 Y.B. Com. Arb. 418. In Italian see, [1983] *Rivista di diritto internazionale privato e processuale* 329-838, and in [1982] 529-829 with note by Giardina at 754.

which both Italy and Germany adhered to it.[349] The Court of Appeal overruled Domiano's objection and granted the enforcement on the basis that the award had been rendered in England which is not party to that Convention and under the English Arbitration Act 1950, the arbitrators are not obliged to give reasons for their award. However, the Italian Supreme Court (*Corte di Cassazione*) reversed the Court of Appeal's decision and accepted Domiano's objection. The Italian supreme Court based its decision on the notion of *lex mercatoria* in a very supportive manner:[350]

> Consequently, the European Convention of 1961, which regulates 'mercantile' arbitration insofar as from a subjective point of view international disputes are concerned, must be deemed to be implicitly incorporated into contracts concluded by merchants from Contracting States in which reference is made to permanent arbitral institutions (in Contracting or other States) for the resolution of disputes involving commercial matters governed by the *lex mercatoria* established between them. The Convention's applicability to these disputes is not dependent on the fact whether the arbitration board pertains to a Contracting State.[351]

In this case the Supreme Court of Italy defined 'mercantile' arbitration as transnational arbitration which is independent of national laws and also confirmed the existence of *lex mercatoria* as rules of conduct,

> However, both parties in the case at issue pertain to States (*i.e.*, Italy and Germany) which adhere to the European Convention of 1961, regulating *transnational* "mercantile" arbitration (called by other's "international commercial arbitration"). By signing and ratifying this Convention, both States incorporate the Convention into their respective legal systems, thereby making it *diritto commune* (*jus communis*),...

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[349] Under the article VIII of the European Convention on International Commercial Arbitration (1961):
The parties shall be presumed to have agreed that reasons shall be give for the award unless they:
(a) either expressly declare that reasons shall not be given; or
(b) have assented to an arbitral procedure under which it is not customary to give reasons for awards, provided that in this case neither party requests before the end of the hearing, or if there has not been a hearing then before the making of the award, that reasons be given.

[350] *Corte di Cassazione* [Supreme Court], Sez. Un., February 8, 1982, No. 722.

[351] [1984] 9 Y.B. Com. Arb. 418 at 421.

> In "mercantile" arbitration the dispute does not need to be subjectively or objectively international (*rectius:* transnational). Rather, the law in which such arbitration operates is transnational, being independent of laws of the individual States. Since "mercantile" law comes into existence through the adhesion of merchants to the values of their milieu, merchants comply with those values, which the majority of them considers binding, because of necessity (*opinio necessitatis*).
> To the extent that it is established that merchants - independently of their belonging to a State and/or the location of their trade, thereby showing an *opinio necessitatis* (also determined by an *affectio* due to practical reasons), a *lex mercatoria* exist (rules of conduct, the contents of which vary but which are fixed for the time being).[352]

13. *Oil Fields of Texas v. Iran*[353] (*Iran-U.S. Claims Tribunal*)

The Iran-U.S. Claims Tribunal, which has made a great contribution to international arbitration development, frequently refers to principles of commercial law without clearly distinguishing them from principles of international law such as the obligation to pay compensation after a *de facto* succession. Some commentators[354] have claimed such a principle seems to be fit only in the category of *lex mercatoria*.

In *Oil Fields of Texas v. Iran* case which was involved with the lease of equipment for petroleum exploration, the issue was concerning the consequences of a *de facto* succession. The claimant sought payment based on contractual obligations and compensation on the grounds of unjust enrichment and expropriation. As the parties did not agree on the applicable law,[355] the Tribunal reasoned since that there is no well-

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[352] [1984] 9 Y.B. Com. Arb. 418 at 420.

[353] *Oil Fields of Texas v. Iran* (1982) 1 Iran-U.S. Claims Tribunal Reports (cambridge: Grotius, 1983) at 350.

[354] J.J. van Hof, *Commentary on the UNCITRAL Arbitration Rules* (The Hague: Kluwer, 1991) at 267.

[355] The Claimant argued that the liability of the National Iranian Oil Company, as agent of the Government, was to be governed by commercial law, while the Respondent argued that Iranian law should be applied.

developed body of law to govern the circumstances of the case, the applicable rules should be derived from general principles of law or the rules of international law. As a result, the Tribunal decided that after a *de facto* succession, the surviving entity is under the obligation to pay appropriate compensation. The Tribunal (in part) held:[356]

> Rules in national law on merger and succession normally contain provisions in order to safeguard the interests of the creditors of the company which ceases to exist. If a *de facto* succession of rights and obligations in a certain field has taken place without the observance of such rules under the applicable national law, it is even more important to establish *a rule under international law* that such succession must have as a consequence that the surviving company is under an obligation to pay appropriate compensation taking into account all the circumstances of the case.[357] (*emphasis added*)

14. ***AAPL v. Sri Lanka (1990)***[358] *(ICSID Arbitration)*

This case is not directly concerned with the application of *lex mercatoria*. However, in this case the tribunal applied the customary international law as well as the law chosen by the parties.[359]

In 1983, Asian Agricultural Products Ltd. (AAPL), a Hong Kong company, made an officially approved investment in Sri Lanka in the form of participation in the equity capital of a Sri Lankan public company, Serendib Seafoods Ltd. Serendib was established to undertake shrimp culture in Sri Lanka. Serendib's shrimp culture farm was destroyed on 28 January 1987 during a military action conducted by Sri Lankan security

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[356] *Oil Fields of Texas v. Iran* (1982) 1 Iran-U.S. Claims Tribunal Reports (cambridge: Grotius, 1983) at 350.

[357] *Ibid.* at 362.

[358] *Asian Agricultural Products Ltd. (AAPL) v. The Republic of Sri Lanka*; Published in: (1991) 30 International Legal Materials 580-627 and dissenting opinion 628-655; (1991) 2 ICSID Rev. F.I.L.J. 526-573 and dissenting opinion 574-597; (1992) 17 Yearbook Comm. Arb. 106-152.

[359] Reminding that Professor Goldman was one of the arbitrator too.

forces against the installation, which was reported to be used by local rebels. AAPL alleged to have suffered a total loss of investment as a result of this action and claimed damages of US$ 8 million from the Government of Sri Lanka. On July 1987, the International centre for Settlement of Investment Disputes (ICSID) received a request from AAPL that arbitration proceedings be initiated against Sri Lanka. AAPL relied on the Washington Convention of 1965 to which Sri Lanka is a party, specifically art. 8(1) of the Agreement between the Government of the United Kingdom of Great Britain and Northern Inland and the Government of Sri Lanka for the Promotion and Protection of Investment of February 13, 1980 (the Bilateral Investment Treaty).[360] The Bilateral Investment Treaty was extended to Hong Kong effective January 14, 1981.

The Arbitral Tribunal[361] held that the Government of Sri Lanka was liable to compensate AAPL for the unlawful requisition and destruction of its investments and awarded as compensation for these losses US$ 460,000 with interest.

In this case the arbitration was initiated exclusively on basis of a treaty provision and not in implementation of a freely negotiated arbitration agreement directly concluded between the parties. Consequently, the parties to the dispute had had no opportunity to choose in advance the applicable law governing the substance of their eventual disputes.

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[360] Art. 8(1) of the Bilateral Investment Treaty which was invoked as expressing Sri Lanka's consent to ICSID arbitration provides:
1. Each Contracting Party hereby consents to submit to the International Centre for the Settlement of Investment Disputes (hereinafter referred to as 'the centre') for settlement by conciliation or arbitration under the Convention on the Settlement of Investment Disputes between States and Nationals of the other States opened for signature at Washington 18 March 1965 any legal disputes arising between that Contracting Party and a national or company of the other Contracting Party concerning an investment of the latter in the territory of the former.

[361] Place of Proceedings: Washington, D.C.; Arbitrators: Ahmed S. El-Kosheri (Egypt), President; Berthold Goldman (France); Samuel K.B. Asanta (Ghana).

The arbitrators reasoned that the parties had acted in the manner that demonstrates their mutual agreement to consider the provisions of the Sri Lanka/UK Bilateral Investment Treaty as being the primary source of the applicable legal rules. Since the mentioned treaty was not a self-contained closed legal system to provide for substantive material rules of direct applicability, the arbitrators argued that it has to be envisaged within a wider juridical context in which rules from other sources are integrated through implied incorporation methods, or by direct reference to certain supplementary rules, whether of international law character or of domestic law nature.

Therefore, the arbitrator applied primarily the Sri Lanka/UK Bilateral Investment Treaty as *lex specialis* and also applied *general customary international law* and relevant domestic rules were referred to as a supplementary source by virtue of Arts. 3 and 4 of the Treaty itself.

15. *Zurich Court of Appeal(1985)*[362]

In this case the court considered a bank guarantee as "supranational *lex mercatoria*".

B. Cases Against *lex mercatoria*

1. *ICC Case No. 4237 (1984)*[363]

This case is interesting as the arbitrator[364] relying on the article 1496 of French Arbitration code, rejected the applicability of *lex mercatoria*. The case was concerning

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[362] Bl Zurch R spr., 1986, No. 23, 44. [cite be De Ly at 255, footnote 245]; Also By Dasser at 21 footnote 75: 85 Blätter Für Zürcherische Rechtsprechung No. 23 (1986) May 9, 1985.

[363] [1985] 10 Y.B. Com. Arb. 52-60.

[364] Sole arbitrator: Loek J. Malmberg.

a sales contract between Syrian State trading Organization (buyer, claimant) and Ghanaian State enterprise (seller, defendant) in 1979 under which the claimant bought from defendant a large amount of plywood and blockboards according to specific qualities, Ghana origin, and under a specified price and shipment schedule. A dispute arose resulting from the defendant's delay in performance. The defendant sent a telex to the claimant that "Due to heavy rains, fuel shortage and other disturbances" they were not able to ship according to the shipment schedule. An ICC arbitration was initiated and the Terms of Reference provided that Paris would be the seat of arbitration and the French International Arbitration Law would be applicable to the procedure. The arbitrator invoked on the article 1496 of that law and regarding the applicable law held:

> As no documents submitted by the parties and the admitted by the Arbitrator point to "rules of law chosen by the parties" the Arbitrator shall, in virtue of Art. 1496, have to determine which are the appropriate rules governing the substance of the dispute.
>
> This poses the question which rules of law are appropriate. It is argued in literature that international arbitrators should, to the extent possible, apply the *lex mercatoria*. Leaving aside that its contents are not easy to determine, neither party has argued that a *lex mercatoria* should be applied. Rather, each party strenuously argued on the basis of a national law, *i.e.*, Syrian and Ghanaian/English law respectively. Accordingly, the Arbitrator shall follow the implied desire of the parties to apply a national law.[365]

2. *ICC Case No. 4650 (1985)*[366]

This case was concerning two agreements on a building project in Jaddah, Saudi Arabia in 1976 which contained an ICC arbitration clause taking place in Geneva and there was no choice of law in the agreements. A dispute arose between an American

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[365] [1985] 10 Y.B. Com. Arb. at 55.

[366] [1987] 12 Y.B. Com. Arb. 111-113.

architect (claimant) and the Saudi Arabian company (respondent). The interim award was rendered in 1985 with the final award in 1986. The claimant contended that as all significant work provided under the agreements was carried out in the State of Georgia (USA) the law of that State should be applied and as an alternative to Swiss substantive law or that possibly the *lex mercatoria* could be applied. Finally, the claimant relied on

> analogous international rules regarding the provision of engineering services which suggest that the law of the place of domicile of the engineer rather than of the employer will govern the legal relations between the parties, in the absence of any express agreement to the contrary."

The defendant submitted that Saudi Arabian law should be applied reasoning that although claimant's obligations were partly performed in Georgia and partly in Saudi Arabia, the defendants' obligations were to be wholly performed in Saudi Arabia. Moreover, under the Second Phase II Agreement, claimant's obligations were all to be performed in Saudi Arabia. Defendant also argued there are no such trade usages which have any direct bearing on the provision of architectural services by an American architect for a project in Saudi Arabia. Thus, the defendant submitted that neither Swiss substantive law nor the *lex mercatoria* should be applied.

The tribunal rejected the application of *lex mercatoria* in the absence of an express choice of the parties. The arbitrators[367] stated:

> Based on the evidence presented to the arbitral the question of the governing law did not appear to have been discussed between the parties and it would seem obvious that no tacit agreement or understanding had been reached. In the absence of any evidence regarding an actual agreement or concurrent intentions of the parties, the arbitral tribunal is of the opinion that one cannot consider that the parties had chosen Swiss substantive law on the *lex mercatoria*. It would seem to the arbitral tribunal that the choice of such a law would require an

[367] The arbitrators were Dr. Robert Briner (Switz), René Merkt (Switz), and Thomas R.A. Morison (U.K.).

agreement between the parties which in the present case was not reached.[368]

3. *Bank Mellat v. Helleniki Techniki*

In this case the English Court of Appeal insisted on the strict positivist approach and rejected the notion of delocalization or anational law:[369]

> The fundamental principle in this connection is that under our rules of private international law, in the absence of any contractual provision to the contrary, the procedural (or curial) law governing arbitrations is that of the forum of the arbitration, whether this be England, Scotland or some foreign country, since this is the system of law with which the agreement to arbitrate in the particular forum will have its closest connection [...].[370]
> Despite some suggestions to the contrary by some learned writers under other systems, *our jurisprudence does not recognize the concept of arbitral procedures floating in the transnational firmament, unconnected with any municipal system of law.* (*emphasis added*)

In this case Lord Diplock emphasize on the choice of a national system of law,

> (Contracts) are mere pieces of paper devoid of all legal effect unless they were made by reference to some system of private law which defines the obligations assumed by the parties to the contract by their use of particular forms of words and prescribes the remedies enforceable in a court of justice for failure to perform any of those obligations.

4. *Kuwait v. Aminoil (1982)*[371]

In 1948, Aminoil was granted a concession by the Ruler of Kuwait for the exploration and exploitation of petroleum and natural gas. At different times the concession agreement was revised, and as the result of the "October war" in 1973 and

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[368] [1987] 7 Y.B. Com. Arb. at 112.

[369] *Bank Mellat v. Helleniki Techniki S.A.*, [1983] W. L. R. at 783. Also [1984] Q.B. 291 at 301.

[370] See *James Miller and Partners v. Whitworth Street (Manchester) Ltd.* [1970] A.C. 583.

[371] *Government of the State of Kuwait v. The American Independent Oil Company (AMINOIL)*; XXI Int'l L. Materials (I.L.M.) (1982) 976-1053; (1984) 9 Y.B. Com. Arb. 71-96; A French translation of the award appears in 109 Journal du droit International (Clunet) (1982) no. 4, 869-909 with comment by Philippe Kahn, "Contrats d'Etat et nationalisation" 844-868.

other circumstances the Government of Kuwait issued Decree Law No. 124 terminating the Agreement between the parties. An ad hoc arbitration was initiated. During the course of the arbitration the parties did not agree on the applicable law. Aminoil contended that the precedents resulting from a series of transnational negotiations and agreements about compensation had instituted a particular rule, of an international and customary character, specific to the oil industry (a *lex petrolea* that was in some way a particular branch of a general universal *lex mercatoria*). In turn, Kuwait argued that the law of Kuwait should be applied. Since the arbitration agreement stipulated that the applicable law should be determined by "having regard to the quality of the parties, the transnational character of their relations and the principles of law and prevailing in the modern world"[372] Kuwait contended that the application of Kuwait law does not exclude the application of international norms, because international law was part of the Kuwait law. The tribunal[373] rejected the submission of Aminoil and stated that it could not share this view, for reasons of fact and of law.[374] Therefore, the tribunal applied the Kuwait reasoning that the law of Kuwait applied "to many matters over which it [was] most directly involved"[375] and because international law was part of the Kuwait law.

There are some other cases against the idea of delocalization which cannot be

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[372] Aminoil, 21 I.L.M. at 1000 (pra. 8 of the award).

[373] The arbitrators were:Prof. Paul Reuter (president); Prof. Hamed Sultan; Sir Gerald Fitzmaurice.

[374] [1984] 9 Y.B. Com. Arb. at 87.

[375] *Ibid.* pra. 6 of the award.

discussed since it falls beyond the scope of the present study. For example, in the case of Amin Rasheed the English House of Lords held,[376] "describing a contract as internationalized would amount to treat it as a *floating contract, unanchored from any system of law*" "contracts are incapable of existing in a legal vacuum. They are mere pieces of paper devoid of all legal effects unless made by reference to some system of private law".[377]

C. Conclusion

Reviewing the case law, it becomes evident that different scholars and judges have different perceptions and understandings of *lex mercatoria*. At present, the expression *lex mercatoria* and "general principles of law", "universal trade usages" and "anational law" are used interchangeably. Therefore, the problem with the term *lex mercatoria* is that it is overused and different people understand it to mean different things. Some scholars have suggested that it be modified: *lex mercatoria* arbitralis.[378] Scholars have suggested that the debate over *lex mercatoria* does not appear to have had more than a marginal impact on the practice of international arbitration.[379] It, however, has been argued that participants in the process of international arbitration apply and create *lex*

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[376] *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.*, [1983] 2 All E.R. 884.

[377] *Amin Rasheed Shipping Corporation v. Kuwait Insurance Co.* [1983] W.L.R. 241, at 249. For the study of State Contracts see generally G.R. Delaume "The Myth of the *lex mercatoria*" *supra* note 171.

[378] H. Smit, "Proper Choice of Law and the *lex mercatoria* Arbitralis" (1989) 63 Tul. L. Rev. 629; reprinted in T.E. Carbonneau, ed., *supra* note 17 at 59.

[379] W. Craig, W. Park, J. Paulsson, *supra* note 28 at 606. They cited S. Jarvin, the former General Counsel of the ICC Court of Arbitration, who noted that *lex mercatoria* "rarely appears" in ICC awards. Comment in (1986) J.D.I. at 1138.

mercatoria without knowing it.[380] The notion of *amiable composition* has accelerated the development of *lex mercatoria* in international commercial disputes. At least in the cases that arbitrators have been empowered as *amiable compositeurs*, the application of *lex mercatoria* has not been questioned.

Since these concepts are not fixed, they can not be codified and are not supposed to be codified. They are subject to change and the elements of this change vary according to the time, place, and type of business. Something may be a usage, practice, or custom of trade in one place which may not be the same in another place or a practice may be abandoned after a while and be replaced by another practice.

One may conclude from the above judgments that if the parties choose the *lex mercatoria* as the applicable law in their contract, that choice can be applied by the international arbitrators according to the principle of party autonomy. However, regarding the national courts, there is no consensus in practice.

In the absence choice of law the situation is different. The existence of a few cases mentioned above cannot prove the admissibility of *lex mercatoria per se* as the cases that have been rendered on the basis of *lex mercatoria* are very few. In addition, there is no unanimity among the legal decisions and opinions. On the whole, it seems that the insertion of *lex mercatoria* as the applicable law in a contract may entail some practical difficulties, particularly that the *lex mercatoria* might be interpreted different from what was intended. If there was just one theory of *lex mercatoria*, the question of predictability might be answered by the fact that national laws are also unpredictable to

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[380] *Ibid.*

some extent. One must ask how an arbitral tribunal or a national court can rely on *lex mercatoria* when there is no unanimity on what *lex mercatoria* is understood to be. Is it an autonomous legal system completely detached from national laws (Goldman's theory) or an autonomous legal order as an independent branch of national legal systems (Schmitthoff' theory) or another of the theories previously analyzed in this study?[381] Professor William W. Park, from Boston University, in this regard has stated:

> *lex mercatoria* is an expression burdened with different meanings. For some lawyers, "law merchant" means no more than trade usages that fill gaps in contracts when the party-selected law is silent. For others, it is an autonomous legal order created through international economic relations, capable of resolving contract disputes between parties who have not subjected their agreement to a special national law. However defined, the uncertain content of the *lex mercatoria* makes it a highly problematic tool in the hands of even an intelligent and intellectually honest arbitrator.[382]

The academic debate is not over yet and there is not one *lex mercatoria*. Therefore, referring to it in judicial decisions may increase the confusion. In this regard I agree with those scholars who suggest that courts and tribunals should wait until the debate is complete at the academic level before rendering decisions at the judicial level.

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[381] See *supra* Chapter Two.

[382] W. Park, "Control Mechanisms in the Development of a Modern *lex mercatoria*" in T.E. Carbonneau, *supra* note 17 at 109.

GENERAL CONCLUSION

As was shown in the first chapter, the old *lex mercatoria* was formed in a different milieu than the new *lex mercatoria*. While ancient merchants practising the old commercial law had their own courts similar to today's arbitration tribunals, the control mechanism corresponding to today's perception of commercial law is completely different from that of the old. In the Middle Ages if merchants did not comply with the customary law of the merchant community, they put their reputations and careers at risk. At present, the merchant community relies on the support of national legal systems for enforcement. Even if an award is rendered in an arbitral tribunal based on non-national law, the enforcement of such an award must be referred to a national court. From this reasoning, one may conclude that at present Goldman's theory must fail because the emergence of a third legal system for the due enforcement of awards seems impossible for practical reasons. If an award can be enforced solely through the support of national courts and without the binding force of the merchants' community *per se*, no one can claim that such a community can create an autonomous legal system completely separate from the national and international systems. The binding force may derive from a self regulatory merchant community but in terms of enforcement the support of national laws is required. Berman's theory of *lex mercatoria* has substantial merit but it can be argued that the format of present day international business does not have to be exactly the same as it was in the Middle Ages. He is correct in asserting that the self-regulatory character of merchants antedates nationalism but it is not clear that a medieval notion of law continues today. Law is to regulate society by guaranteeing justice and peace. In the Middle Ages the structure of this regulation was different and it cannot be assumed to

be the same today. Furthermore, the most important characteristic of *lex mercatoria* is its international nature. Here again there is a big gap. In Medieval Europe *lex mercatoria* was regulating a small part of the commercial community whereas today's notion of internationality is much wider. At present, if *lex mercatoria* is meant to serve the international business community it must encompass the expectations of all participants in international business circles not just, for example, western society. It should be global so that a Syrian, Korean or Brazilian judge can understand the same concept of *lex mercatoria* as a French judge may understand.

This does not mean that the evolution of international business law should be hindered. It is evident that in the new international economic order, the merchant community has been involved with circumstances which are distinct from domestic situations. This diversity requires a new arrangement to govern the different aspects of this new emerging field of law. On the other hand, the players of international transactions have changed. At the moment, states are interested in transnational commerce and they should be considered as part of the merchant community.[383] The emergence of developing countries that are active participants in international trade at present is another important issue that should be taken into consideration. Basically, the participation of states as private parties has changed the format of the international trade such that it cannot be compared with the situation in the Middle Ages. Nowadays, when states are part of the merchant community, how can their presence and interests in the

[383] At least in developing countries, they are the most important players of it. This view is contrary to Schmitthoff's who believes that since states do not have interests in commercial transactions, they should leave the commercial realm for the merchant community.

international contracts be denied? In developing countries, even in industrial countries, foreign trade is considered to be the essential and strategic part of their internal and external policies. The best example is currency control applied by most states. In sum, when states participate in international trade and have control mechanisms over it they should be considered as part of the that community, even perhaps the main part of it.

One may conclude that commercial law has peculiar characteristics which its formats and applications will be varied in different circumstances. In the Middle Ages commercial law was carried out without the intervention of authorities, or with little interference; in the present-day, states are major players in international business law, particularly in case of developing countries and state contracts. Thus, if the expression *lex mercatoria* gains increasing recognition by all nations, it will likely be something very different from what it meant in the Middle Ages. There was no international public policy (*public ordre*) at that time and the nature of enforcement was quite different.[384] Nationalism is another factor that did not exist, one which has weakened the role of custom in their commercial relationships.

There is some logic to the rationale of those mercatorists who declare that because *lex mercatoria* antedates national laws and has been absorbed by them, it is capable of regulating a body of laws binding on the merchant community without the intervention of domestic laws. Yet, their conclusion is problematic. While no one denies the self-regulatory character of the business community, the focus must be whether the absorption of *lex mercatoria* by domestic legal systems creates any defect or malfunction. If

[384] At that time if a merchant would not obey the court's decision, he would put his reputation at risk. At present, there are sanction and means of enforcing awards.

nationalism has caused *lex mercatoria* troublesome with conflict of law rules, *lex mercatoria* has obtained enforceability through its absorption by national laws. Reviewing the traditional contents of *lex mercatoria* shows that the absorption has not caused any serious problems but has rather facilitated its function and applicability. If there are some lacunae in national laws regarding "modern transnational contracts" this is because more time and practice are necessary for the development of a comprehensive body of national laws.

Predictability:

Since scholars differ in their understandings of the expression *lex mercatoria*, it may prove troublesome for a national court or an arbitral tribunal to render a decision based on *lex mercatoria* as it is not clear what *lex mercatoria* refers to. From a practical point of view, the elimination of national laws in the context of transnational contracts makes no sense, mainly for the enforcement reason. International arbitration rules indicate that the main goal of the judicial process is enforceability. Many such laws require the arbitrators to render awards that can be enforceable.[385] At this stage *lex mercatoria* confronts a serious difficulty. One of the requirements for enforceability is predictability. The proponents of *lex mercatoria* argue that national laws may differ in their degree of predictability. At a theoretical level, the argument is fair but in practice members of the business community require predictability. If a national court or arbitral tribunal renders an award based on *lex mercatoria*, it may not be clear which perception

[385] New York Convention. As of 16 March, 1993, there are 90 Contracting States (and 26 extensions) to the New York Convention. (Reported in the list of Contracting States to the New York Convention by the Treaty Section of the United Nations & UNCITRAL, Vienna; cited from [1993] 18 Y.B. Com. Arb. 323.)

of *lex mercatoria* is meant by that award. It may be Goldman's *lex mercatoria* which is an autonomous legal system outside the national and international legal system or it may be the *lex mercatoria* introduced by Schmitthoff who sees it inside the jurisdiction of the national system. Furthermore, it may encompass any of the other concepts of *lex mercatoria* analyzed in Chapter Two. To some extent the battle is over terminology. Though its principles are not always well defined, no one can deny that there is something called international business law. Even the most challenging opponent of *lex mercatoria*, Professor Mann, declared years ago that the emergence of new aspects of international commercial law require special attention.

Lex mercatoria is not the only suggested solution to regulate international business law and disputes arising from it. It is true that international transactions have peculiarities that the domestic transactions do not have, but the question is whether these peculiarities are a matter of form or a matter of substance.

In the old *lex mercatoria*, the merchant community consisted of a specific social class within which the individuals were merchants with a sort of homogeneity with other members of the class. At present, however, the participants in international trade come from different social groups. As well, states are a main part of this community. In developing countries, because states are the most powerful merchants, the private sector does not have the capability even to compete with them. Moreover, commercial activities are controlled by the governments to the extent that they are considered an essential part of their public policy.

It is true that business communities around the world have certain general

expectations in common which help to create some harmony in international commercial activities. At times of nationalism such general norms became national laws. This is the main reason, for example, that maritime law is similar in all national legal systems. One may similarly, conclude that laws absorbed by national legal systems are the traditional turf of *lex mercatoria*. This may be the best rationale accounting for similarities among national systems.

Through repetition of these practices an autonomous body of law has been established and then absorbed by national laws. However, uncertainty arises with new aspects of contractual relationships, such as turnkey, joint venture, management contracts, etc.. In these types of transactions there is not a highly advanced body of law because the merchant community itself has no uniform body of laws in this regard.

What mercatorists are trying to achieve might be achieved through national and international legislation with much more predictability and enforceability. The problem is that such a body of laws still has not come into existence. It does not matter who is going to be the first inventor of this body of rules. The possibility of the merchant community creating a customary body of international business law before it appears in the enactments of states is possible, realistic and logical. There is also no problem with states absorbing this body of laws into their national legislation. In this way there is an symbiotic relationship between *lex mercatoria* and national law.

From a literature and precedent review it becomes evident that debate centers on

new types of international transactions.[386] If the gap-filling function of domestic laws is lacking the question will arise as to why such uncertainty does not exist in matters concerning maritime sales or documentary credits, commodity transactions, and the like, which are the traditional turf of *lex mercatoria*. The unavoidable answer is that these new types of contractual relationships still have not given rise to a highly advanced body of law. If this reason is accepted, then it may be that the origin of such a failure is not directly caused by national laws, or at least there is no structural problem with national laws. If the existence of states is the reality, why should one view this reality pessimistically? Why not take advantage of states to support the well-functioning of *lex mercatoria*? Has *lex mercatoria* really suffered from its absorption by states in the 18th century? History shows that this absorption allowed the formation of a strong, homogenous body of laws with links to different legal systems. This trend supports the spirit of *lex mercatoria*. For this reason there is no controversy over traditional types of transactions. This may prove that domestic laws need more time to develop into suitable regulations for new international transactions. As mentioned above, the problem is that there is not yet a highly advanced body of laws. Until such a body of law is established, the adjudicators must rely on abstract general principles such as *pacta sunt servanda*, good faith, force majeure, and unjust enrichment. This, I hold, is not the fault

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[386] Professor A. Goldstajn has listed a group of these type of transactions such as contracts for industrial co-operation, Time-sharing contracts, Syndicated loans, Consortia, Turn-key contracts, international licensing, Know-how contracts, Computer-service contracts, Engineering contracts, Consulting engineering contracts, Management consulting contracts, Joint Ventures, Petrol station contracts, Bank contracts(Letters of credit, credit transfer,...), Swap contracts, Drilling contracts (for ore, oil, and other raw materials), Leasing contracts, Factoring contracts, Franchise contracts, Tourism contracts. See A. Goldstajn, *supra* note 61 at 21.

of *lex mercatoria* or national legal systems. This unpredictability will exist until an advanced body of such rules comes into existence. These rules may emerge first at the customary level within the merchant community and then be absorbed by national laws exactly as occurred two centuries ago.

A unanimous definition of *lex mercatoria* is necessary. *Lex mercatoria* may be seen as a double-edged sword in that this inherent confusion as to its meaning is coupled with its unpredictable nature. Thus, until such a universal definition is agreed upon, the merchant community should not be inserting the term *lex mercatoria* into their contracts as an applicable law because it causes too much confusion.

This does not mean that *lex mercatoria* has to fail. The challenge is to show how it can operate in present day international commercial relations. One may emphasize the roles of custom and trade usage which are the most acceptable interpretations of *lex mercatoria*. Goldman, by going through conflict of laws methodology and introducing *lex mercatoria* as the third legal system, has chosen the most difficult way to reach a solution. Schmitthoff's goal of conflict avoidance through the comparative methodology has been more successful but still not wholly suitable. Berman's theory is more conservative and practical especially because he recognizes the position of states in backing up the *lex mercatoria*. He introduces *lex mercatoria* as a customary law which is autonomous but needs the support of national laws.

At present, the major difficulty confronting *lex mercatoria* as an applicable law, even if it is applied by eminent arbitrators, is that its content is not precise enough for such practitioners to predict the litigation outcomes for their clients. This is the why the

appearance of *lex mercatoria* in international contracts is extremely rare.[387] The mercatorists, however, consistently state that *lex mercatoria* is at the developing stage; thus, it is not surprising that such predictability has not yet been achieved. Instead, some have suggested that arbitral case law be a main source for the content of *lex mercatoria*.[388]

In case of investment contracts, some domestic laws have developed into an advanced body of laws which are preferred by merchants. In this regard, the law of New York state has become akin to a uniform law.[389] This proves that national laws without an extensive historical background are potentially capable of creating an authoritative body of law. There are no structural obstacles before national laws welcome to *lex mercatoria*. No one may claim that national laws do not have some lacunae. If an adjudicator is confronted with a lacuna he must settle the dispute by referring to subsidiary means of law, of which custom is one example. In this way, *lex mercatoria* will ultimately be absorbed into national law. If national laws can function very well in the traditional area of *lex mercatoria*, why should they not be able to do so in new areas of international trade? Mercatorists want to magnify the role of trade usages and customs in present day international law. They have had some success as was shown with national and international legislation. That national courts also follow the

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[387] M. Mustill, *supra* note 32 at 86.

[388] The British scholar, J. Lew, states: "The publication of arbitral awards would facilitate the development of the *lex mercatoria* into a coherent body of rules which through the arbitral case law would make it easier for arbitrators and parties to identify the relevant commercial rules for the different aspects of international trade." J. Lew, "The Case for the Publication of Arbitral Awards" in J. Schultsz & A. van den Berg, eds., *The Art of Arbitration* (1982) 223, at 231.

[389] G. Delaume, Myth of *lex mercatoria*, *supra* note 171 at 80.

debate shows that they are concerned about international commerce and that they too want to adopt an autonomous body of laws.

Having reviewed the awards and judgments I come to the conclusion that the nature of whatever is understood by *lex mercatoria* is controversial, because it is mostly based on business community practices and usages. These concepts are not fixed, cannot be codified completely and are not supposed to be codified as statutory law. They are subject to change and the elements of this change vary according to the time, place, and type of business. Something may be a usage, practice, or custom of trade in one place which may not be so in another place. Also, a practice may be abandoned soon after its adoption and be replaced by another practice.

One of the reasons that *lex mercatoria* has received more attention in international arbitration than national courts is that the authority of international arbitration derives from the parties agreement, not a given national law. The first key issue in the dispute settlement is the issue of applicable law. According to typical State policy, courts usually refer to their national conflict rules in the first instance. The arbitrators, however, function according to their parties' wills, and this gives them more flexibility.

Mercatorists argue that because states have incorporated *lex mercatoria* in their national laws, this is proof that *lex mercatoria* is a set of rules that are binding per se before their incorporation into national laws. In practice, however, the situation is different and national laws themselves are widely based on international practice. The portion of *lex mercatoria* that has been incorporated into national laws consists of maritime law, commodity transactions and documentary credits which are within the

traditional realm of *lex mercatoria*. Problems arise when cases deal with new forms of international transactions, for which there is not a highly developed body of autonomous law. For example, with joint ventures, state contracts, and investment contracts in developing countries, judges or arbitrators have to resort to general principles such as *pacta sunt servanda*, good faith, *force majeure*, and unjust enrichment.[390]

After all these observations I choose to adhere to Professor Harold Berman's approach such that if one accepts that there are some contract practices and trade usages made by the commercial community, these have normative value prior to their incorporation into national legal systems and, thus, in case of conflict the national legislation will prevail. In reality these practices still requires the formal blessing of national or international laws. The key point is that where lacunae exist in transnational contracts, the need for a universal trade usage is evident, whether it be labelled *lex mercatoria* or otherwise.

[390] F.J. Dasser, *Incoterms, supra* note 175 at 39.

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