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The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?

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THE *LEX MERCATORIA* AND INTERNATIONAL CONTRACTS: A CHALLENGE FOR INTERNATIONAL COMMERCIAL ARBITRATION?

ABUL F.M. MANIRUZZAMAN *

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INTRODUCTION

The quest for a third legal order stems from many jurists' conviction that neither municipal law nor international law is appropriate or suitable for dealing with international commercial disputes when parties from different countries are involved. In their view, a national legal system may not be sensitive to the expectations of a disputing party from a different national legal background, and international law proper may not be adequate to deal with cross-border commercial transactions. Thus, a third legal order, popularly known as the *lex mercatoria*, which is neither national nor international law but a mixture with the characteristics of both, is an attractive option. Although the *lex mercatoria* had its existence at the dawn of human civilization¹ and was practiced widely in the Middle Ages,² it remained buried until recently when some scholars of international repute started advocating its suitability for application to modern international commercial relations. There is now vast literature on the

1. See generally FRIEDRICH K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 6 (1993); LEON E. TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983).

2. See generally Leon E. Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage, Part I*, 12 J. MAR. L. & COM. 1 (1980); Leon E. Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage, Part II*, 12 J. MAR. L. & COM. 153 (1981); J.H. Baker, *The Law Merchant and the Common Law Before 1700*, 38 CAMBRIDGE L.J. 295, 299 (1979).

subject,³ as it has attracted a great deal of attention from jurists of different countries. There are still some perennial issues of the *lex mercatoria*, however, that have created controversies amongst the jurists. For example, relatively scant attention has been paid in the literature to the issue of the *lex mercatoria*'s applicability to State contracts. This study is not thus yet another piece on the *lex mercatoria*. The purpose of this article is to evaluate these issues afresh in the light of recent developments. It must be noted that this discussion concentrates on the *lex mercatoria* primarily as a body of substantive law applicable to international commercial contracts, including State contracts.⁴ This article mainly examines the *lex mercatoria* in the context of international commercial arbitration.

Section two of this article begins by critically analyzing the different prominent juristic views relating to the *lex mercatoria*. Section three examines certain controversial issues concerning the *lex mercatoria*. Sections four and five briefly highlight the role of arbitrators in the development of the *lex mercatoria* and its present state of application primarily in arbitral case law. Sections six, seven, and eight examine the question of the *lex mercatoria* as a legal system in the context of recent developments and alternative views. Section nine broadly outlines the reasons why the *lex mercatoria* fails to develop

3. See, e.g., FELOC DASSER, INTERNATIONALE SCHIEDSGERICHTEN UND LEX MERCATORIA, RECHTSVERGLEICHENDER BEITRAG ZUR DISKUSSION UBER EIN NICHTSTAATLICHES HANDELSRECHT 1 (1989); PHILIP C. JESSUP, TRANSNATIONAL LAW (1956); Harold J. Berman & Colin Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L.J. 221 (1978); Bernardo M. Cremades & Steven L. Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transactions*, 2 B.U. INT'L L.J. 317 (1984); John S. Ewart, *What is the Law Merchant?*, 3 COLUM. L. REV. 135 (1903); Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747 (1985).

4. This approach is justified since "the literature as a whole and the theoretical foundations which it proposes treat the *lex mercatoria* as a body of substantive law." The Rt. Hon. Lord Justice Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, in LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 149, 174 n.82 (Maarten Bos & Ian Brownlie eds., 1987); see also H.A. Grigera Naón, *Preliminary Report: The Applicability of Transnational Rules in International Commercial Arbitration*, in THE ILA REPORT OF THE 64TH CONFERENCE, QUEENSLAND, AUSTRALIA 127, 128 (1990) (depicting wider perspective of the *lex mercatoria*). Dr. Naón identified four types of rules where transnational principles might be found: procedural, substantive, choice of law, and social engineering. See Naón, *supra*, at 128.

as a consistent body of law in arbitral case law, proving to be a substantial challenge for arbitration as an institution. Finally this article draws several conclusions in light of the above issues.

I. THE THEORY OF THE *LEX MERCATORIA*

The so-called third legal system has been described in the literature by various names, such as "transnational law," "transnational commercial law," the "*lex mercatoria*," and "international law of contracts." Judge Jessup first used the term "transnational law," asserting that it includes "all law which regulated actions or events that transcend national frontiers. Both public and private international law are included as are other rules which do not wholly fit into such standard categories."⁵ Professor Goode prefers the notion of "transnational commercial law" to that of "transnational law" in relation to commercial matters.⁶ He argues that "transnational law" is broad enough to include the national law of international trade and national conflict of laws rules. In Goode's view:

"Transnational commercial law" is conceived as law which is not particular to or the product of any one legal system but represents a convergence of rules drawn from several legal systems or even, in the view of its more expansive exponents, a collection of rules which are entirely anational and have their force by virtue of international usage and its observance by the merchant community. In other words, it is the *rules*, not merely the actions or events, that cross national boundaries.⁷

Professor Schmitthoff's concept of transnational law,⁸ which is restricted to international commercial transactions, is motivated by his vision of the unification of law.⁹ In his view, although transnational law is derived from international sources such as international conventions and international usages, it should be part of national law as

5. JESSUP, *supra* note 3, at 2.

6. See Roy Goode, *Usage and Its Reception in Transnational Commercial Law*, 46 INT'L & COMP. L.Q. 1, 2-3 (1997).

7. *Id.* at 2.

8. See CLIVE M. SCHMITTHOFF, COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE 22 (2d ed. 1981).

9. See generally Clive M. Schmitthoff, *The Unification of the Law of International Trade*, J. BUS. L., 1968 Annual Issue, at 105, 112.

an autonomous body of rules applicable to international business transactions.¹⁰ Due to its international character, uniform practices would develop in all national legal systems, thereby encouraging the unification of law. Thus, in his words, "transnational law is the uniform law developed by parallelism of action in the various national systems in an area of optional law in which the state in principle is disinterested."¹¹ Critics, however, doubt the autonomous character of such a body of rules.¹² Norbert Horn, like Schmitthoff, expresses the view that "[t]his phenomenon of uniform rules serving uniform needs of international business and economic co-operation is today commonly labeled *lex mercatoria*.¹³ It should be noted that sometimes jurists, in a similar context, use the expressions transnational law and the *lex mercatoria* interchangeably.¹⁴ However, Professor Goldman, a strong advocate and exponent of the *lex mercatoria*, is specific as to the concept. He defines the *lex mercatoria* as "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."¹⁵

10. See Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, in CLIVE M. SCHMITTHOFF'S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 20 (Chia-Jui Cheng ed., 1988).

11. Clive M. Schmitthoff, *Nature and Evolution on the Transnational Law of Commercial Transactions*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS: STUDIES IN TRANSNATIONAL ECONOMIC LAW 19, 22 (Norbert Horn & Clive M. Schmitthoff eds., 1982).

12. See, e.g., Filip De Ly, *Feloc Dasser's Internationale Schiedsgerichte und Lex Mercatoria, Rechtsvergleichender Beitrag zur Diskussion Über Ein Nichtstaatliches Handelsrecht*, 39 AM. J. COMP. L. 626 (1991) (book review); see also Goode, *supra* note 6, at 32-34.

13. Norbert Horn, *Uniformity and Diversity in the Law of International Commercial Contracts*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS: STUDIES IN TRANSNATIONAL ECONOMIC LAW, *supra* note 11, at 3, 15-16.

14. Cf. H.A. Grigera Naón, *The U.N. Convention on Contracts for International Sale of Goods*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS: STUDIES IN TRANSNATIONAL ECONOMIC LAW, *supra* note 11, at 89, 90.

15. Berthold Goldman, *The Applicable Law: General Principles of Law: the Lex Mercatoria*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113, 116 (Julian D.M. Lew ed., 1986).

Professor Dupuy, an ardent supporter of transnational law, considers State contracts to belong to a specific legal regime.¹⁶ In the *Texaco* decision, he writes: "contracts between States and private persons can, under certain conditions, come within the ambit of a particular and new branch of international law: the international law of contracts."¹⁷

Some influential writers, like Professor Weil, support Dupuy's position and remain skeptical of the concept of transnational law or the *lex mercatoria* as far as it relates to State contracts.¹⁸ For Professor Weil, "the international law of contracts" is simply a new branch of public international law specific to State contracts.¹⁹ Conversely, Professor Goldman does not seem to think that this legal order is a new branch of international law; he considers it instead to be an autonomous third legal order that is equally appropriate for State contracts and contracts between private parties.²⁰ In his discussion of transnational law, Jessup did not make his view clear on the character of the law of State contracts.²¹ The inclusion of such a body of law may be implied in the broad sense in which he used the term "transnational."²² It thus follows that the corpus of transnational law is a genus of which the international law of contracts is one species. As Fatouros writes: "It may be that traditional public international law, private international law, *the law of state contracts* and international

16. See *Texaco Overseas Petroleum Co. v. Libyan Arab Rep.*, 53 I.L.R. 389, 446-49 (1977).

17. *Id.* at 447-48.

18. See Propser Weil, *Principes Généraux du Droit et Contrats D'État*, in LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES, ÉTUDES OFFERTES À BERTHOLD GOLDMAN 387, 406-07 (1982); cf. Jean-Flavien Lalive, *Contrats Entre États ou Entreprises Étatiques et Personnes Privées: Développements Récents*, in 1983-III RECUEIL DES COURS, COLLECTED COURSES OF THE HAGUE ACADEMY OF INTERNATIONAL LAW 9, 175-76 (1984).

19. See Weil, *supra* note 18, at 405.

20. See generally Berthold Goldman, *Lex Mercatoria*, FORUM INTERNATIONALE NO. 3, Nov. 1983, at 1,1-24.

21. See Jessup, *supra* note 3, at 83, 93 (discussing the confusion over the choice of law on State contracts).

22. ARGYRIS A. FATOUROS, GOVERNMENT GUARANTEES TO FOREIGN INVESTORS 287 (1962).

administrative law would constitute separate branches of transnational law."²³

The position of international law of contracts as a branch of transnational law also became clear when Professor Dupuy wrote in his legal opinion in the *Kuwait v. Aminoil* arbitration case. He stated:

The development over a number of decades of the international law of contracts is analyzed as that of a part of transnational law, an autonomous system which, by reason of the presence of a State in the contractual relationship, meets in some respects public international law. But given the progress and growing complexity of international economic relations, transnational law has made it possible to make the traditional legal categories within which they were confined more flexible. This explains in particular the evolution that has taken place since the old judgments of the Permanent Court of International Justice, which maintained a point of view oriented exclusively on State-dominated international relations and did not conceive of any instrument other than the treaty. Thus, without however being identical to the latter, contracts between States and foreign private persons are governed, subject to certain conditions, by that special field of transnational law, the international law of contracts.²⁴

Professors Weil and Dupuy appear to confine the scope of international law of contracts to the contractual relationships between States and private persons; they do not take into account the relationship between private parties from two different States. In this sense, the *lex mercatoria* appears to have a wider scope because it, as mentioned earlier, extends to both types of contractual relationships,²⁵ i.e., between States and private persons, on the one hand, and between two private persons on the other. It follows that international law of contracts may be considered part of the *lex mercatoria*. It is in this wider circumference that the *lex mercatoria* would be considered a prospective third legal order, as many writers suggest that principles applicable in international commerce between private persons should

23. *Id.* (emphasis added).

24. Professor R.J. Dupuy, *Legal Opinion to Aminoil* 28-29, 41, available in *Aminoil Pleadings, infra* note 59.

25. Cf. Lalive, *supra* note 18, at 175. In Lalive's opinion, the transnational law of contracts would have a wider scope than the *lex mercatoria* because it would also include general principles of law and arbitral awards concerning State contracts. *See id.*

also apply to the contractual relationships between States and private parties.²⁶ One well-known writer observes, however:

This third legal system would constitute a modern *Lex Mercatoria* whose proposed scope, however, remains somewhat fluid depending on the views of its sponsors. Thus, certain advocates of the new doctrine would include in it both state and other contracts, whereas others consider that the *Lex Mercatoria* should be the basis of a transnational law of state contracts, considered in their individuality.²⁷

To recall Professor Goldman's conception of the *lex mercatoria*, the general principles of law and general usages of international trade appear to be the two main pillars of the whole panoply of his *lex mercatoria*. Having recognized the difficulty "to draw a clear distinction, in the framework of the *lex mercatoria*, between general principles and transnational customary rules,"²⁸ Goldman puts the same label on both of them signifying their indistinctiveness when he wrote, "the general principles of law are not only those referred to in Article 38 (1)(c) of the Statute of the International Court of Justice; there may be added to it principles progressively established by general and constant usages of international trade."²⁹ There is no doubt that, in fact, the general principles of law often coincide with customary international law.³⁰ It seems that Professor Goldman has attached a new meaning to the concept of general principles of law as it is understood under Article 38 (1)(c) and has extended its usual scope by encompassing "principles progressively established by general and constant usages of international trade."³¹ This begs the ques-

26. See, e.g., Berthold Goldman, *La Lex Mercatoria dans les Contrats et L'arbitrage Internationaux: Réalité et Perspectives*, in 106 JOURNAL DU DROIT INTERNATIONAL 475 (1979).

27. Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TUL. L. REV. 575, 576-77 (1989).

28. Goldman, *supra* note 15, at 115.

29. Goldman, *supra* note 20, at 21.

30. See Johan G. Lammers, *General Principles of Law Recognized by Civilized Nations*, in ESSAYS ON THE DEVELOPMENT OF THE INTERNATIONAL LEGAL ORDER 68-69 (Frits Kalshoven et al. eds., 1980).

31. Goldman, *supra* note 20, at 21; see also Goode, *supra* note 6, at 33.

There are no doubt some usages that are so broad in character and so universal of application that they would be recognised in any developed legal system, and would, in-

tion from the theoretical point of view. Professor Goldman maintains that: “(t)he *lex mercatoria* comprises rules the object of which is mainly, if not exclusively, transnational, and the origin is customary and thus spontaneous, *notwithstanding the possible intervention of inter-State or state authorities in their elaboration and/or implementation.*”³²

It follows that the *lex mercatoria* may be a variant of transnational customary law. By setting standards—such as, “customary,” “transnational,” and “spontaneous”—Professor Goldman thus takes a narrower view than those of Judge Jessup,³³ Clive Schmitthoff,³⁴ and Ole Lando³⁵ on such a third legal order. He is not in favor of the expansive scope of the *lex mercatoria*; instead, he believes the laws of inter-State or State origin that relate to international trade cannot automatically form part of the *lex mercatoria*.³⁶ He does tend to suggest, however, that those rules that are elevated to the status of customary law through frequency of practice³⁷ or reflect the international custom or general principles of law may be part of the *lex mercatoria*, irrespective of their makers.³⁸ Thus, Professor Goldman asserts:

[T]he initiatives of international bodies in the preparation of texts intended to provide a framework for international economic activities do not prevent such a text from being integrated into *lex mercatoria*, provided that these initiatives do not comport an exercise of the *imperium* of the States that comprise the international bodies, and provided also

deed, be likely to have lost their distinctive status as trade usages and to have acquired the status of a general principle of law.

Goode, *supra* note 6, at 33.

32. Goldman, *supra* note 15, at 114 (emphasis added).

33. See JESSUP, *supra* note 3, at 1.

34. See CLIVE M. SCHMITTHOFF, THE LAW OF INTERNATIONAL TRADE, ITS GROWTH, FORMULATION AND OPERATION: SOURCES OF THE LAW OF INTERNATIONAL TRADE 1, 3 (1964).

35. See Ole Lando, *Dicey and Morris's The Conflict of Laws*, 47 INT'L & COMP. L.Q., Apr. 1998, at 394, 400-05 (1998) (book review) (summarizing the differing descriptions of the *lex mercatoria* by various authors).

36. See generally Goldman, *supra* note 20, at 6.

37. *Id.* at 6.

38. See *id.* at 5.

that the substance of the directives adopted or the models proposed do in fact reflect international custom or general principles of law.³⁹

From this normative standpoint, Professor Goldman finds support from Professor Goode, Professor Dupuy, and Lord Mustill. Professor Goode distinguishes between the *lex mercatoria* and transnational commercial law on the basis of their normative characters.⁴⁰ He believes transnational commercial law consists of "the totality of principles and rules, whether customary, conventional, contractual or derived from any other source, which are common to a number of legal systems" while the *lex mercatoria*⁴¹ is "that part of transnational commercial law which is uncodified and consists of customary commercial law, customary rules of evidence and procedure and general principles of commercial law, including international public policy."⁴² It is clear, then, that Professor Goode immunizes the concept of the *lex mercatoria* completely from the positivist notion of law that may be reflected in part in the corpus of transnational commercial law. As spontaneity is the principal basis of selection of rules

39. *Id.* at 7.

40. See Goode, *supra* note 6, at 2-3.

41. Cf. Roy Goode, *The Adaptation of English Law to International Commercial Arbitration*, 8 ARB. INT'L 1, 12-13 (1992).

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 Michael Kerr when rejecting the concept of a stateless arbitration procedure. It is clear that uncodified international trade usages, so far identifiable, are capable of being given normative force by a national or supranational legal system and to that extent constitutes 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.

Id.

42. *Id.*; see also Emmanuel Gaillard, *Thirty Years of Lex Mercatoria: Towards the Selective Application of Transnational Rules*, 10 ICSID REV.-FOREIGN INVESTMENT L.J. 208, 210-11 (1995).

for the *lex mercatoria*, it attributes to it a narrower connotation. Further, Professor Dupuy says:

[forms of international trade] have created a phenomenon whose principal characteristic is that it is *spontaneous* and has been established by the creation of new rules or by the adaptation of existing legal rules and practice to the requirements of contemporary international economy. Its origin is the *need for effectiveness* pursued by the various economic agents across, or in defiance of, frontiers.⁴³

Although Mustill has not denied the necessity of the development and promulgation of the *lex mercatoria*, he holds the view that, independently of any such endeavors, "the *lex mercatoria* simply exists. It springs up spontaneously, in the soil of international trade. It is a growth, not a creation."⁴⁴ He has also noted that there are two perceptions of the *lex mercatoria*:

One concept is that the *lex* is a standing body of legal norms, which automatically applies *ipso jure* to every transaction within its purview, unless expressly excluded. The other is that the *lex* provides, so to speak, a repertoire of rules available to those parties who, expressly or by implication, choose to incorporate them into their dealings, and who, by the same token, choose to detach their contracts from the national law to which they would otherwise be subject.⁴⁵

He further asserts "[t]here is really no common ground between these two perceptions of the *lex mercatoria*."⁴⁶ One recognizes, however, that the *lex mercatoria* is a body or system of norms, the purpose of which may be self-regulation within a defined category of trade.⁴⁷ Recently, there seem to be reinvigorated efforts in certain circles to distill and collate such self-regulatory rules in the fields of petroleum transactions such as the *lex petrolea*,⁴⁸ electronic transac-

43. Dupuy, *supra* note 24, para. 26.

44. See Mustill, *supra* note 4, at 153.

45. *Id.* at 160.

46. *Id.*

47. See DE LY, *infra* note 152, para. 249.

48. See Doak R. Bishop, *International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea*, in 23 Y.B. COMMERCIAL ARB. 1131, 1131-1210 (Albert Jan van den Berg ed., 1998); Ahmed S. El-Kosheri, *Le Régime Juridique*

tions such as the *lex electronica*,⁴⁹ construction contracts such as the *lex constructionis*,⁵⁰ and maritime matters such as the *lex maritima* or the general maritime law.⁵¹ These different sets of rules, which may

Créé par les Accords de Participation dans le Domaine Pétrolier, 147 HAGUE RECUEIL DES COURS 219 (1975).

49. See generally M. Vincent Gautrais et al., *Droit du Commerce Electronique et Normes Applicables: L'Emergence de la Lex Electronica* 5 REVIEW DE DROIT DES AFFAIRES/INT'L BUS. L.J. 547 (1997); THE GENERAL USAGE FOR INTERNATIONAL DIGITALLY ENSURED COMMERCE (G.U.I.D.E.C.), ICC Publication (1997); ROY GOODE, ELECTRONIC BANKING—THE LEGAL IMPLICATIONS (1985); MICHAEL ROWE, ELECTRONIC TRADE PAYMENTS—A PRACTICAL GUIDE TO ELECTRONIC BANKING AND INTERNATIONAL TRADE (1987); Bernard D. Reams, Jr., ELECTRONIC CONTRACTING LAW: EDI AND BUSINESS TRANSACTIONS (1996); Raj Bhala, *Self-Regulation in Global Electronic Markets Through Reinvigorated Trade Usages*, 31 IDAHO L. REV. 863, 866 (1995) (explaining why trade usages should be seen as legal foundation for the practices of market participants); Diana Faber, *Electronic Bills of Lading*, LLOYD'S MAR. COMM. L.Q. 232-44 (1996); UNCITRAL Model Law on Electronic Commerce, in 36 I.L.M. 197 (1997).

50. See Charles Molineaux, *Moving Toward a Construction Lex Mercatoria: A Lex Constructionis*, 14 J. INT'L ARB., Mar. 1997, at 55, 59-61 (1997) (describing the importance of standardized contracts for international construction); see also Will Hughes & David Greenwood, *The Standardization of Contracts for Construction*, INT'L CONSTR. L. REV., 1996 Annual Issue, at 196.

51. See generally William Tetley, *The General Maritime Law—The Lex Maritima*, 20 SYRACUSE J. INT'L L. & COM. 105, 133-34 (1994) (describing the forms, terms and rules applied in general maritime law). The writer explains that the *lex maritima* "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 jurisdictions unless limited or excluded by a particular statute." *Id.* at 108. He also asserts:

[A] modern *lex maritima* exists in international bill of lading and charterparty *forms* and in universal *terms* and *practices* throughout the shipping world. A voyage charter-party entered into any country in the world has terms with common meanings. Examples include: voyage charterparty forms, such as the Amwelsh Form, the Baltimore Form, the C(Ore) 7 Form, the Gencon Form, the Norgain Form, the Sugar Charter-Party Form and the Asbatankvoy Form. Other well-known time charterparty forms include the New York Produce Exchange Form (NYPE), the Baltic and International Maritime Conference Uniform Time-Charter (Baltime), and the STB Form of Tanker Time Charter. The Uniform Rules for Sea Waybills 1990 of the Comité Maritime International (CMI) and the Voyage Charterparty Laytime Interpretation Rules 1993 are additional examples of modern *lex maritima* documents, reflecting a consensus on basic rules and definitions of legal terms among various participants in the world shipping community. They exist without any national or international legislation.

Id. at 133-34.

The writer also claims that until the sixteenth century, the *lex maritima* was quite uniform throughout Western Europe. *See id.* at 109; see also William Searle

be drawn from a variety of sources other than customs and usages, may be considered species of the *lex mercatoria*. Though Mustill has not denied that the *lex mercatoria* has "significant solidity to be capable in appropriate circumstances of controlling the rights of the parties,"⁵² there remains an important question as to whether it qualifies as a law, a legal order, or a legal system. We shall turn to this shortly.

The *lex mercatoria* should be understood in its widest sense. The *lex mercatoria* may be customary, conventional, non-conventional, contractual, codified, uncodified, or it may be derived from the general principles of law or trade usages. The different categories of the principles and rules that constitute the corpus of the *lex mercatoria* should be of transnational origin and character, and applicable to cross-border transactions. If this is acceptable, it would be easier to recognize the different members of the *lex mercatoria* family such as the *lex petrolea*, the *lex electronica*, the *lex constructionis*, the *lex maritima*, international law of contracts, and so on.

The category of the constituent rules of the *lex mercatoria* may be identified by their respective sources. Certain *lex mercatoria* rules may be customary and spontaneous as Professors Goldman, Goode, and Dupuy claim; while Lord Mustill and others assert they may be identified in the restrictive sense, as with the *lex mercatoria* proper. When an international contract is governed in part by the *lex electronica*, in part by the *lex petrolea*, and in part by the *lex mercatoria* proper, the governing law of the contract as a whole may be described as the *lex mercatoria*. This expansive use of the term *lex*

Holdsworth, *The Development of the Law Merchant and Its Courts*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 289, 292-293 n.10 (Assoc. of Am. Law Schools eds., 1907) (describing the origins of English maritime law); Joseph Story, *Progress of Jurisprudence*, in THE MISCELLANEOUS WRITINGS OF JOSEPH STORY 198, 214-15 (William W. Story ed., 1972) (predicting that maritime law will become highly uniform throughout the commercial world); Michael Conant, *The Commerce Clause, the Supremacy Clause and the Law Merchant: Swift v. Tyson and the Unity of Commercial Law*, 15 J. MAR. L. & COM. 153, 155-56 (1984) (explaining the relationship of commercial law or law merchant to maritime law); Aboubacar Fall, *Defence and Illustration of Lex Mercatoria in Maritime Arbitration: The Case Study of "Extra-Contractual Detention" in Voyage Charter-Party Disputes*, 15 J. INT'L ARB. 83, 90-91 (1998) (configuring the rule of extra-contractual detention by arbitrators).

52. Molineaux, *supra* note 50, at 59.

mercatoria may be helpful to avoid the ever growing terminological confusion.

Before proceeding to the theoretical debate of whether the *lex mercatoria* constitutes a legal order or a system of law, it is necessary to critically examine some of its aspects in relation to other relevant matters in order to understand the legal nature of the rules of the *lex mercatoria*.

II. DIFFERENT ASPECTS CONCERNING THE *LEX MERCATORIA*

A. IS THE *LEX MERCATORIA* AUTONOMOUS?

Some claim that the *lex mercatoria* is an autonomous legal order in the sense that it is distinct from both national legal orders and the international legal order.⁵³ In the operational sense, however, such a claim will prove futile. Although one national legal system may be autonomous from another, this claim cannot be set forth in the context of the *lex mercatoria*.⁵⁴ Due to its insufficiency in form and substance, it sometimes turns to national legal orders for its implementation, its substance, and its efficacy.⁵⁵ It is thus well recognized that

53. See Goldman, *supra* note 20, at 22; Mustill, *supra* note 4, at 151 (defining the *lex mercatoria* as “anational”); Lando, *supra* note 3, at 752 (asserting that the binding force of the *lex mercatoria* stems from the recognition of it as an autonomous norm system by the business community and by state authorities); De Ly, *supra* note 12, at 627.

54. See Jan Paulsson, *La Lex Mercatoria dans l'Arbitrage*, C.C.I., 35 REV. ARB. 55, 60-77 (1990).

55. See Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, in *LEX MERCATORIA AND ARBITRATION* 71, 84-85 (Thomas E. Carboneau, ed., rev. ed., 1998) (explaining that the concept of *lex mercatoria* “is not that of a self-contained system covering all aspects of international commercial law, but rather as a source of law made up of custom, practice, convention, precedent—and many national laws”); William W. Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in *LEX MERCATORIA AND ARBITRATION*, *supra*, at 143, 152 (describing how parties to arbitration may turn to courts for the enforcement of an agreement or an award); Keith Highet, *The Enigma of the Lex Mercatoria*, in *LEX MERCATORIA AND ARBITRATION*, *supra*, at 133, 134 (explaining that parties to a contract must look to a legal framework to give expression and content to their will); Hans Smit, *Proper Choice of Law and the Lex Mercatoria Arbitralis*, in *LEX MERCATORIA AND ARBITRATION*, *supra*, at 93, 108 (emphasizing the role of *lex mercatoria arbitralis* in applying the proper law for recognition and enforcement of

both national legal orders and the international legal order support and contribute to the *lex mercatoria* and "in so doing enhance its efficiency."⁵⁶ Without the complementary and supplementary role of the relevant national legal order concerned, and sometimes of the international legal order as well, the *lex mercatoria* may prove on its own to be a set of inoperative rules. Therefore, there is no reason to consider it autonomous. As Delaume has aptly remarked:

In final analysis, trade usages, uniformity of definition of trade terms or the care given to spelling out clearly and in detail the respective rights and obligations of the parties, are all useful factors of conflict avoidance. They do reduce the chances of disputes and, if a dispute arises, they may be of considerable assistance to the parties, the judge or the arbitrator, in finding the proper solution. They do not, however, rule out the applicability of municipal or international law as the ultimate source of law capable of supplying a conclusive answer to contractual problems.⁵⁷

Delaume thus subscribes to the view that "the delocalization of transnational contracts is never complete."⁵⁸ In other words, it is impossible for the transnational commercial process to be truly autonomous.⁵⁹

Some claim that "the new law merchant, as an autonomous legal regulation, is founded on the complementary interaction of party

international arbitration agreements); Christopher W.O. Stoecker, *The Enigma of the Lex Mercatoria: To What Extent Does It Exist?*, 7 J. INT'L ARB., Mar. 1990, at 101, 109-10 (1990) (describing the relationship between *lex mercatoria* and national substantive law and conflict of laws).

56. Goldman, *supra* note 20, at 22.

57. GEORGE R. DELAUME, LAW AND PRACTICE OF TRANSNATIONAL CONTRACTS 100 (1988).

58. *Id.* at 99.

59. See also *Kuwait v. Aminoil*, 21 I.L.M. 976 (1982). Professor Rigaux stated that:

there is no transnational law in the sense of a novel and autonomous system of law regulating delocalized legal relationships. There are only partial or occasional instances of transnationality which within the framework of the international legal system and of the state legal systems have resulted in the formation of original rules of conduct, often through the application of principles borrowed from these two systems, the formation of such rules being justified by the law of autonomy.

Pleadings of *Kuwait v. Aminoil* (available in the Squire Law Library, University of Cambridge) [hereinafter Aminoil Pleadings].

autonomy and arbitration.”⁶⁰ It must be recognized that such an interaction cannot be unbridled. As mentioned earlier, aside from the national public policy restrictions, arbitration may be confronted with transnational public policy.⁶¹ Thus, the autonomous character of the *lex mercatoria* cannot be ensured.

B. SOURCES OF THE *LEX MERCATORIA*

There is a controversy amongst the proponents of the *lex mercatoria* concerning the sources from which it is drawn and the relative importance of the sources they deem admissible. Professor Lando has listed several “elements” rather than “sources” of the *lex mercatoria* as follows: (a) public international law, (b) uniform laws, (c) the general principles of law, (d) the rules of international organizations, (e) customs⁶² and usages, (f) standard form contracts,⁶³ (g) reporting of arbitral awards.⁶⁴ Here again, if one sticks to Professor Goldman’s view for the *lex mercatoria*, that it should be derived from the customary and spontaneous principles, the breadth of the sources will be restricted.⁶⁵ Dasser reckons, in his recent work on the

60. Clive M. Schmitthoff, *International Business Law: A New Law Merchant*, in CLIVE SCHMITTHOFF’S SELECT ESSAYS ON INTERNATIONAL TRADE LAW 20, 33 (Chia-Jui Cheng, ed., 1988); see also Aleksander Goldstajn, *The New Law Merchant*, J. BUS. L., 1961 Annual Issue, at 12.

61. See Gaillard, *supra* note 42, at 222-23; Lalive, *supra* note 18, at 176.

62. “Custom” as a source of the *lex mercatoria* has to be qualified in the view of some scholars. Thus Professor Bhala has distilled five ingredients of custom that are needed to make the *lex mercatoria* today as was the case during the middle ages. Custom must (a) reflect trade habits and market usages; (b) persist over a substantial period of time (i.e., being constant and established); (c) be universal; (d) be extrinsic to the legal system; and (e) be of utilitarian benefit on the merchant community, i.e., it must promote the maximum benefit (or greatest goal for the greatest number) of merchants. See Raj Bhala, *Applying Equilibrium Theory and the FICAS Model: A Case Study of Capital Adequacy and Currency Trading*, 41 ST. LOUIS U. L.J. 125, 205-06 (1996). This catalogue of attributes of custom, however, may not be equally accepted by the mercatorists who favor regional transnational rules or *lex mercatoria* and so on. See Gaillard, *supra* note 42, at 230-31.

63. See generally Antonio Boggiano, *INTERNATIONAL STANDARD CONTRACTS: THE PRICE OF FAIRNESS* 1-20 (1991) (defining standard form contracts).

64. See Lando, *supra* note 3, at 748-52.

65. See Mustill, *supra* note 4, at 159.

The repetition of transactions in the same form could at most create a group of norms peculiar to the individual trade, thereby creating a network of para-legal systems. This

lex mercatoria, that only trade usages and general principles of law may be considered as genuine sources of the *lex mercatoria*.⁶⁶ Similarly, in Professor Goode's view, "only general principles and uncodified usages constitute the *lex mercatoria*".⁶⁷

C. THE CONTENT OF THE *LEX MERCATORIA*

The *lex mercatoria* is still in the making. Different proponents have tried to derive its contents from different numbers of sources.⁶⁸ As we have seen, the proponents do not agree with regard to the sources of the *lex mercatoria*, and it is not surprising that with regard to its contents the result is much the same. The truth commonly recognized by the proponents is that "[i]t is not possible to provide an exhaustive list of all the elements of the 'law merchant'."⁶⁹ There have been attempts by some jurists, however, to enumerate the rules of the *lex mercatoria* in *seriatim*. Thus, Lord Justice Mustill was able to cull some twenty such alleged rules⁷⁰ while a student note in the *Har-*

is quite inconsistent with the theoretical premises of the *lex mercatoria*, which is that it springs spontaneously from the structure of international commerce—which is quite plainly regarded as an indivisible whole.

Id.

66. See De Ly, *supra* note 12, at 627 (explaining Dasser's discussion of the sources of the *lex mercatoria*).

67. Goode, *supra* note 6, at 4.

68. See De Ly, *supra* note 12, at 627 (distinguishing between positivistic, pragmatic, and autonomous conceptions of the *lex mercatoria*).

69. See Lando, *supra* note 3, at 749; Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in *LEX MERCATORIA AND ARBITRATION*, *supra* note 55, at 23, 29-32 (discussing a variety of perspectives on the source and content of private international law); see also ICC Case No. 4237/1984, 10 Y.B. COM. ARB. 52, 55 (1985).

70. See Mustill, *supra* note 4, at 174-77. For an understanding of those rules it seems reasonable to reproduce them in the following manner:

1. A general principle that contracts should *prima facie* be enforced according to their terms: *pacta sunt servanda*. The emphasis given to this maxim in the literature suggests that it is regarded, not so much as one of the rules of the *lex mercatoria*, but as the fundamental principle of the entire system. 2. The first general principle is qualified at least in respect of certain long-term contracts, by an exception akin to '*rebus sic stantibus*'. The interaction of the principle and the exception has yet to be fully worked out. 3. The first general principle may also be subject to the concept of *abus de droit*, and to a rule that unfair and unconscionable contracts and clauses should not be enforced. 4. There may be a doctrine of *culpa in contrahendo*. 5. A contract should be

vard Law Review lists only seven items as "general principles of law."⁷¹ The support for such enumerated principles as rules of the *lex mercatoria* from other jurists appears to be a matter of degree.⁷² One

performed in good faith. 6. A contract obtained by bribes or other dishonest means is void, or at least unenforceable. So too if the contract creates a fictitious transactions designed to achieve an illegal object. 7. A State entity cannot be permitted to evade the enforcement of its obligations by denying its own capacity to make a binding agreement to arbitrate, or by asserting that the agreement is unenforceable for want of procedural formalities to which the entity is subject. 8. The controlling interest of a group of companies is regarded as contracting on behalf of all members of the group, at least so far as concerns an agreement to arbitrate. 9. If unforeseen difficulties intervene in the performance of a contract, the parties should negotiate in good faith to overcome them, even if the contract contains no revision clause. 10. 'Gold clause' agreements are valid and enforceable. Perhaps in some cases either as gold clause or a 'hardship' revision clause may be implied. 11. One party is entitled to treat itself as discharged from its obligations if the other has committed a breach, but only if the breach is substantial. 12. No party can be allowed by its own act to bring about a non-performance of a condition precedent to its own obligation. 13. A tribunal is not bound by the characterization of the contract ascribed to it by the parties. 14. Damages for breach of contract are limited to the foreseeable consequences of the breach. 15. A party which has suffered a breach of contract must take reasonable steps to mitigate its loss. 16. Damages for non-delivery are calculated by reference to the market price of the goods and the price at which the buyer has purchased equivalent goods in replacement. 17. A party must act promptly to enforce its rights, on pain of losing them by waiver. This may be an instance of a more general rule, that each party must act in a diligent and practical manner to safeguard its own interests. 18. A debtor may in certain circumstances set off his own cross-claims to extinguish or diminish his liability to the creditor. 19. Contracts should be construed according to the principle *ut res magis valeat quam pereat*. 20. Failure by one party to respond to a letter written to it by the other is regarded as evidence of assent to its terms.

Id.

71. See Note, *General Principles of Law in International Commercial Arbitration*, 101 HARV. L. REV. 1816, 1826-33 (1988):

1. A sovereign government may make and be bound by contractual agreements with foreign private parties. 2. The corporate veil may be pierced to prevent a beneficial owner from escaping contractual liability. 3. Force majeure justifies non-performance of a contract such that the loss is borne fairly by the parties. 4. Contracts that seriously violate *bonos mores* or international public policy are invalid. 5. Equitable compensation constitutes the primary remedy for damages. 6. The right of property and of acquired vested rights is generally inviolable—a State may not effect a taking without equitable compensation. 7. A party may not receive unjust enrichment.

Id. at 1826-33.

72. See Lowenfeld, *supra* note 55, at 88-89 (responding to Lord Justice Mustill's counting of the rules, and expressing his conservative view by confirming only ten principles out of the twenty-principle list in light of his practical experience as an arbitrator over a long period of time); see also W. LAURENCE CRAIG

word of caution must be expressed here that what may be culled as the rules of the *lex mercatoria* or the general principles of law in the context of ordinary commercial contracts between two private parties may not always be suitable when State contracts or economic development agreements are involved.⁷³ For this reason, amongst others, many jurists have voiced their objections to the application of the *lex mercatoria* in arbitrations involving disputes between States and foreign private parties.⁷⁴ Although Professor Dupuy propagated his theory of the international law of contracts in the *Texaco* award, he unfortunately did not articulate the principles or the rules of that body of law.⁷⁵ He left the readers of his decision bewildered with speculations as to the possible rules applicable to different situations under the panoply of the international law of contracts.⁷⁶ The Iran-United States Claims Tribunal has applied "general principles of law" to a wide range of commercial activities.⁷⁷ In general, the Tribunal's

ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 607-619 (2d. ed. 1984) (describing and critiquing three distinct views of *lex mercatoria*).

73. See Abul F.M. Maniruzzaman, *The New Generation of Energy and Natural Resource Development Agreements: Some Reflections*, 11 J. ENERGY NAT. RESOURCES L. 207, 207-47 (1993); see also *International Commercial Arbitration: The Conflict of Law Issues in Determining the Applicable Substantive Law in the Context of Investment Agreements*, 40 N.I.L.R. 201-237 (1993).

74. See, e.g., STEPHEN J. TOOPE, MIXED INTERNATIONAL ARBITRATION 94 n. 221 (1990).

75. See Christopher Greenwood, *State Contracts in International Law—The Libyan Oil Arbitrations*, 1982 BRIT. Y.B. INT'L L. 27, 64-65 (discussing Professor Dupuy's theory of the international law of contracts).

76. See *id.*

It is true that the only rule of the international law of contracts expressly stated in this part of the *Texaco/Calasiatic* award is that that law is based upon the notion of *pacta sunt servanda*, thereby suggesting that the international law of contracts relies for its substantive rules upon analogies with the law of private contracts and the public international law of treaties rather than upon civil law notions of administrative contracts.

Id. at 64. Both Professors Fatouros and Rigaux criticize the *Texaco* award for its emphasis on *pacta sunt servanda*. See Argyrios A. Fatouros, 74 AM. J. INT'L L. 134, 137 (1978); RIGAUX, 67 REVUE CRITIQUE DE DROIT INTERNATIONAL PRIVÉ 435, 450-52 (1978); see also Derek W. Bowett, *Claims between States and Private Entities: The Twilight Zone of International Law*, 35 CATH. U. L. REV. 929, 933 (1986) (explaining that although international law contains no rules about contracts, rules about treaties can be applied by analogy).

77. See Grant Hanessian, *General Principles of Law in the Iran-U.S. Claims Tribunal*, 27 COLUM. J. TRANSNT'L L. 309, 330-31 (1989) (discussing the wide

treatment of numerous doctrines as general principles appears to lack detailed explanations of their underpinnings.⁷⁸ This can be ascribed to many reasons. As one commentator observed:

The inexorable press of the caseload limits the Tribunal's time and resources. Few arbitrating parties have treated applicable law as a significant part of their presentations; fewer still have provided comparative analyses. Finally, most arbitrators have not been inclined toward a comparative viewpoint, particularly absent urging by the parties.⁷⁹

As a final word of caution, in the context of economic development agreements, "general principles" should be applied carefully.⁸⁰ Thus, in Professor Cheng's words: "If the general principles of law are not to run the risk of being exploited as an ideological cloak for self-interest, it is essential that their scope and substance be clearly defined and understood."⁸¹

On a happier note for the mercatorists, it must be mentioned that the UNIDROIT Principles of International Commercial Contracts⁸²

range of issues resolved by the Iran-U.S. Claims Tribunal including "contract formation, interpretation, performance, breach, termination, and unjust enrichment" as well as "negotiable instruments, bailment, liability for unjustified attachment, third party beneficiaries, and partnerships") (citations omitted); John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 AM. J. INT'L L. 278, 292-99 (1989) (discussing the tribunals "general principle" jurisprudence).

78. See Crook, *supra* note 77, at 292 (discussing the fact that a rigorous analysis of comparative law has not been done as often).

79. *See id.*

80. See Harold Cooke Gutteridge, *Comparative Law and the Law of Nations*, 21 BRIT. Y.B. INT'L L. 1, 1 (1945) ("A high degree of caution is, in fact, essential before any private law principle or analogy can be accepted as conforming to the standard of universal or general recognition which has been adopted as the test for its employment for international purposes.")

81. See Bin Cheng, *GENERAL PRINCIPLES OF LAW AS APPLIED BY INTERNATIONAL COURTS AND TRIBUNALS* xiv (1953).

82. See UNIDROIT: PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS, PRINCIPES D'UNIDROIT RELATIFS AUX CONTRATS DU COMMERCE INTERNATIONAL, (International Institute for the Unification of Private Law ed., 1994) [hereinafter UNIDROIT]; see also Michael J. Bonnell, *Unification of Law by Non-Legislative Means: The UNIDROIT Principles of International Commercial Contracts*, 40 AM. J. COMP. L. 617, 618-32 (1992) (examining the efforts by UNIDROIT and Professor Ole Lando to develop a general regulatory system for contract law); PRINCIPLES OF EUROPEAN CONTRACT LAW PART I: PERFORMANCE,

and the Principles of European Contract Law prepared by the Commission on European Contract Law have recently collated certain general principles that are considered suitable for application to cross-border transactions.⁸³ The Preamble of the UNIDROIT Principles indeed provides that “[the principles] may be applied when the parties have agreed that their contract be governed by ‘general principles of law’, the ‘*lex mercatoria*’ or the like.”⁸⁴ Such codification of general principles of law is a great milestone for the development of the *lex mercatoria*. The status of both sets of principles remains, however, as *lex ferenda*. Time will determine their true status. If, in fact, they are well received by the international business community and applied by arbitrators, a new chapter will be added to the life of the modern *lex mercatoria*. Bonell considers the UNIDROIT Principles as a well-defined set of rules.⁸⁵ And he is very sanguine that in resorting to these Principles arbitrators “would succeed in reducing considerably the uncertainty and unpredictability which has so far characterized their decisions.”⁸⁶ The hope is so high among some jurists that one could not but express it in an enchanting manner:

The “music” of *lex mercatoria* is beginning to sound sweeter and sweeter. There should be no lack of masterly compositions (such as the United Nations Sales Convention) nor indeed of great composers and musicians to create a world trade code, the *leges mercatoriae*. Before long, the convention on general principles of commercial contracts prepared by

NON-PERFORMANCE AND REMEDIES (Ole Lando & Hugh Beale eds., 1995); Arthur Hartkamp, *Principles of Contract Law*, in TOWARDS A EUROPEAN CIVIL CODE 37, (Arthur Hartkamp et al. eds., 1998); Michael J. Bonnell, A “Restatement” of *Principles for International Commercial Contracts: An Academic Exercise or a Practical Need?*, REVUE DE DROIT DES AFFAIRES INTERNATIONAUX 873 (1988); Marcel Fontaine, *Les Principes pour les Contrats Commerciaux Internationaux élaborés par UNIDROIT*, REVUE DE DROIT INTERNATIONAL ET DE DROIT COMPARÉ 23 (1991).

83. See generally Michael J. Bonnell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?*, II UNIFORM L. REV. 229 (1996).

84. UNIDROIT, *supra* note 82, preamble.

85. See MICHAEL J. BONNELL, AN INTERNATIONAL RESTATEMENT OF CONTRACT LAW: THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS 211 (2d ed. 1997) (describing the advantages of the UNIDROIT Principles compared to unspecified general principles of law or the *lex mercatoria*).

86. *Id.*

UNIDROIT in Rome will be playing first fiddle in the concert of the future.⁸⁷

The suitability of the UNIDROIT Principles to State contracts depends, however, on how States respond to it in practice. Therefore, it would be premature to give any definitive view on the matter at this early stage.

D. THE *LEX MERCATORIA* AND PARTY AUTONOMY

Proponents of the *lex mercatoria* have suggested that the inclusion of an arbitration clause, the choice of an international tribunal,⁸⁸ or a clause referring disputes to an international arbitration center⁸⁹ in an international contract implies the application of the *lex mercatoria*. Their initial aim may be to place the contract itself in the *lex mercatoria*, that is to say the contract rooted in the *lex mercatoria*, to allow it an overriding authority.

The issue is whether those elements in an international contract can override the parties' express choice of any law other than the *lex mercatoria*. The answer must be no.⁹⁰ As Mustill has aptly said:

The arbitrator is mandated to decide the dispute in accordance with the contract; and the contract includes an agreement to abide by the denominated law. An arbitrator who decides according to some other law, whether anational or otherwise, presumes to rewrite the bargain. He has

87. Andreas Kappus, "Lex Mercatoria" als Geschäftsstatut vor staatlichen Gerichten im deutschen internationalen Schuldrecht, in PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHTS 137, 142 (1993). But see Uriel Procaccia, *The Case Against Lex Mercatoria*, in NEW DEVELOPMENTS IN INTERNATIONAL COMMERCIAL AND CONSUMER LAW 87 (Proceedings of the 8th Biennial Conference of the International Academy of Commercial and Consumer Law) (Jacob S. Ziegel ed., 1998).

88. See ERIC LOQUIN, APPOINT DE LA JURISPRUDENCE ARBITRALE: L'APPLICATION DE RÈGLES ANATIONALES art. 19 (1986); Goldman, *supra* note 15, at 480.

89. *See id.*

90. Cf. CMI Int'l, Inc. v. Iran, 4 Iran-U.S. Cl. Trib. Rep. 263, 267-68 (1983) (stating that the Iran-U.S. Claims Tribunal may often find it necessary to interpret and apply national law).

no right to do this. However good his motives, he does a disservice to the parties and to the institution of international arbitration.⁹¹

Thus, one may argue that if an arbitrator applies any law other than the parties' chosen one, the parties' expectations would be frustrated. If this is allowed, contrary to the parties' wishes, the international business community may lose its trust in the arbitration institution itself and the prospect of arbitration will be in limbo. Since arbitration itself is based on party autonomy, this principle must be respected in various matters in the context of arbitration.⁹² The arbitrator's revision of the parties' contract by substituting the applicable law, however equitable,⁹³ should be prohibited in principle for the sake of the sanctity of the contract. Thus, the *lex mercatoria* should not oppose the well-established principle of party autonomy, as it is one of the general principles of private international law. Professor Reisman justly pointed out, "It is unfair to the parties and dangerous for the future of arbitration if arbitrators can arrogate to themselves a change of the rules once parties have selected a set of them to govern their transactions."⁹⁴

91. Mustill, *supra* note 4, at 168; see also Bowett, *supra* note 76, at 931-32 (1986) (asserting that the law of the contracting state party is preferable in claims between states and private entities); Queens Office Tower Assocs. v. Iran Nat'l Airlines Corp., 2 Iran-U.S. Cl. Trib. Rep. 247, 250 (1983) (demonstrating an application of New York law to an international dispute).

92. See Bowett, *supra* note 76, at 932 (asserting that the party's law should not be disregarded as the basic, proper law).

93. See HENRI MAZEAUD ET AL., TRAITÉ THÉORIQUE ET PRATIQUE DE LA RESPONSABILITÉ CIVILE DELICTUELLE ET CONTRACTUELLE sec. 1, at 735 (6th ed. 1965); GEORGE RIPERT, 81 LA RÈGLE MORALE DANS LES OBLIGATIONS CIVILES; see also UNCITRAL DRAFT MODEL LAW FOR INTERNATIONAL COMMERCIAL ARBITRATION, art. 34(2), in 24 I.L.M. 1302, 1314 (1985); §585 Abs 2 Allgemeines Bürgerliches Gesetzbuch [ABGB] (Aus.), reprinted in 1 INTERNATIONAL HANDBOOK OF COMMERCIAL ARBITRATION (Pieter Sanders ed., 1998); BELGIUM JUDICIAL CODE art. 1074, reprinted in 1 INTERNATIONAL HANDBOOK OF COMMERCIAL ARBITRATION (Pieter Sanders ed., 1998); THE NETHERLANDS CODE OF CIVIL PROCEDURE, Art. 1065 (1), reprinted in 12 Y.B. COMM. ARB. 370 (1987); UNITED STATES ARBITRATION ACT, February 12, 1925, sec. 10, reprinted in 1 INTERNATIONAL HANDBOOK OF COMMERCIAL ARBITRATION (Pieter Sanders ed., 1998).

94. W. MICHAEL REISMAN, SYSTEMS OF CONTROL IN INTERNATIONAL ADJUDICATION AND ARBITRATION: BREAKDOWN AND REPAIR 95 (1992).

Lowenfeld and Smit emphasized the role of party autonomy in the elaboration of the *lex mercatoria*.⁹⁵ Professor Gaillard has expressed his reservation about the application of transnational rules in disregard of the law chosen by the parties.⁹⁶ He also remains unsympathetic to the idea that national laws contain lacunae and thus permit the application of transnational rules even when the parties have expressly submitted their disputes to a given national law.⁹⁷ Bowett also believes that "whenever there is a contractual choice of a specific municipal legal system as the proper law, the choice is to that legal system *per se*. There is no *renvoi* to international law, and thereby to other municipal systems generally, via the concept of 'general principles of law' as a part of international law."⁹⁸

E. THE *LEX MERCATORIA* AND THE CONFLICT OF LAWS

The proponents of the *lex mercatoria* contend that one of its goals is to get rid of the cumbersome exercise of applying conflict rules. As Dr. Mann noted, "One of the purposes of [the *lex mercatoria*] is to eliminate the search for the proper law of the contract or, more generally, the rules of conflict of laws."⁹⁹ Lord Justice Mustill took care to explain that:

the purpose of the conflict of laws is to enable the tribunal accurately to identify the national law which governs the contract. This is precisely antithetical to the premise of the *lex mercatoria*, which is that the arbitrator's first step is to reject any national law as the governing law.¹⁰⁰

95. See Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View*, in *LEX MERCATORIA AND ARBITRATION*, *supra* note 55, at 71, 79 (emphasizing the importance of the expectation of parties in arbitration); see also Smit, *supra* note 55, at 100-01 (discussing the role of parties' choice of arbitration language).

96. See Emmanuel Gaillard, *supra* note 42, at 215-16 (citing a case where the parties' express choice of law was overridden in arbitration).

97. See *id.* at 216; cf. Southern Pacific Properties (Middle East) Ltd. v. Egypt, 8 ICSID-REV. FOREIGN INVESTMENT L.J. 328, 350-53; *id.* at 478-94 (El Mahdi, J., dissenting).

98. BOWETT, *supra* note 76, at 932 n.12.

99. Frederick A. Mann, *England Rejects "Delocalised" Contracts and Arbitration*, 33 INT'L & COMP. L.Q. 193, 196-97; see also REISMAN, *supra* note 94, at 136.

100. MUSTILL, *supra* note 4, at 154.

He added, however, that "it would be possible to have a specialist conflicts system with only one rule—namely, that all disputes concerning international trade should, when referred to arbitration, be regulated by the *lex mercatoria*."¹⁰¹ Professor Juenger similarly summed up the effect that "the *lex mercatoria* threatens the very existence of the conflict of laws because once supranational norms emerge, choice-of-law rules and principles become superfluous."¹⁰² This approach is antithetical to the role traditionally attributed to the rules of private international law, reflecting a territorial sovereign's need to control private relationships involving foreign elements to protect its own social and economic policies for the sake of its self-preservation.¹⁰³ The main thrust of this approach is that private interests in a transnational context should prevail over wider community interests in a given territorial domain even though this may appear contrary to conventional wisdom.¹⁰⁴ Juenger further remarked that "[t]raditional conflict of laws tenets, rooted as they are in statism and positivism, seem out of tune with our times, when commercial practices are being freed from state interference."¹⁰⁵ Thus, in the transnational context, there appears to be a tension and conflict between the conventional positivistic choice-of-law approach, which Juenger considers¹⁰⁶ to be a parochial one in the discharge of judges' or arbitrators' transnational functions, and the modern supranational approach of the *lex mercatoria*. Some jurists, like Professor Goldman, mention the possibility of such a body of supranational conflicts

101. *Id.*; see also Arthur Von Mehren, *To What Extent is International Commercial Arbitration Autonomous?*, in LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES: ÉTUDES OFFERTES À BERTHOLD GOLDMAN, 217, 226-27 (Philippe Fouchard et al. eds., 1982) (postulating an arbitration scheme with the *lex mercatoria* as the sole body of law).

102. Friedrich K. Juenger, *American Conflicts Scholarship and the New Law Merchant*, 28 VAND. J. TRANSNAT'L L. 487, 497 (1995).

103. See REISMAN, *supra* note 94, at 136-38 (discussing the problems and conflicts of public and private international law and the *lex mercatoria*).

104. *See id.*

105. Friedrich K. Juenger, *Contract Choice of Law in the Americas*, 45 AM. J. COMP. L. 195, 203 (1997).

106. See Friedrich K. Juenger, *The Lex Mercatoria and the Conflict of Laws*, in *LEX MERCATORIA AND ARBITRATION*, *supra* note 55, at 265, 271 (noting the parochialism and uncertainties of multistate litigation); *see also* Juenger, *supra* note 102, at 500.

rules,¹⁰⁷ but unfortunately very few of them have satisfactorily explained the meaning and nature of such rules. Despite the mercatorists' continuous onslaught, the traditional conflicts methodology remains a dominant feature in important arbitration¹⁰⁸ and relevant legislation,¹⁰⁹ both nationally and internationally.¹¹⁰

At present there are no adequate or developed *lex mercatoria* conflict of laws rules, nor does there lie any prospect of such rules in the foreseeable future. This is true not only in the context of both international trade and investment matters but also in other fields.

If the *lex mercatoria* conflict of laws rules are based on the general principles of conflict of laws,¹¹¹ one may wonder how the *lex mercatoria* would be found applicable when the choice-of-law clause is absent. This is because one of the general principles of conflict of laws is the "centre of gravity" or "the most significant connection" or "the closest connection" principle,¹¹² and according to this principle the national law of the country with which the transaction has the most significant connection applies.¹¹³ Again, the argument is a circular

107. See Berthold Goldman, *Les Conflits des lois dans L'arbitrage International de Droit Privé*, in 1963, 109 RECUEIL DES COURS 351 (1964); see also Gaillard, *supra* note 42, at 217-18 (noting the transnational origin of choice-of-law rules often used by arbitrators); see also von Mehren, *supra* note 101, at 227 ("In time a *lex mercatoria* of conflictual rules might then emerge in response to the special opportunities and challenges that conflicts questions present for the arbitral process."). See generally Arthur von Mehren, *Recent Trends in Choice-of-Law Methodology* 60 CORNELL L. REV. 927, 928 (1975) (delineating how a legal system should regulate multi-state transactions).

108. See, e.g., English Arbitration Act § 46(3) (1996), available in <http://www.hmso.gov.uk/acts/acts_1996/1996023.html>; German Institution of Arbitration Rules of 1 January 1992, § 21(2), <<http://www.dis-arb.de/scho/schiedsordnung92-e.html>>.

109. See, e.g., Rome Convention on the Law Applicable to Contractual Obligations art. 4(1), reprinted in 1980 O. J. (L 266).

110. See Marc Blessing, *Regulation in Arbitration Rules on Choice of Law*, in PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION 391, 391-446 (Arthur Hartkamp et al. eds., 1998).

111. See Goode, *supra* note 6, at 28 (discussing the use of conflict of laws principles relating to international arbitration); see also Gaillard, *supra* note 42, at 218.

112. See DICEY AND MORRIS ON THE CONFLICT OF LAWS 1035-43, Rule 180 (10th ed., 1980).

113. See Rome Convention on the Law Applicable to Contractual Obligations, *supra* note 109, art. 4(1); See Paulo M. Patocchi, *Characteristic Performance: A*

one as far as the substantive applicable law is concerned. Professor Juenger and others, however, anticipate a way out through teleological techniques in the choice-of-law process, the objective of which is to uphold the spirit of transnational relationships.¹¹⁴

Even if it is accepted that the *lex mercatoria* directly applies as the substantive law to the dispute without any reference to any conflict rules,¹¹⁵ there may be cases in which the *lex mercatoria* may not be sufficient to govern all the aspects of the dispute.¹¹⁶ In such cases, the arbitrator may have to apply some national or international conflict of laws rules to determine which law applies to those aspects of the dispute not covered by the *lex mercatoria*. Article 7(2) of the Vienna Convention on Contracts for the International Sale of Goods includes such a provision.¹¹⁷ It is clear that the disregard of conflict rules is not absolutely possible in all disputes. Even many mercatorists did not hesitate to admit that the *lex mercatoria* cannot claim to be a complete and autonomous system of law, and consequently the existence

New Myth in the Conflict of Laws?, in ÉTUDES DE DROIT INTERNATIONAL EN L'HONNEUR DE PIERRE LALIVE 113, 113-39 (C. Dominicé et al. eds., 1993).

114. See generally Juenger, *supra* note 105, at 220; see also Luther L. McDougal III, *Toward Application of the Best Rule of Law in Choice of Law Cases*, 35 MERCER L. REV. 483 (1984); Luther L. McDougal III, "Private" International Law: *Ius Gentium versus Choice of Law Rules or Approaches*, 38 AM. J. COMP. L. 521, 532-37 (1991) (proposing that the best way to take substantive policies into account is to develop and apply transnational laws).

115. But see Goode, *supra* note 41, at 13.

[T]he adoption of conflict of laws Conventions, and in particular the Rome Convention on the law applicable to contractual obligations, makes it increasingly difficult to detach arbitration from national conflict of laws rules, for such Conventions require the application of a national law (unless the parties otherwise agree) and the Conventions themselves form part of transnational commercial law.

Id.

116. See *id.* (stating that general *lex mercatoria* principles are not always appropriate for all aspects of a case).

117. See United Nations Convention on Contracts for the International Sale of Goods, Vienna, 1980, art. 7(2), reprinted in ALBERT H. KRITZER, GUIDE TO PRACTICAL APPLICATIONS OF THE UNITED NATIONS CONVENTION ON CONTRACTS FOR THE INTERNATIONAL SALE OF GOODS 578 (1989) ("Questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, *in the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law.*") (emphasis added).

of the *lex mercatoria* cannot eliminate the need for a choice-of-law clause in an international contract.¹¹⁸

Another criticism that can be leveled against the mercatorists' contention for the automatic application of the *lex mercatoria* is that it cannot be the arbitrator's first step to reject any national law as the applicable substantive law where the choice of law is clear, either because the parties have unequivocally agreed to it or because one particular State's law simply has the closest and most real connection with the particular transaction.¹¹⁹ In particular, in the context of State contracts, such as economic development agreements,¹²⁰ the host State's law, having the closest and most real connection with the transaction concerned, proves to be the most relevant and applicable.¹²¹ In any event, the *lex mercatoria* may be helpful when the national law is not adequate to govern a matter.¹²² From that perspective, the *lex mercatoria* may be an additional option in the search for the applicable law rather than an alternative to that search.¹²³ The Or-

118. See Georges van Hecke, *Contracts Subject to International or Transnational Law*, in INTERNATIONAL CONTRACTS 25, 37 (Hans Smit et al. eds., 1981) (stating that application of the *lex mercatoria* is not a complete solution for the arbitration of international contracts).

119. *See id.*

120. Economic development contracts are energy and natural resource development contracts, construction and management contracts, turnkey contracts, or licensing contracts regarding transfer of technology that are, to a greater or lesser degree, supposed to be performed in the country of the contracting State party.

121. *See Hecke, supra* note 118, at 37 (arguing that host State's law is the most applicable to particular transactions).

122. *See* ICC Case No. 4761, 1987 CLUNET 1137 (1986).

In the partial award made with the parties' consent in 1984, the arbitral tribunal held that the applicable law was in principle Libyan law but that the arbitrators might apply a *lex mercatoria* where Libyan law had not been proved or if it had lacunae or was incomplete. In the final award, under the heading "law and discussion", the Arbitrators declared that they would apply Libyan laws in the first place, and in the second place *lex mercatoria* and general principles of law.

Id.

123. *See* Goldman, *supra* note 26, at 482; *cf.* Georges R. Delaume, *The Pyramids Stand: The Pharaohs Can Rest in Peace*, 8 ICSID-REV. FOREIGN INVESTMENT L.J. 231, 241-48 (1993). *But see* Southern Pacific Properties (Middle East) Ltd. v. Arab Republic of Egypt, 8 ICSID-REV. FOREIGN INVESTMENT L.J. 328, 350-53 (addressing Article 42(1) of the ICSID convention); *id.* at 478-494 (1993) (El Mahdi, J., dissenting).

ganization of American States Inter-American Convention on the Law Applicable to International Contracts (1994), known as the Mexico City Convention, has endorsed such an additional or supplementary role of the *lex mercatoria*.¹²⁴ Article 10 of the Convention provides that:

In addition to the provisions in the foregoing articles, the guidelines, customs, and principles of international commercial law as well as commercial usage and practices generally accepted shall apply in order to discharge the requirements of justice and equity in the particular case.¹²⁵

Various arbitration rules¹²⁶ and relevant national legislation¹²⁷ also provide for an additional role of the applicable trade usages¹²⁸ in all cases, whether or not the parties have chosen an applicable law.

124. See *Organization of American States Fifth Inter-American Specialized Conference on Private International Law: Inter-American Convention on the Law Applicable to International Contracts*, OAS Doc. OEA/Ser.K/XXI.5 (Mar. 17, 1994), reprinted in 33 I.L.M. 732, 733-39 (1994).

125. *Id.* at 735. Article 9 of the Mexico City Convention thus also allows the supplementary role of the *lex mercatoria* in the absence of the parties' choice. It provides that:

If the parties have not selected the applicable law, or if their selection proves ineffective, the contract shall be governed by the law of the State with which it has the closest ties.

The Court will take into account all objective and subjective elements of the contract to determine the law of the State with which it has the closest ties. It shall also take into account the general principles of international commercial law recognized by international organizations.

Id.

126. See, e.g., World Intellectual Property Organization Arbitration Rules art. 59(a) (1994), WIPO Pub. No. 446(E) (1994), reprinted in HANS SMIT & VRATISLAV PECHOTA, ARBITRATION RULES ISSUED BY INTERNATIONAL INSTITUTIONS 271, 294 (1997); Vienna International Arbitration Centre Arbitration Rules, Art. 16(1), available in <<http://www.international adr.com/vienna.htm>>.

127. See, e.g., Code Civil [C. Civ.] art. 1496 (Fr.); *id.* art. 834, amended by Law No. 25 of Jan. 5, 1994.

128. The "trade usages," as referred to, however, should not be confused with the distinct concept of *lex mercatoria*. See YVES DERAINS & E.A. SCHWARTZ, A GUIDE TO THE NEW ICC RULES OF ARBITRATION 225 (1998).

Because both *lex mercatoria* and trade usages are to a certain extent each related to customary business practices, the frontier between the two is not always clearly perceived. But the term "lex mercatoria" . . . is ordinarily intended to refer to legal rules

F. AMIABLE COMPOSITION, *EX AEQUO ET BONO* AND THE *LEX MERCATORIA*

Some have argued that while applying the *lex mercatoria*, arbitrators act as *amiable compositeur* (friendly arbitrator).¹²⁹ If the *lex mercatoria* and amiable composition are considered inseparable, and one should mean the other, then this concept is fallacious. It is well established that the arbitrator's authority to act as *amiable compositeur* is derived from two sources: (a) the parties' express consent or agreement, and (b) the applicable *lex arbitri* that permits that agreement.¹³⁰ On the contrary, if the arbitrator acts as *amiable compositeur*, his action will certainly be considered invalid and any award rendered thereby will be unenforceable.¹³¹ Acting as *amiable compositeur*, an arbitrator can decide *ex aequo et bono* (according to equity, justice, and fairness).¹³² Although *ex aequo et bono* implies the use of

arising out of international commerce. Trade usage, on the other hand, normally constitutes part of the parties' agreement (unless excluded). That is, parties expect that the contracts they conclude, unless specifically agreed otherwise, will be performed in accordance with the usual practices observed in their area of business. Thus unlike *lex mercatoria*, trade usage is internal, not external to the parties' agreement.

Id., see also CRAIG ET AL., *supra* note 72, at 295 ("Usages may be deemed incorporated into the contract as a matter of specific intent (for instance, if reference is made in the contract to INCOTERMS, or contracting regulations), or by implication (a custom is not referred to but is deemed by the arbitrators to have been within the contemplation of the parties).").

129. See CRAIG ET AL., *supra* note 72, at 296 (discussing cases where arbitrators based their decision on usage without reference to a particular law).

130. See, e.g., UNCITRAL Arbitration Rules (1976) Art. 33(2) (visited Dec. 15, 1998) <<http://www.un.or.at/uncitral/english/texts/arbcconc/arbitral.htm>>; International Center for Letter of Credit Arbitration, Inc. (ICLOCA) Rules of Arbitration (1996) Art. 33(2); see also JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION: A STUDY IN COMMERCIAL ARBITRATION AWARDS 120-22 (1978) (discussing the role of arbitrators as *amiable compositeurs*).

131. See CRAIG ET AL., *supra* note 72, at 297-98 (identifying cases where arbitrator's decisions were overturned on appeal).

132. See *id.* at 513. While *amiable compositeur* has wider connotation than *ex aequo et bono*, an arbitrator, acting as *amiable compositeur*, may not or have no need to resort to equity or justice and may fall back on other factors to decide a dispute. See Mauro Rubino-Sammartano, *Amiable Compositeur (Joint Mandate to Settle) and Ex Aequo et Bono (Discretionary Authority to Mitigate Strict Law)*, 9 J. INT. ARB. 5, 5-16 (1992) (discussing the roles of arbitrators as *amiable compositeurs*).

an extra-legal standard, it does not necessarily restrict the application of law.¹³³ It suggests, rather, that the arbitrator is not bound by strict application of law. Therefore, an arbitrator acting as *amiable compositeur* or deciding *ex aequo et bono* may apply the *lex mercatoria*,¹³⁴ but the converse is not necessarily true, as has been recently confirmed by Austrian, French, and English courts in decisions on the enforceability of arbitral awards based on the *lex mercatoria*.¹³⁵ To those who consider the *lex mercatoria* not as law but as a catalogue of equitable directives, the arbitrator's application of it appears to be the result of his role as *amiable compositeur*¹³⁶ or decision *ex aequo et bono*.¹³⁷ The main thrust of equating amiable composition and *ex aequo et bono* with the *lex mercatoria* is identifying equity with the

133. See Christopher Schreuer, *Decisions ex aequo et bono under the ICSID Convention*, 11 ICSID REV.-FOREIGN INVESTMENT L.J. 37, 62-63 (1996); Christopher Schreuer, *Decisions ex aequo et bono by International Courts and Arbitral Tribunals*, in INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE 275 (Pieter Sanders ed., 1967).

134. See Mechema Ltd. v. Mines, Mineraux et Metaux, reprinted in VII Y.B. COM. ARB. 77 (1982) (award of November 3, 1977); ICC Award No. 3267, reprinted in 12 Y.B. COM. ARB. 87-89 (1987) (award of 28 March 1987); Goldman, *supra* note 26, at 475, 480; LOQUIN, *supra* note 88, art. 577; Yves Derains, *Possible Conflict of Laws Rules and the Rules Applicable to the Substance of the Dispute*, in UNCITRAL'S PROJECT FOR A MODEL ON INTERNATIONAL COMMERCIAL ARBITRATION 169, 188 (International Council for Commercial Arbitration Congress Series, No. 2) (Pieter Sanders ed., 1984). One should note that it is admitted that the arbitrators need not enjoy powers of *amiables compositeurs* to apply national rules and, more generally, the *lex mercatoria*. Cf. ICC awards in cases 1969 CLUNET 888 No. 1641; 1975 CLUNET 989 No. 2281; 1965 CLUNET No. 1375; 1970 CLUNET No. 1568; 1973 CLUNET No. 1859, in REV. ARB. 131, 133, 135 (1973); Decision of the Tribunal de Grand Instance de Paris, Mar. 4, 1982 (unpublished).

135. See Pabalk Ticaret Ltd. Sirketi v. Norsolor S.A. (Turkey v. France), 9 Y.B. COM. ARB. 159 (1984); Fougerolle v. Banque de Proche Orient, 1982 REV. ARB. 183 (France); Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. R'As al-Khaimah Nat'l Oil Co., 1 A.C. 295 (1990) (English). The English Court of Appeals upheld the arbitral tribunal's application of the *lex mercatoria* not as *amiable compositeur* but based on Article 13 (3) of the ICC Arbitration Rules in the absence of a choice-of-law clause. *See id.*

136. See Eric Loquin, 7 L'amiable composition en droit comparé et international, Contribution à l'étude du non-droit dans l'arbitrage commercial, Université de Dijion, Institut de relations internationales, Travaux de centre de recherche sur le droit de marchés et des investissements internationaux, Vol. 7, at 325-31 (Librairies Techniques, Paris, 1980).

137. *See id.*

lex mercatoria.¹³⁸ While it is true that equity may be part of the *lex mercatoria*, the two concepts are not interchangeable. As the mercatorists consider the *lex mercatoria* to be law even though it corresponds to equity, they generally distinguish between the *lex mercatoria* and equity. The distinction is apparent, however, when the results of the application of both to a given situation are different. The differing results may stem from the fact that the *lex mercatoria* means more than equity in that it includes more variable elements than equity, and in a given situation the application of the *lex* may prevail over equity. Such a distinction is vital in order to show that while applying the *lex mercatoria* arbitrators do not necessarily act as *amiable compositeur*.¹³⁹ Decisions by equity within the law, however, should not be confused with decisions by *ex aequo et bono*. The International Court of Justice has articulated this distinction in the *Continental Shelf* judgment:

Whatever the legal reasoning of a court of justice, its decisions must by definition be just, and therefore in that sense equitable. Nevertheless, when mention is made of a court dispensing justice or declaring the law,

138. See Mann, *supra* note 99, at 196-97.

The purpose (of the *lex mercatoria*) is to substitute ill-defined "equity" for rules of law, to rely on what is considered fair and conforming to usage. 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.

Id; see also Jean-Denis Bredin, *La loi de juge*, in LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES, ÉTUDES OFFERTES À BERTHOLD GOLDMAN 281 (Philippe Fouchard et al. eds., 1982); *cf.* Lando, *supra* note 3, at 55.

139. See DASSER, *supra* note 3, at 754-55. One reviewer of the book notes:

[T]he author draws a clear line between application of the *lex mercatoria* and "amiable composition." While *lex mercatoria* would involve application of rules of law, "amiable composition" would authorize arbitrators to depart from any rule of law and to look to the fairness of their decision. Such a distinction is always made by proponents of the *lex mercatoria* to avoid criticism that arbitrators acted as "amiables compositeurs" without being duly authorized by the parties. However, the distinction rests upon the assumption that the *lex mercatoria* is at least consists of autonomous legal rules. Since the author's position with regard to trade usages and general principles as autonomous rules is not very convincing, his conclusion that application of the *lex mercatoria* cannot be identified with "amiable composition" may also be questioned

De Ly, *supra* note 12, at 628.

what is meant is that the decision finds its objective justification in considerations lying not outside but within the rules, and in this field it is precisely a rule of law that calls for the application of equitable principles. There is consequently no question in this case of any decision *ex aequo et bono*, such as would only be possible under the conditions prescribed by Article 38, paragraph 2, of the Court's Statute.¹⁴⁰

Such a position has been consistently maintained by the International Court of Justice in its growing jurisprudence in the field of maritime boundary delimitations.¹⁴¹ These juristic views also support the role of equity *infra legem* in decisions according to law per se.¹⁴² Equity *infra legem* is "that form of equity which constitutes a method of interpretation of the law in force and is one of its attributes."¹⁴³ It

140. *The North Sea Continental Shelf*, 1969 I.C.J. 3, 48.

141. See, e.g., *Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1982 I.C.J. 18 (Feb. 24); *Application for Revision and Interpretation of the Judgment of February 24, 1992 in the Case Concerning the Continental Shelf (Tunisia v. Libyan Arab Jamahiriya)*, 1985 I.C.J. 192; *Delimitation of the Maritime Boundary in the Gulf of Maine (Canada v. United States of America)*, 1984 I.C.J. 246 (Oct. 12); *Continental Shelf (Libyan Arab Jamahiriya v. Malta)*, 1985 I.C.J. 13 (June 3); *Land, Island and Maritime Frontier Dispute (El Salvador v. Honduras)*, 1992 I.C.J. 351 (Sept. 11); *Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway)*, 1993 I.C.J. 38 (June 14); *Id.* at 211-279 (separate Opinion of Judge Weeramantry); see also *Iceland/Norway Continental Shelf Area Between Iceland and Jan Mayen (1981), Recommendations of the Conciliation Commission*, 20 I.L.M. 979 (1981); *Dubai/Sharjah Maritime and Land Boundaries Award (1981)* of the Court of Arbitration, 91 I.L.R. 543 (1993); *Guinea/Guinea-Bissau Delimitation of the Maritime Boundary Award (1985)* of the Arbitration Tribunal, 25 I.L.M. 251 (1986), 77 I.L.R. 636 (1988); *Egypt/Israel Arbitration Award in Boundary Dispute Concerning the Taba Area*, 27 I.L.M. 1421 (1988), 80 I.L.R. 1; *Canada/France Delimitation of Maritime Areas Award (1992)* of the Court of Arbitration, 21 U.N.R.I.A.A. 267 (1997), 31 I.L.M. 1145 (1992).

142. See, e.g., Mohammed Bedjaoui, *L'Énigma des "principes équitables" dans le Droit des Délimitation Maritimes*, XLII REVISTA ESPANOLA DE DERECHO INTERNACIONAL 367 (1990); Robert Jennings, *Equity and Equitable Principles*, 42 ANNUAIRE SUISSE DE DROIT INTERNATIONAL 27 (1986); Robert Jennings, *The Principles Governing Marine Boundaries*, in STAAT UND VÖLKERRECHTSORDUNG, FESTSCHRIFT FÜR KARL DOEHRING 398 (1989); B. Kwiatkowska, *Equitable Maritime Delimitation, as Exemplified in the Work of the International Court of Justice during the Presidency of Sir Robert Yewdall Jennings and beyond*, 28 OCEAN DEV. & INT'L L. 91 (1997).

143. Statement of the President of the International Court of Justice, Judge Mohammed Bedjaoui to the 49th United Nations General Assembly, at 4 U.N. Doc. A/49/PV.29, 13 (Oct. 1994), reprinted in I.C.J. Y.B. 1994-1995 (No. 49) at 211-

is, in Rosenne's words, "equity not in terms of 'opposition' to 'law', but in terms of fulfilling the law and if necessary supplementing it."¹⁴⁴ There is no reason why this jurisprudence should not apply in the context of the *lex mercatoria*.

A caveat must be made, however, that the overbearing application of equity may prove a decision to be one *ex aequo et bono*. Judge Bedjaoui thus reserves his view on the role of equity within the law when he describes equity as "a riddle wrapped in a mystery inside an enigma."¹⁴⁵ The superimposition of flexible principles, such as those in equity, upon so fluid a legal system as the *lex mercatoria* may fail to produce a predictable legal result.¹⁴⁶ Hence, the arbitrator must be careful even when he is authorized to apply the *lex mercatoria*. Professor Weil's cautionary remarks in the context are noteworthy:

If law and equity are the twin daughters of justice, *ex aequo et bono* is a third. From law to *ex aequo et bono* by way of equity is a seamless continuum. So much is this the case, that, however much the courts assimilate equity to the law, they have sometimes given the impression of leaning rather in the direction of *ex aequo et bono*. The very emphasis in the repeated pronouncements on the subject of equity "as a legal concept" cannot but arouse the suspicion that it is necessary, from time to time, to retrieve the position.¹⁴⁷

G. IS THE *LEX MERCATORIA* UNIVERSAL?

Although the classical *lex mercatoria* is conceived as a universal and pervasive "arrière-plan"¹⁴⁸ underlying every arbitral decision in

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144. SHABTAI ROSENNE, AN INTERNATIONAL LAW MISCELLANY: THE POSITION OF THE INTERNATIONAL COURT OF JUSTICE ON THE FOUNDATIONS OF THE PRINCIPLE OF EQUITY IN INTERNATIONAL LAW 204 (1993).

145. Bedjaoui, *supra* note 142, at 387.

146. Cf. Maritime Delimitation in the Area Between Greenland and Jan Mayen (Denmark v. Norway), 1993 I.C.J. 211, 257 (separate Opinion of Judge Weeramantry).

147. PROSPER WEIL, THE LAW OF MARITIME DELIMITATION—REFLECTIONS 164-65 (1989).

148. See BARHOLD GOLDMAN, FRONTIERS 183 (1964); see also Swift v. Tyson, 41 U.S. 1 (16 Pet.) (1842) (Story, J.).

the field of international commerce,¹⁴⁹ the majority of jurists now believe that the *lex mercatoria* has not attained such universality.¹⁵⁰ These views are obvious from the mercatorists' counter theories of "macro" *lex mercatoria* and "micro" *lex mercatoria*.¹⁵¹ The classical notion of the *lex mercatoria* represents only the views of certain western jurists and arbitrators.¹⁵² In addition, the *lex mercatoria* is said to be historically based only on certain western trading nations' practices and trade usages.¹⁵³ A parallel development is also undenia-

149. Mustill, *supra* note 4, at 157.

150. *See id.* (discussing the general opinion of jurists regarding *lex mercatoria*).

151. *Id.* at 155-57. "Macro" *lex mercatoria* means the law merchant that is common to all or most of the States engaged in international trade. "Micro" *lex mercatoria* means the law merchant generated with specific reference to the individual contract. On this basis, the *lex mercatoria* need not be the same all over the world. The arbitrator will tend to confine his investigations to those legal systems which are connected with the subject matter of the dispute. *See Lando, supra* note 3, at 747, 750, 766.

152. *See FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA* 208-48 (1992).

153. The theory of the *lex mercatoria* has not commanded favorable reaction from different quarters. In particular, Third World lawyers seem to be especially skeptical. Thus, one African lawyer has this to say:

African lawyers reject the conceptual premise of a *lex mercatoria* because their views were never accommodated in the development of the *communis opinio doctrum* upon which a *lex mercatoria* is said to be predicated. The common principles that are said to make up the *lex mercatoria* were themselves largely developed at a point in time when trading relationship with Africans were undertaken mainly for the benefit of Europeans in the context of a colonial political structure. The Africans could take no part in those relationships. African lawyers do not necessarily share those principles on all points. Accordingly, they consider it inequitable for arbitrators chosen or selected to preside over their disputes with multinational companies to elect *lex mercatoria* as providing the rules of application in the face of a case they believe clearly requires application of the laws of the African State. African lawyers and impartial analysts believe that it is a mistake for Western arbitration lawyers to see the development of arbitration only through the eyes of Western trading entities

Sampson L. Sempasa, *Obstacles to International Commercial Arbitration in African Countries*, 41 I.C.L.Q. 387, 410, pt. II (Apr. 1992); *see also* M. Sornarajah, *The UNCITRAL Model Law: A Third World View Point*, 6 J. INT'L ARB. Dec. 1989, at 7, 17 (stating "the so-called *lex mercatoria* is a creation of Western scholars and arbitrators who have loaded it with norms entirely favourable to international business."); M. SORNARAJAH, *THE INTERNATIONAL LAW ON FOREIGN INVESTMENT* 354 (1994) (citing problems with the claim that a system of law applicable to transactional business disputes has been created as a result of an accumulation of arbitral awards and the consistency with which arbitrators have

bly noticeable in the field of traditional international law, which is essentially Europocentric.¹⁵⁴ The great international lawyer John Westlake once observed that for the evidence of customary law "it is enough to show that the general *consensus* of opinion within the limits of European civilization is in favour of the rule."¹⁵⁵ Although universality does not imply uniformity, the *lex mercatoria*, if it is to command universal acceptability, should generally be responsive to the values and traditions of various legal cultures. It should be particularly responsive, however, to the expectations of the international business community.

adopted certain doctrines). Jurists from the western and other developed countries also hold the views along the same lines. An Australian judge, Mr. Justice Rogers of the Supreme Court of New South Wales, who, referring to the past existence of this law merchant and its modern reincarnation, observed:

It seems to me that this approach equates universality with only the European world. This alleged universal law merchant held no sway in India, or China and even less in the less developed or undiscovered parts of the world. Thus, the cry of universality must surely ring hollow. In much the same way, the new *lex mercatoria* can hardly be said to bear the imprint of universality. Is it seriously suggested that the trade usage of the highly sophisticated international conglomerates in the Western world are to be found or accepted in less developed commercial societies? It seems to me that there is a new *lex mercatoria* in the same very confined way that there was once in the Middle Ages. However, even this restricted notion seems to have been explored in a deeply researched article by Sir Michael Mustill.

Justice Andrew Rogers, *Contemporary Problems in International Commercial Arbitration*, 17 INT'L BUS. L. 154, 158-59 (1989) (emphasis added). See also Professor Gaillard's (France) remarks in *The ILA Report of the 64th Conference*, Queensland, Australia 146 (1990) (stating "[I]t could be argued that the whole notion of transnational law was a child of the European and Western countries that the customs and usages of Third World countries were completely different and therefore that the principle was unacceptable. That posed the danger that courts in Third World countries would not enforce awards delivered in accordance with principles of transnational law.")

154. See James Thuo Gathii, *International Law and Eurocentricity*, 9 EUROPEAN J. INT'L L. 184 (1998) (reviewing two books on Eurocentricity and international law). See generally Robert Y. Jennings, *Universal International Law in a Multicultural World*, in LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE, *supta* note 4, at 39, 42.

155. JOHN WESTLAKE, INTERNATIONAL LAW 16 (1904).

IV. THE ROLE OF ARBITRATOR IN THE DEVELOPMENT OF THE *LEX MERCATORIA*

As the *lex mercatoria* is an incomplete body of rules, the arbitral tribunal is considered an indispensable instrument for the creation and development of the *lex mercatoria*.¹⁵⁶ It has been remarked that:

[i]n making his award, the arbitrator does not simply expound a *lex mercatoria* which is already there, albeit inchoate; but rather creates new rules, which he then applies retrospectively to the original bargain. Yet further away from the first concept is the notion that, in the absence of established norms, the arbitrator exercises a creative function, acting as a social engineer.¹⁵⁷

Similarly, Professor Lando stressed the creative role of the arbitrator in the development of the *lex mercatoria*:

The parties to an international contract sometimes agree not to have their dispute governed by national law. Instead they submit it to the customs and usages of international trade, to the rules of law which are common to all or most of the States engaged in international trade or to those States which are connected with the dispute. Where such common rules are not ascertainable, the arbitrator applies the rule or chooses the solution which appears to him to be the most appropriate and equitable. In doing so he considers the laws of several legal systems. This judicial process, which is partly an application of legal rules and partly a selective and creative process, is here called application of the *lex mercatoria*.¹⁵⁸

Much of the arbitrator's role as a "social engineer" in creating and developing the *lex mercatoria* depends on his rendering reasoned awards.¹⁵⁹ Although an arbitrator's crucial role in the development of

156. See generally Bernardo M. Cremades, *The Impact of International Arbitration on the Development of Business Law*, 31 AM. J. COMP. L. 526, 527-531 (1983) (arguing that the arbitration decisions help create standards for international business).

157. MUSTILL, *supra* note 4, at 161.

158. Lando, *supra* note 3, at 747. See also Georges van Hecke, *Contracts Between States and Foreign Private Law Persons*, in 7 ENCYCLOPEDIA OF PUBLIC INTERNATIONAL LAW 54, 58 (Rudolf Bernhardt ed., 1984).

159. See MICHAEL J. MUSTILL, *THE NEW LEX MERCATORIA: THE FIRST 25 YEARS* 174 (1987) (discussing the impact of the arbitrator on future decisions).

the *lex mercatoria* is not denied, a careless and whimsical approach to decision-making may impede its growth.¹⁶⁰

V. APPLICATION OF THE *LEX MERCATORIA* BY TRIBUNALS: THE PRESENT STATE

Recently, some well-known international arbitration cases have attempted to develop the *lex mercatoria*. Among the Libyan oil nationalization cases, the *Texaco* award was specifically engaged in such an attempt, under the theory of international law of contracts.¹⁶¹ In the context of State contracts, the theory of internationalization of contract has been developed as a vehicle for the theory of international law of contracts. Although the *Texaco* and the *Revere*¹⁶² awards are considered to be "the high watermarks of the internationalisation of such contracts,"¹⁶³ arbitrators have not appeared to be fond of such a theory in subsequent arbitration cases.¹⁶⁴ A long serving judge of the Iran-United States Claims Tribunal observed:

[T]he references in Article V of the Claims Settlement Declaration to 'principles of commercial and international law' and to 'usages of the

160. See *infra* pt. IX (analyzing the forces restricting the growth of the *lex mercatoria*).

161. See *Texaco v. Libya*, 53 I.L.R. 389, 441 (1979).

162. *In re Revere Copper & Brass, Inc. v. Overseas Private Inv. Corp. (OPIC)*, 56 I.L.R. 258 (1980) (Award of August 24, 1978).

163. David Flint, *Foreign Investment and the New International Economic Order*, in PERMANENT SOVEREIGNTY OVER NATURAL RESOURCES IN INTERNATIONAL LAW 144, 159 (Kamal Hossain & Subrata Chowdhury eds., 1984).

164. See *Kuwait v. Aminoil*, 66 I.L.R. 519 (1982) (Award of November 30, 1979) (stating that the contract is subject to transnational law); *Redfern, The Arbitration Between the Government of Kuwait and Aminoil*, 55 BRIT. Y.B. INT'L L. 65, 89 (1984); *Wintershall A.G. et al v. Qatar*, 28 I.L.M. 795 (Partial Award of Feb. 5, 1988) (arguing that the agreement concerned, an economic development agreement containing both arbitration and stabilization clauses, was an internationalized contract and thereby governed by general principles of law and public international law). In both of the above cases the ad hoc arbitral tribunals discarded the claimants' contentions. See *id.*; see also *Amoco International Finance Corp. v. Iran*, 15 Iran-U.S. Cl. Trib. Rep. 189, 234 (1987); cf. Richard B. Lillich, *The Law Governing Disputes under Economic Development Agreements: Reexamining the Concept of "Internationalization"*, in INTERNATIONAL ARBITRATION IN THE TWENTY-FIRST CENTURY: TOWARDS "JUDICIALIZATION" AND UNIFORMITY 61, 61-114 (Richard B. Lillich and Charles N. Brower, eds., 1993). See generally, De laume, *supra* note 27, at 575-611.

'trade' were used frequently by the Tribunal to justify resort to 'general principles of law.' I believe that the Tribunal consciously tried to promote the development of such a *lex mercatoria*.¹⁶⁵

Although the Tribunal has relied upon various sources of the *lex mercatoria*, including customs, usages, and practices of international commerce, to derive "general principles of law," it has not clearly mentioned that it applied the *lex mercatoria*. In some cases the *lex mercatoria* has been applied¹⁶⁶ or recognized,¹⁶⁷ while other interna-

165. GEORGE H. ALDRICH, THE JURISPRUDENCE OF THE IRAN-UNITED STATES CLAIMS TRIBUNAL: AN ANALYSIS OF THE DECISION OF THE TRIBUNAL 157 (1996). Article V of the Claims Settlement Declaration (Declaration of the Government of the Democratic and Popular Republic of Algeria concerning the Settlement of Claims by the Government of the United States of America and the Government of the Islamic Republic of Iran, 1981) provided the Tribunal with broad discretion in its choices of applicable law. It provides that "the 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 Tribunal determines to be applicable, taking into account relevant usages of the trade, contract provisions and changed circumstances." *Id.*

166. See, e.g., ICC Award No. 3267, 12 Y.B. COM. ARB. 87-89 (1987); ICC Case No. 4761 (1984). See also ICC Award No. 5904, CLUNET, at 1107 (1989); ICC Award No. 5721, CLUNET, at 1019 (1990).

167. See, e.g., General National Maritime Transport Co. v. Gotaverken Arendal AB, CLUNET 660 (1980) (decision of the Paris Court of Appeal); Compania Valenciana de Cementos Portland SA v. Primary Coal, Inc, *in Sec. B, INT'L ARB. REPORT 5* (Dec. 1989) (ruling that it should be settled "according to the only customs of international business, customs otherwise known as the *lex mercatoria*," because the arbitrator could not find an applicable national law.) The Court of Appeal said that the arbitrator's choice of the *lex mercatoria* was correct. See *Primary Coal, Inc.*, *supra*, at 5.

[T]hrough an application of these principles and through a search for the most pertinent connection between the dispute and a body of substantive rules that, taking into account the legal nature of the situation, the arbitrator examined different criteria of connection invoked, and . . . judged without appeal that none of the conceivable connections was sufficient to justify the applicability of a specific legislation, . . . he (applied) the *lex mercatoria*, provisions of an international character which are used for the resolution of such a dispute in the absence of a specified legislative competence.

Id.

In rejecting the annulment application, the Court of Appeal said the arbitrator was "faithful to the mission with which he was entrusted." *Id.*; see also Societe Gotaverken Arendal A.B. v. Libyan Nat'l General Maritime Transp. Co., 1980 REV. ARB. 524; Orion Cia. Espanola de Seguros v. Belfort, 2 LLOYD'S L. REP. 257, 264 (1962) (remarks of Megaw, J.).

tional arbitration tribunals have renounced it.¹⁶⁸ Although the mercatorists often rely upon certain cases, such as the *Norsolor*,¹⁶⁹ *Fougerolle*,¹⁷⁰ and *Deutsche Schachtbau*¹⁷¹ cases, for their claim that the case law has established a trend towards the recognition of the *lex mercatoria* as a distinct body of rules or a legal order independent of national legal orders and courts in different jurisdictions have upheld the arbitrators' application of the *lex*,¹⁷² critics are not so convinced for cogent reasons.¹⁷³ There is no denying that certain national courts were not against the enforcement of an award on the ground that the

168. See, e.g., ICC Case No. 4650, reprinted in 7 COLLECTION OF ICC ARBITRAL AWARDS 67, 68 (Sirgard Jarvis et al. eds., 1994) (stating that although the evidence showed the question of the law governing the contract was not discussed by the parties, it should also not be determined by the *lex mercatoria* at the decision of the arbitral tribunal because the choice of this law would require an agreement between the parties); see also Amin Rasheed Shipping Corp. v. Kuwait Ins. Co., 2 All E.R. 884 (H.L. 1983) (holding that the circumstances surrounding the formation of the Contract indicated the parties intended the contract to be governed by English law); Bank Mellat v. Helliniki Techniki SA, 3 All E.R. 428, 437 (1983) (dismissing an appeal for costs because the contract was not within the English court's jurisdiction and the action was inconsistent with ICC rules).

169. Pabalk Ticaret Ltd. Sirketi v. Norsolor S.A. (Turkey v. France), 11 Y.B. Com. Arb. 484 (1986), as reprinted in, W. Michael Reisman, et. al., INTERNATIONAL COMMERCIAL ARBITRATION 203 (1997).

170. Societe Fougerolle v. Banque de Proche Orient (France v. Lebanon), 1982 Rev. Arb. 183, et seq. (decision of the French Cour de Cassation).

171. Deutsche Schachtbau-und Tiefbohrgesellschaft m.b.H. v. Ras al Khaimah National Oil Co., 2 LLOYDS L. REP. 246 (1987) (decision of the English Court of Appeal).

172. See Goldman, *supra* note 20, at 15-18; David W. Rivkin, *Enforceability of Arbitral Awards Based on Lex Mercatoria*, 9 ARB. INT. 67, 73-80 (1993).

173. See MUSTILL, *supra* note 4, at 178-82; REISMAN, *supra* note 94, at 138; Paul Freeman, *Lex Mercatoria: Its Emergence and Acceptance as a Legal Basis for the Resolution of International Disputes*, ARB. DISPUTE RESOLUTION L.J. 289, 293-298 (1997); Otto Sandrock, *Die Fortbildung des Materiellen Rechts durch die Internationale Schiedsgerichtsbarkeit*, in RECHTSFORTBILDUNG DURCH INTERNATIONALE SCHIEDSGERICHTSBARKEIT 21, 75-81 (Karl-Heinz Böckstiegel ed., 1989); BONNELL, *supra* note 85, at 135 ("[T]he total number of (reported) awards which expressly refer to the general principles of law, the *lex mercatoria* or the like as their exclusive or predominant source of inspiration is quite limited."); F. Dasser, *Lex Mercatoria: Werkzeug der Praxis oder Spielzeug der Lehre?* in SCHWEIZERISCHE ZEITUNG FÜR INTERNATIONALES UND EUROPÄISCHES RECHT 299, 312 (1991) (stating that in his search for decisions based on the *lex mercatoria*, the author could find no more than some fifty arbitral decisions and two-thirds of which concerned disputes arising out of State contracts).

arbitrators applied the *lex mercatoria*. This, perhaps, is a result of the liberal legal attitude towards the *lex mercatoria* in those concerned jurisdictions.¹⁷⁴ But such a position cannot be axiomatically guaranteed everywhere, nor are the staunch supporters of the *lex* prepared to contend as such.¹⁷⁵ Derains and Schwartz recently noted in the context of ICC arbitral practice:

Notwithstanding the controversy generated by references to transnational legal rules or the *lex mercatoria*, the actual application of such rules in ICC arbitration remains relatively uncommon. When contracting, it is most often to a single national law that the parties refer, and this also remains the approach of most ICC arbitrators.¹⁷⁶

At best it can be said that while the existence of the *lex mercatoria* is recognized in case law as a set of anational rules or norms, it does not receive the status of a self-sufficient legal order as some might claim; a burning issue addressed in the following section.

VI. THE *LEX MERCATORIA* AS A LEGAL ORDER

There is now a great controversy amongst jurists as to whether the *lex mercatoria* is properly called a legal order or legal system. The importance of a definitive answer to this lies in the fact that "it is impossible to grasp the nature of law if we limit our attention to the single isolated rule."¹⁷⁷ There is no doubt that the *lex mercatoria* exists, and isolated rules may be pointed out as belonging to the corpus of the *lex mercatoria*, but what matters is not the particular isolated rule that may be applicable rather the authority of the law to which it belongs.¹⁷⁸ Thus, an eminent scholar of legal philosophy has put for-

174. For a review of different national attitudes towards the *lex mercatoria*, see Ning Jin, *The Status of Lex Mercatoria in International Commercial Arbitration*, 7 AM. REV. INT'L ARB. 163, 177-83 (1996); Lando, *supra* note 3, at 747, 755-61; Blessing, *supra* note 110, at 391.

175. See Lando, *supra* note 3, at 760-61.

176. DERAINS & SCHWARTZ, *supra* note 128, at 219; see also Paulsson, *supra* note 54, at 55.

177. HANS KELSEN, GENERAL THEORY OF LAW AND STATE 3 (Anders Wedberg trans., 2d ed. 1961).

178. But see MICHAEL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION 81 (2d ed. 1989) (expressing doubts as to the existence of *lex mercatoria* and therefore its usefulness in resolving commercial disputes).

ward his thesis that "a theory of legal system is a prerequisite of any adequate definition of 'a law'."¹⁷⁹

Professor Goldman is of the view that the *lex mercatoria* is a legal order.¹⁸⁰ For him, a legal order is "the body of specific rules, and the organs intended to apply them (if not necessarily to promulgate them, since custom is established spontaneously—even though it may at a further stage be reinforced by codification), that emerge from the formation and the activity of a specific social group."¹⁸¹

We have already discussed the nature of the body of specific rules as he interprets it. By the 'specific social group,' he signifies *societas mercatorum*.¹⁸² Thus, he says:

[T]hose involved in international trade certainly constitute a specific social group. It might be objected that it is a heterogeneous group, composed of a number of "merchant communities." But in fact the same may be said with respect to nation-states, in which merchants, farmers, and members of the professions constitute distinct communities within the society as a whole. Likewise, the various "merchant communities" of international trade comprise a worldwide society whose needs and customary rules are determined by the economic character, and the international character, of the relationships that are created within it.¹⁸³

According to the positivists, mainly influenced by John Austin,¹⁸⁴ there are primarily three general and important features of the law—namely that it is normative, institutionalized, and coercive.¹⁸⁵ It is normative in that it serves, and is meant to serve, as a guide for human behavior.¹⁸⁶ It is institutionalized in that its formulation, application, and modification are, to a large extent, performed or regulated

179. JOSEPH RAZ, THE CONCEPT OF A LEGAL SYSTEM 2 (2d ed. 1980).

180. See Goldman, *supra* note 20, at 20-22.

181. *Id.* at 21.

182. See *id.*

183. *Id.*

184. See JOHN AUSTIN, THE PROVINCE OF JURISPRUDENCE DETERMINED 165 (1995) (setting forth one part of the core of Austin's legal philosophy); JOHN AUSTIN, LECTURES ON JURISPRUDENCE OR THE PHILOSOPHY OF POSITIVE LAW xi (Robert Campbell ed., 1966) (introducing Austin's lectures on positive law).

185. See RAZ, *supra* note 179, at 3.

186. See *id.*

by institutions.¹⁸⁷ It is coercive in that obedience to it, and its application, are internally guaranteed, ultimately, by the use of force.¹⁸⁸ Thus, if a body of rules or norms is claimed as a legal system in the positivistic sense, it must satisfy all these characteristics. To what extent Professor Goldman's theory of the *lex mercatoria* constitutes a legal system, evidently, begs the question.

It is beyond the scope of this present paper to examine the status of the *lex mercatoria* as a legal order or legal system in the light of contemporary analytic theories of legal systems propounded by noted theorists such as Kelsen,¹⁸⁹ Hart,¹⁹⁰ and Dworkin.¹⁹¹ For our present purpose, it will suffice to say that *lex mercatoria*, in the Austinian positivistic perspective,¹⁹² does not entirely conform to some important features of the law that are characteristics of a legal system, namely the characteristics of institutionalization and coerciveness, though it qualifies for the normative character.¹⁹³ For this reason, if it is claimed as a legal system at all, it is an imperfect or incomplete one. Goldman, however, attributes the institutionalized nature of the *lex mercatoria* to the *societas mercatorum* from which it originates.¹⁹⁴ In the positivist theory of law, a *societas mercatorum* cannot provide the requisite character of law as it does not possess the sov-

187. See *id.*

188. See *id.*

189. See KELSEN, *supra* note 177, at 3 (discussing the law as an order of human behavior).

190. See H.L.A. HART, THE CONCEPT OF LAW 17 (Penelope A. Bulloch & Joseph Raz eds., 2d ed. 1994) (stating that the purpose of his work is not to define "law" but to advance legal theory by improving the analysis of the distinctive structure of a municipal legal system, and providing a better understanding of the resemblances and differences between law, coercion, and morality as types of social phenomena).

191. See RONALD DWORKIN, TAKING RIGHTS SERIOUSLY vii (1977) (defining and defending a liberal theory of law).

192. See JOHN AUSTIN, *supra* note 184, at 33 (defining the philosophy of positive law as concerned with law as it necessarily is, rather than with law as it ought to be).

193. See MUSTILL, *supra* note 4, at 152-53.

194. See Goldman, *supra* note 20, at 20-21 (discussing the history of the concept behind *lex mercatoria*).

ereign authority.¹⁹⁵ The substitution of the sovereign by the *societas mercatorum* as the institutional source of law is subject to considerable criticism.¹⁹⁶ Attacks have been leveled against certain aspects of the *societas mercatorum*, such as the plurality, its uncertain existence and sometimes vague identity, its lack of coherency of practices, and the voluntary character of merchant communities, which may make the law ineffective and uncertain.¹⁹⁷ Goldman, however, was quick to acknowledge that “[s]ince the ‘mercantile’ *societas* does not have sovereign attributes, and since it does not have its own powers of coercion, the efficacy of its decisions depends upon the availability of recourse to the mechanisms of sovereign legal orders.”¹⁹⁸ The recourse to such mechanisms may be restricted in many ways.¹⁹⁹

One may plausibly argue that there is no legal system other than international law²⁰⁰ and various national legal systems developed by States individually. In both legal systems, States have roles to play. In the national legal systems, the State is individually concerned; and in the international legal order, States collectively play their roles in

195. See *id.* at 20 (expressing the idea that *lex mercatoria* has no governmental weight of authority because it is not based on one nation’s set of laws).

196. Paul Lagarde, *Approche Critique de la Lex Mercatoria*, in LE DROIT DES RELATIONS ÉCONOMIQUES INTERNATIONALES, ÉTUDES OFFERTES À BERTHOLD GOLDMAN 125, 125-49 (Philippe Fouchard et al. eds., 1982).

197. See *Corte di Cassazione*, RIVISTA DI DIRITTO INTERNAZIONALE PUBBLICO E PRIVATO 829 (1982) (decision of the Italian Supreme Court); Andrea Giardina, *Arbitrato transnazionale e lex mercatoria di fronte alla Corte di Cassazione*, 1982 RIVISTA DI DIRITTO INTERNAZIONALE PUBBLICO E PRIVATO 754 (1982).

198. See Goldman, *supra* note 20, at 20.

199. See Karl-Heinz Böckstiegel, *Introduction to Proceedings of Working Group II*, in PLANNING EFFICIENT ARBITRATION PROCEEDINGS: THE LAW APPLICABLE IN INTERNATIONAL ARBITRATION, *supra* note 110, at 251, 257.

No matter where one stands in this dispute, what is important for international arbitrators is one specific consideration: They owe the parties an award which can be enforced as widely as possible. Before they rely on *lex mercatoria* they would have to examine and make sure that their award will ultimately not be hampered or perhaps even stopped from execution in a State where the national courts consider *lex mercatoria* as outside of the law, and therefore consider the award as not based on the law in the sense of either the national procedural law or of the New York Convention.

Id.

200. See JAMES L. BRIERLY, THE LAW OF NATIONS 68-71 (Sir Humphrey Wal-dock ed., 6th ed. 1963) (commenting on international law as a system of law).

the creation, formulation, and enforcement of law. In the international legal order, there is a plurality of sovereigns, whose collective efforts make it viable and enforceable. This theory of the identification of State and law together remains the prevailing theory among legal writers and, therefore, could muster authoritative support.²⁰¹

As noted earlier, in the view of many mercatorists, the principal bases of the *lex mercatoria* are the general principles of law. In the *Kuwait-Aminoil* arbitration, Aminoil argued before the Tribunal that the general principles of law are the principal and only constituents of the system of rules of the transnational legal system.²⁰² In his legal opinion to the Government of Kuwait, Professor Rigaux remarked that:

[t]his is equivalent to asserting that the general principles of law can by themselves constitute a legal system. Such a proposition cannot be accepted in view of the classical meaning in law of general principles of law. Both in internal legal systems and in the international legal system, the general principles of law are considered as a subsidiary source of law: this means that those principles are applicable only in the absence of specific rules, but also that these principles, being a subsidiary structure, can only be used in conjunction with other normative sources which indirectly modify by their particular binding contents the numerous interpretations which result from references between the general principles. The subsidiary nature of the general principles of law, far from being contingent is thus necessarily linked to the practical implementation of the system of rules in a system of law.²⁰³

He also added that "the proposed identification between the general principles of law and transnational law contradicts not only the assumptions which are the basis of its reasoning, but also the legal features which define the concept of general principles of law."²⁰⁴

201. See M. BELLET, REV. CRIT. DIP. 222 (1967); HENRI BATIFFOL ET PAUL LAGARDE, DROIT INTERNATIONAL PRIVÉ II n. 520-21 (1976); YVON LOUSSOUARN ET PIERRE BOUREL, DROIT INTERNATIONAL PRIVÉ n. 74-75 (1978).

202. See Aminoil Pleadings, *supra* note 59; see also *Kuwait v. Aminoil*, 21 I.L.M. 976, 1000-01 (1982) (discussing the law applicable to the substantive issues in the dispute).

203. Aminoil Pleadings, *supra* note 59 (legal opinion of Professor Rigaux).

204. *Id.*

In the view of other jurists, like Professor Lagarde, the general principles of law are not a complete legal system but rather a source of public international law derived from national legal systems. On this basis, he seriously challenges the status of the general principles of law as the *lex mercatoria*.²⁰⁵

Yet another scholar has commented:

[W]hat is a law without a legal system supporting it? Just because the *lex mercatoria* is theoretically available as a source for interpretation or amplification of contractual clauses does not make it law. It is, in my own view, not a system of *lex mercatoria* but rather, at most, a set of *principia mercatoria*. Indeed, *principia mercatoria* would be a better phrase by far than *lex mercatoria*. The former more correctly reflects the nature, application, and content of these principles than any suggestion that they form part of an inchoate or undiscovered legal system outside national jurisdictions.²⁰⁶

In a similar vein, Dr. Mann says: “[I]t is impossible, or would at any rate be inexact to speak of the application of the general principles of law recognised by civilised nations. The general principles are not a law or a legal system that can be applied or referred to.”²⁰⁷

Most opponents of the *lex mercatoria* would agree that it does not derive its binding force from any State authority and does not provide a sufficiently substantial and solid system.²⁰⁸ Thus in some respects, it cannot be called a legal system in the true sense of the term. Some may go even further and argue that it is therefore not suitable as the sole basis for the settlement of legal disputes.²⁰⁹

205. See Lagarde, *supra* note 196, at 131-32.

206. See Keith Hight, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 616 (1989).

207. Frederick A. Mann, *The Proper Law of Contracts Concluded by International Persons*, 35 BRIT. Y.B. INT'L L. 34, 44 (1959).

208. See MICHAEL J. MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION 81 (2d ed. 1989) (doubting the existence of *lex mercatoria* and its ability to resolve commercial disputes).

209. See, e.g., ANTHONY WALTON, RUSSELL ON THE LAWS OF ARBITRATION 230 (19th ed. 1979) (asserting that it is the duty of the arbitrator to decide the issues submitted to him according to the legal rights of the parties and not according to what he would consider fair and reasonable); SIR MICHAEL MUSTILL & STEWART C. BOYD, COMMERCIAL ARBITRATION 611 (1989) (arguing that the judge is to de-

In the *Amin Rasheed case*,²¹⁰ the English House of Lords re-affirmed that every contract owes its existence to a specific system of law that necessarily governs its conclusion, its life, and its termination:

[C]ontracts are incapable of existing in a legal vacuum. They 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.²¹¹

It may be argued that while domestic legal regimes or public international law provide a sufficient framework for contractual relationships, the *lex mercatoria* does not meet such standards. The House of Lord's statement appears to be tautological to what Professor Sauser-Hall had ruled a quarter century earlier in the *Aramco* award that:

It is obvious that no contract can exist *in vacuo*, i.e., without being based on a legal system. The conclusion of a contract is not left to the unfettered discretion of the Parties. It is necessarily related to some positive law which gives legal effects to the reciprocal and concordant manifestations of intent made by the parties. The contract cannot even be conceived without a system of law under which it is created. Human will can only create a contractual relationship if the applicable system of law has first recognised its power to do so.²¹²

Those who support the general principles of law as the proper law of contract, however, give a short shrift as to whether they constitute a system of law or not.²¹³ Their concern is whether such principles

termine the appeal solely upon whether the appeal falls within the guidelines); Frederick A. Mann, *Lex facit arbitrum*, in INTERNATIONAL ARBITRATION, LIBER AMICORUM FOR MARTIN DOMKE 157 (1967); Frédéric-Édouard Klein, *De L'Autorité et de la loi dans les Rapports Commerciaux Internationaux*, in FESTSCHRIFT FÜR F.A. MANN 617 (1977); 1 PETER SCHLOSSER, RECHT DER INTERNATIONALEN PRIVATEN SCHIEDSGERICHTSBARKEIT 157 (1957).

210. *Amin Rasheed Shipping Corp. v. Kuwait Ins. Co.*, 2 All. E.R. 884 (1983).

211. *Id.* at 891.

212. *Saudi Arabia v. Arabian American Oil Co.(Aramco)*, 27 I.L.R. 117, 165 (Arbitration Tribunal 1958).

213. See C. WILFRED JENKS, THE PROPER LAW OF INTERNATIONAL ORGAN-

can provide satisfactory and balanced solutions to the matters arising out of a contract.²¹⁴ Jenks thus contends that “whether they (general principles of law) can serve as proper law . . . depends not on any preconceived notion of what constitutes a legal system but on whether they can fulfil satisfactorily in practice the function of a proper law and are in fact used for that purpose.”²¹⁵ At the end of the day, however, one must consider the efficacy of the award based solely on the general principles of law. The enforceability of such an award depends on the legal attitudes towards the award in the country of enforcement.

It is to be borne in mind that doing away with a legal system as governing law means excluding all concepts of public policy. As Professor Bowett puts it: “One is left with a contract attached to no legal system and thus totally free of all restraints of public policy.”²¹⁶ Probably for this and other reasons, the majority of the members of the *Institut de Droit International* rejected a proposal to include a reference to transnational law and/or the *lex mercatoria* in a resolution on the law governing agreements between States and foreign private parties.²¹⁷

IZATIONS 152 (1962) (arguing that only a recognized legal system is an appropriate and proper law but that the current system is not applicable to international law); *see also* Frederick A. Mann, *The Proper Law of Contracts Concluded by International Persons*, 35 BRIT. Y.B. INT'L L. 34 (1959).

214. See JENKS, *supra* note 213, at 152.

215. *Id.*; *see also* 2 DANIEL P. O'CONNELL, INTERNATIONAL LAW 982 (2d ed. 1970) (arguing that general legal principles are an emanation of diverse legal systems and are a compound of basic doctrines).

216. DEREK W. BOWETT, THE TWILIGHT ZONE OF INTERNATIONAL LAW 930 (1986); *see also* Mann, *supra* note 209, at 172-78.

217. See 58 *AnnlDI*, Tome 2, at 192 (Athens Session, 1979). It should be noted, however, that the position of the Institute changed later in the light of the developments in the law of international arbitration. The Institute in 1989 adopted a “Resolution on Arbitration between States, State Enterprises, or State Entities, and Foreign Enterprises,” which provides that:

The parties have full autonomy to determine the procedural and substantive rules and principles that are to apply in the arbitration. In particular, (1) a different source may be chosen for the rules and principles applicable to each issue that arises and (2) these rules and principles may be derived from different national legal systems *as well as from non-national sources such as principles of international law, general principles of law, and usages of international commerce.*

63 *AnnlDI*, Tome 2, at 330 (1990) (*emphasis added*).

The application of the *lex mercatoria*, divorced from international or transnational public policy,²¹⁸ or any national public policy or mandatory rules, may lead to the unenforceability of an arbitral award by any national court.²¹⁹ This would be inconsistent with the principle that the arbitrator "shall make every effort to make sure that the award is enforceable."²²⁰ In addition to international public policy, or transnational public policy,²²¹ the arbitrator should take into account the public policy of the State where the arbitration takes place, and of the place of enforcement.²²²

218. See Gaillard, *supra* note 42, at 222-23; PIERRE LALIVE, TRANSNATIONAL (OR TRULY INTERNATIONAL) PUBLIC POLICY AND INTERNATIONAL ARBITRATION 3 ICCA Cong. Series 257 (Pieter Sanders ed., 1987).

219. See Georges van Hecke, *Contracts Subject to International or Transnational Law in INTERNATIONAL CONTRACTS*, *supra* note 118, at 25, 47-48 n.3. Professor Georges van Hecke has made an important observation that:

The difficulty arises from the fact that the *lex mercatoria*, as it is commonly understood, does not contain any mandatory rules. Hence, the problems of validity of the contract, misrepresentation, undue influence, penalty clauses, and protection of the weaker party, are all left in a vacuum which has to be filled by resort to the chosen law or, in the absence of a choice, to the objective proper law. The *lex mercatoria* can operate only within the framework set up by the governing law.

Id. He has claimed that the majority opinion at the Basle conference supported this view. *See id.*

220. ICC Rules of Arbitration art. 26, ICC Pub. No. 447-3 (1988) [hereinafter 1988 ICC Rules of Arbitration]; *see also* ICC Rules of Arbitration art. 35 (1998), available in <<http://www.iccwbo.org/html/rulesenglish.htm>>. For a further discussion on enforcement of arbitral awards, see ALBERT J. VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958 (1994). Article V(2)(b) of the New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards (1958), provides as follows:

2. Recognition and enforcement of an arbitral award may be refused if the competent authority in the country where recognition and enforcement is sought finds that: (b) The recognition or enforcement of the award would be contrary to the public policy of that country.

221. See LALIVE, *supra* note 218, at 257 et seq. (finding term "transnational" to be more appropriate as "international" is ambiguous); Goldman, *supra* note 20, at 22.

222. See Abul F.M. Maniruzzaman, *International Arbitration and Mandatory Public Law Rules in the Context of State Contracts: An Overview*, 7 J. INT'L ARB. (No. 3) at 53, 63 (1990).

VII. APPLYING “RULES OF LAW” INSTEAD OF A LEGAL SYSTEM TO SETTLE INTERNATIONAL CONTRACT DISPUTES

Occasionally, international contract disputes may be settled by applying certain principles, rules, or usages, rather than a legal system itself. The relevance of a legal system may be minimal in such cases. The system may not have any bearing on public policy matters, whether national, international, or transnational. The concerned parties are happy with the settlement of their disputes as such and abide thereby. Hence, it is questionable whether the use of such principles, rules, or usages should be determined by their existence within a legal framework, rather than by their suitability for resolving disputes. Often, the facts of a case require an approach to be of a more practical nature rather than theoretical. This is not to say that the arbitrator will override the parties’ choice of a national law and resort to the *lex mercatoria*. The arbitrator may apply the *lex mercatoria* when the parties have expressly provided so in their contract,²²³ or when the parties have failed to make an express choice of law and the applicable arbitration rules permit the application. The trend seems to be in that direction in certain recent international arbitration rules as well as in relevant national legislation. Parties, as well as arbitrators, are allowed wider freedom to choose “rules of law” and are not required to confine themselves to a legal system.²²⁴ In the absence of the par-

223. See ICC Case No. 4650 (discussing the tribunal declining to accept *lex mercatoria* as the applicable law in the absence of any proof that the parties had so intended). The authors of International Chamber of Commerce Arbitration appreciated this to be the proper conduct of a tribunal like the ICC. See W. LAURENCE CRAIG ET AL., INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 300 (2d ed. 1990).

224. See Article 42(1) of the ICSID Convention which provides that:

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.

Washington Convention of the Settlement of Investment Disputes Between States and Nationals of Other States, Mar. 18, 1965, 575 U.N.T.S. 159 (emphasis added). In the first sentence the parties are allowed to choose “rules of law.” The parties have thus wider freedom to choose a legal system, any set of rules, or the *lex mercatoria* as they think most appropriate for their purpose. In the second sentence the Tribunal is allowed to choose, in the absence of the parties’ agreement, at least a

ties' choice, the arbitrator is no longer required to resort to conflicts rules in order to determine the "law" or "rules of law" applicable to the dispute.²²⁵ As resorting to conflicts rules may lead to the application of a national legal system,²²⁶ arbitrators are freed from this requirement and are left to employ their own practical wisdom and prudence to determine the appropriateness of the applicable law or rules of law. This is a radical move that breaks away from the traditional control of a national legal order and endorses the autonomist theory of arbitration.²²⁷ Article 59 (a) of the WIPO Arbitration Rules, 1994, represents this new landmark step.²²⁸ Article 17(1) of the new 1998 ICC Arbitration Rules (effective from January 1, 1998) has gone one step further by allowing the parties, as well as the arbitrator, to resort to "rules of law" rather than "the law."²²⁹ The expression

legal system—i.e. the law of the contracting State party, *inter alia*, and not "rules of law" as the parties are in the first sentence. Thus, the second sentence allows the Tribunal restricted freedom with regard to the choice of law. *But see* Lando, *supra* note 3, at 759.

225. See, e.g., C. CIV art. 1496 (Fr.) ("The arbitrator shall decide the dispute in accordance with the *rules of law* the parties have chosen; in the absence of such a choice, in accordance with those which he considers appropriate. He shall, in all cases, take into account commercial customs.") (emphasis added) (translated); Swiss Private International Law (PILA) Art. 187 (1) [Swiss Arbitration Act, i.e. Chapter 12 of PILA]; Netherlands Arbitration Act 1986, Art. 1054(2); Arbitration and Conciliation Act 1996 of India, Section 28 (1)(b)(i)(iii); London Court of Arbitration Rules 1985, Art. 13.1(a); Netherlands Arbitration Institute Rules 1986, Art. 46; Mexican Commercial Code, Art.1445(2) (West 1995) (requiring that the tribunal apply principles of law selected by the parties; however, should the parties fail to designate the governing law, the tribunal shall determine the applicable law, taking into account the characteristics and nexus of the matter); American Arbitration Association's International Arbitration Rules Art.29 (1) [second sentence]; *see also* Blessing, *supra* note 110, at 391, 391-446.

226. See Abul F.M. Maniruzzaman, *Conflict of Laws Issues in International Arbitration: Practice and Trends*, 9 ARB. INT'L, (No. 4) at 371, 371-403 (1993).

227. See Abul F.M. Maniruzzaman, *State Contracts and Arbitral Choice-of-Law Process and Techniques: A Critical Appraisal*, 15 J. INT'L ARB. (No. 3) at 65, 70-72 (1998).

228. World Intellectual Property Organization Arbitration Rules art. 59(a) (1994), reprinted in HANS SMIT & VRATISLAV PECHOTA, *ARBITRATION RULES ISSUED BY INTERNATIONAL INSTITUTIONS* 271, 294 (1997) (allowing an arbitrator to choose a law "that it determines to be appropriate" when the parties have not otherwise expressed a choice of law).

229. Cf. The Arbitration and Conciliation Act of 1996 of India, Sec. 28(1)(b)(iii).

"rules of law" has also been adopted in the most recent revisions of the international arbitration rules of the American Arbitration Association (effective from April 1, 1997) and the London Court of International Arbitration (effective from January 1, 1998). This means that there is no need to cling to the positivistic notion of a legal system in settling a dispute.²³⁰ The authority to resort to "rules of law" by the parties or the arbitrator paves the way for the application of transnational rules, general principles of law, the *lex mercatoria* rules, and principles or rules of international law, both customary and conventional, whichever are deemed to be most appropriate in the circumstances. For instance, the parties or the arbitrator may resort to the UNIDROIT Principles of International Commercial Contracts,²³¹ which "represent a system of rules of contract law,"²³² and the awards rendered on that basis should be enforceable.²³³ Principles of European Contract Law (PECL) would be useful in this matter.²³⁴ The 1992 ILA Cairo resolution endorsed the application of such transnational rules.²³⁵ Even England, which was traditionally hostile to the

230. See generally DWORKIN, *supra* note 191, chs. 2-3 (criticizing the theory of legal positivism as an inadequate conceptual theory of law).

231. See UNIDROIT, *supra* note 82.

232. *Id.* at 3.

233. See Hans van Houtte, *The UNIDROIT Principles of International Commercial Contracts*, 11 ARB. INT'L 373 (1995) ("The Principles will only be part of the *lex mercatoria* if they are recognized as such by the business community and its arbitrators."); Michael J. Bonnell, *The UNIDROIT Principles of International Commercial Contracts and the Principles of European Contract Law: Similar Rules for the Same Purposes?*, 2 UNIFORM L. REV. 229 (1996); Michael Joachim Bonnell, *The UNIDROIT Principles in Practice—The Experience of the First Two Years* (visited Jan. 21, 1999) <<http://www.unidroit.org/english/principles/pr-exper.htm>> (mentioning several arbitral awards and court decisions applying the UNIDROIT Principles as well as contracts in which these Principles are chosen as the law governing the contract); HOWARD M. HOLZMANN & JOSEPH E. NEUHAUS, A GUIDE TO THE UNIDROIT MODEL LAW OF INTERNATIONAL COMMERCIAL ARBITRATION: LEGISLATIVE HISTORY AND COMMENTARY 768 (1989). "Rules of law" is a more flexible term that would cover, for example, "the rules embodied in a convention or similar text elaborated on the international level, even if not yet in force." Jonathan Hill, *Some Private International Law Aspects of the Arbitration Act of 1996*, 46 INT'L & COMP. L.Q. 274, 303 (1997).

234. See Ralph Amissah, International Trade Law Monitor (last modified Oct. 3, 1993) <http://itl.irv.uitt.no/trade_law/>.

235. The International Law Association adopted in its Cairo resolution on 28 April 1992 as follows:

application of national principles or the *lex mercatoria*,²³⁶ has recently changed her attitude, albeit in a restricted manner. Section 46 (1)(b) of the new English Arbitration Act 1996 allows the arbitrator to decide the dispute "in accordance with . . . other considerations" only if the parties so agree.²³⁷ The phrase "other considerations" has not been defined in the Act. It may imply various matters, such as *lex mercatoria*, trade usages, equity, amiable composition, and *ex aequo et bono*.²³⁸ It is not, however, the purpose here to examine in detail the implications of Section 46 of the Act.²³⁹ Further, the English Court of Appeal in *DST v. Rakoil*²⁴⁰ upheld an arbitral award rendered in Switzerland for enforcement in England in which the arbitrators had applied "internationally accepted principles of law governing contractual relations" to determine a dispute arising under an oil exploration agreement.²⁴¹ The Court of Appeals took this position despite the argument against enforcement that:

[i]t would be contrary to English public policy to enforce an award which holds that the rights and obligations of the parties are to be determined,

The fact that an international arbitrator has based an award on transnational rules (general principles of law, principles common to several jurisdictions, international law, usages of trade, etc.) rather than on one law of a particular State should not in itself affect the validity or enforceability of the awards (1) where the parties have agreed that the arbitrator may apply transnational rules; or (2) where the parties have remained silent concerning the applicable law.

See ILA REP. (1992) (on file with author).

236. *See, e.g.*, Czarnikow v. Roth Schmidt and Co., 2 K.B. 478, 484 (1992) (Bankes, L.J.) (describing both the traditional English reservations and recent openness towards the *lex mercatoria*).

237. English Arbitration Act, *supra* note 108, § 46 (1)(b).

238. *See 1996 Report on the Arbitration Bill*, DEPARTMENTAL ADVISORY COMMITTEE ON ARBITRATION LAW, 13 ARB. INT'L (No. 3) 275, 309-10 (1997) (detailing Article 46 and awards on different issues); *see also* Rivkin, *supra* note 172, at 78-80 (1993) (explaining concerns surrounding the English modern view towards *lex mercatoria*).

239. *See* Stewart R. Shackleton, *The Applicable Law in International Arbitration under the New English Arbitration Act 1996*, 13 ARB. INT'L (No. 4) 375 (1997) (characterizing the English departure from Article 46); Hill, *supra* note 233, at 298-303 (examining the Arbitration Act of 1996 and its effects on private international law).

240. 2 LLOYD'S REP. 246 (1987).

241. *See id.* at 251.

not on the basis of any particular national law, but upon some unspecified,²⁴² and possibly ill defined, internationally accepted principles of law.

In his opinion for the court, however, Lord Donaldson M.R. reasoned that:

The parties have left the proper law to be decided by the arbitrators and have not in terms confined their choice to national systems of law. I can see no basis of concluding that the arbitrators' choice of proper law—a common denominator of principles underlying the laws of the various nations governing contractual relations—is out with the scope of the choice which the parties left to the arbitrators.²⁴³

Some commentators, in evaluating the court's decision, have cautioned that not too much should be read into the case for the *lex mercatoria*;²⁴⁴ however, as the court was mainly concerned with the enforcement of the award and not directly with the choice-of-law aspect.²⁴⁵

242. *Id.* at 252.

243. *Id.* at 254. But see W. Laurence Craig, 13(3) *Arbitration Rules*, in INTERNATIONAL COMMERCIAL ARBITRATION 220, 229 (W. Laurence Craig, et al. 2d ed. 1990) (describing the criticism of the decision on the matter of interpretation of Article 13(3)).

244. See Hill, *supra* note 233, at 302-03 (describing a more flexible term for covering rules on an international level); MUSTILL, *supra* note 4, at 170-72 (examining several cases in relation to their applications of *lex mercatoria*); STOECKER, *supra* note 55, at 124. But see Andreas Kappus, *Einzug der "Lex Mercatoria" in das Englische House of Lords*, PRAXIS DES INTERNATIONALEN PRIVAT-UND VERFAHRENSRECHT 135 (1990) (where the writer considered the House of Lords decisions); see also A.J.E. Jaffey, *Arbitration of International Commercial Contracts: the Law to be Applied by the Arbitrators*, in CURRENT ISSUES IN INTERNATIONAL BUSINESS LAW 131, 140 (David L. Perrott & Istvan S. Pogany eds., 1988) (distinguishing between England and other nations' arbitrations).

245. See BONNELL, *supra* note 85, at 149-52 (discussing the UNIDROIT principles). Nevertheless the question remains whether under Article 13(3) of the ICC Arbitration Rules (1988) the arbitrators can directly choose the *lex mercatoria* disregarding "the rules of conflict which he deems appropriate." 1988 ICC Rules of Arbitration, *supra* note 220, art. 13(3). It is not clear whether the arbitrators relied on some sort of *lex mercatoria* conflict rules that they deemed appropriate and that led them to apply the *lex mercatoria* as the substantive law, i.e. "internationally accepted principles of law governing contractual relations." DST v. Rakoil, 2 LLOYD'S REP. 246, 251 (1987). The equation remains the same whichever way it is viewed. See SMIT & PECHOTA, *supra* note 126, at 56-57; see also ICC Case No. 5953, Revue Arb. 701 (1990), Clunet, JOURNAL DE DROIT INTERNATIONALE 1056

Once it is accepted that the arbitrator is authorized, either by the parties or by the applicable arbitration rules, to apply the *lex mercatoria* or the rules of law as he considers appropriate, the next question is how he should go about choosing and applying those rules. If the transnational rules and principles—such as those embodied in the Convention on Contracts for the International Sales of Goods (“CISG”),²⁴⁶ the UNIDROIT Principles,²⁴⁷ PECL, or the like, which are definitive whether they become part of a national law or not—are considered by arbitrators, there is little difficulty in finding appropriate rules or principles. The problem remains, however, when the arbitrator has the total freedom to choose. The problem is that, amongst these variables, the parties may not have any clear idea as to what the outcome would be before the dispute is finally decided by the arbitrator. The problem is much more acute where there is no existing suitable rule applicable to a dispute, or no guidance can be found in the well-recognized existing rules, requiring the arbitrator to frame one. The situation is not unusual in the context of an international contract. This problem may be examined in the light of a conceptual framework, which seems to be very close to the heart of the mercatorists. The following section addresses this problem.

VIII. THE *LEX MERCATORIA* AS A LEGAL PROCESS: THE CONCEPTUAL FRAMEWORK AND A CAVEAT

Much ink has been poured in establishing the *lex mercatoria* as a legal order and on the issue of its validity as a legal order.²⁴⁸ The issue has been raised from the positivistic points of view and, more

(1990); Clunet, *JOURNAL DE DROIT INTERNATIONALE* 430 (1990) (opining that under Article 13(3) of the ICC Arbitration Rules arbitrators are not bound by any domestic conflict rules).

246. Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, UN Doc. A/CONF.97/18, 19 I.L.M. 668 (1980).

247. See Michael J. Bonnell, *The UNIDROIT Principles in Practice—The Experience of the First Two Years* (visited Jan. 21, 1999) <<http://www.unidroit.org/english/principles/prexper.htm>> 1 (identifying the application of UNIDROIT Principles in such countries as the Netherlands, New Zealand, Estonia, Czech Republic, Lithuania, and Tunisia).

248. See Goldman, *supra* note 20, at 20.

specifically, from the Austinian angle.²⁴⁹ To some mercatorists, public international law offers a plank in the troubled water of legal theory—albeit in an analogous sense. Although international law is not law at all in the Austinian positivistic sense, no one denies its validity in practice as a legal order and a normative force. For many, Austin's legal positivism is not the final word when defining a legal system. The sense of a legal system or order is sometimes attributed to international law, though not in the Austinian fashion, as a system or body of rules.

Some jurists prefer to consider international law to be a process.²⁵⁰ International law and the *lex mercatoria* have at least one thing in common: neither of them is regarded as a legal system in the Austinian positivistic sense. The *lex mercatoria* also shares with public international law certain common general principles of law, such as *pacta sunt servanda* and *rebus sic stantibus*, though their respective fields of operation are different.²⁵¹ Public international law is concerned with relations among States, while the *lex mercatoria* deals with business transactions among private individuals. Although there are differences, one may also find certain striking epistemological similarities between public international law and the *lex mercatoria* as far as their status as a legal order is concerned. Our purpose here, however, is not to examine the nature of international law; it suffices to note that the theory of international law as a process is fraught with many practical problems, amongst which uncertainty and unpredictability of the law are often pointed out.²⁵² Many mercatorists would contend that if the *lex mercatoria* is regarded as a legal process, rather than a body of rules or a legal system in the

249. See AUSTIN, *supra* note 184, at 260 (determining the province of jurisprudence).

250. See ROSALYN HIGGINS, PROBLEMS AND PROCESS: INTERNATIONAL LAW AND HOW WE USE IT 2-12 (1994) (describing the nature and function of international law).

251. See Lord McNair, *The General Principles of Law Recognized by Civilized Nations*, 32 BRIT. Y.B. INT'L L. 1, 1-19 (1975) (identifying the choice of law, arbitral precedents, general principles, and respect for acquired rights associated with international legal systems).

252. See GODEFRIDUS J.H. VAN HOOF, RETHINKING THE SOURCES OF INTERNATIONAL LAW 44 (1984) (analyzing legal idealism, absolutism, and relativism).

Austinian sense, one may come close to the reality about the *lex mercatoria*. Professor Lando considers the *lex mercatoria* as a judicial process, meaning that it is applied by arbitrators in their innovative or creative decision making process.²⁵³ It should be recognized, however, that the *lex mercatoria* is not invented on the spur of the moment in an arbitrator's decision making process. It already exists in different forms that came about through a legal process and the arbitrator makes a choice from those preexisting forms in his decision-making process, also a part of a legal process in the generic sense. Thus, in a given case, it is conceptually more appropriate to consider the whole legal process of the *lex mercatoria* from its genesis to its application.

The *lex mercatoria stricto sensu* is found and not made. In recent theories, however, a wider ambit is attributed to it. It is known as transnational commercial law or the *lex mercatoria lato sensu*, as alluded to earlier. The mercatorists maintain that in the application of the *lex mercatoria*, arbitrators do not act mechanistically; rather, they must play a creative role in selecting principles or rules out of variables to render a judgment that reflects the expectation of the international business community. For them, if the *lex mercatoria* is applied oblivious to its context, its purpose will be frustrated. In the arbitral decision-making process, arbitrators, unlike judges of national courts, are concerned with the parties' expectations. The *lex mercatoria* basically grew out of the expectations and aspirations of business people, irrespective of the involvement of sovereign authorities who may formally codify the *lex mercatoria* in conventions or in other forms.²⁵⁴ Thus, the mercatorists stress the importance of context in the application of the *lex mercatoria* because it is designed to perform its functions in the international business com-

253. See Ole Lando, *The Law Applicable to the Merits of the Dispute*, in ESSAYS ON INTERNATIONAL COMMERCIAL ARBITRATION 129, 147-50 (Petar Sarcevic ed., 1989).

254. See Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria in Lex Mercatoria and Arbitration*, in LEX MERCATORIA AND ARBITRATION, *supra* note 55, at 173, 194 (concluding, with regard to the Vienna Sales Convention or the CISG, that “[t]he Convention itself purports to formulate the most common practice and therefore qualifies as an expression of the *lex mercatoria*”); see also Lando, *supra* note 35, at 402 (“Its (CISG) rules may now be regarded as part of the *lex mercatoria*.”)

munity. The context includes the business community interests, needs, and expectations. The purpose of the application of the *lex mercatoria* is to promote common values in the international business community, irrespective of national divergences on such matters. The arbitrator's intuition will lead him to the community expectation, which will dictate the best choice he can make out of diverse rules and principles. In the arbitrator's decision-making process, his "reason and logic," rather than the statutory rulebook of interpretation, are considered the guiding light for his interpretation of the disputing parties' contract.²⁵⁵ As mentioned earlier, arbitrators can, and are expected to, play a significant role in the development and clarification of the *lex mercatoria*. Thus, the arbitral process and the concept of the *lex mercatoria* are intertwined. Out of choices from various rules and principles and with guidance from the facts of a particular case, the arbitrator plays his creative role as a "social engineer."²⁵⁶ The gradual concretization of the *lex mercatoria* is thus considered to take place in the arbitrator's creative decision-making process.²⁵⁷

Further, the mercatorists contend that the *lex mercatoria* cannot be a fixed body of rules, and that it should constantly respond to the changing community needs. It should thus be dynamic and not static. In the arbitral process, the arbitrator can give effect to this perception of the *lex mercatoria*. In performing his creative and dynamic role in the decision-making process, the arbitrator may have to coordinate or subordinate rules or principles available to him. To build up the corpus of the *lex mercatoria*, these subordination and coordination methods may be vital tools. Different national practices or scattered

255. See Lando, *supra* note 3, at 148 (discussing UNIDROIT principles and describing *lex mercatoria* as the type of international law applied to international commercial contracts).

256. Lando, *supra* note 3, at 154.

257. See SIR HERSCH LAUTERPACHT, THE DEVELOPMENT OF INTERNATIONAL LAW BY THE INTERNATIONAL COURT OF JUSTICE 268 (1958) (describing the role of the international court as an agency for the progression of international law [hereinafter LAUTERPACT, INTERNATIONAL COURT OF JUSTICE]; SIR HERSCH LAUTERPACHT, THE FUNCTION OF LAW IN THE INTERNATIONAL COMMUNITY 254-56 (1933).

sets of usages or practices on specific matters may have to be coordinated in order to find a direction in the relevant context.²⁵⁸

One more point, which the mercatorists equally acknowledge, is that the *lex mercatoria* is not a self-contained or a fully developed legal system. In Lando's words, it "is still a diffuse and fragmented body of law."²⁵⁹ Hence, the *non-liquet*—incompleteness of the law—may arise in relation to particular issues of a case. It would be to the great satisfaction of the mercatorists, however, to assert that because the *lex mercatoria* is a legal process, arbitrators can overcome a *non-liquet* through their creative arbitral decision-making functions. It is well recognized that the judicial creativity of international judges is considered a tool to fill gaps in international law.²⁶⁰ Consequently, the declaration of a *non-liquet* by a judge is prohibited in international law. To solve this problem, Sir Hersch Lauterpacht suggested the recourse to "the general principles of law" in order to avoid a *non-liquet*.²⁶¹ The general principles may not cover all the issues that arise in arbitration. Therefore, the arbitrator may have to resort to other sources of the *lex mercatoria* and even to a national legal system in order to supplement the *lex mercatoria*. As mentioned earlier, the advocates of the *lex mercatoria* have not denied the supplementary role of the relevant national legal orders.²⁶²

258. See DE LY, *supra* note 152, at 271 (observing that "[i]nternational business law consists of a mix of rules of national law from various sources (national, international, self-regulatory) relating to conflict of laws, substantive law and civil procedure in which the interplay between these rules is of paramount importance.").

259. See Lando, *supra* note 3, at 147 (discussing UNIDROIT principles and the disparity surrounding *lex mercatoria* law).

260. See Hersch Lauterpacht, *Some Observations on the Prohibition of 'Non-Liquet' and the Completeness of the Law*, in 2 INTERNATIONAL LAW: BEING THE COLLECTED PAPERS OF HERSCH LAUTERPACHT 213, 216-37 (Elihu Lauterpacht ed., 1975); cf. Julius Stone, *Non Liquet and the Function of Law in International Community*, 35 BRIT. Y.B. INT'L L. 124, 124-61(1959) (distinguishing the Lauterpacht work as primarily focused on strict terms instead on meta-legal premises, and as examining the importance of the law—creative as opposed to the law—in applying roles of international courts).

261. See LAUTERPACHT, INTERNATIONAL COURT OF JUSTICE, *supra* note 257, at 66-67.

262. See Goldman, *supra* note 20, at 22; Aleksander Goldstajn, *The New Lex Merchant Reconsidered*, in LAW AND INTERNATIONAL TRADE 171, 184 (Fritz Fabricius ed., 1973).

A caveat must now be made, however, that even if the *lex mercatoria* is regarded as a legal process, the conceptual terrain on which the arbitrator is supposed to skate is not free from pitfalls. The arbitrator's aim to arrive at contextual justice may lead him to take a route that may sometimes turn out to be essentially non-legal and in fact may be considered *ex aequo et bono*. Furthermore, if the arbitrator is allowed unfettered freedom in rendering contextual justice, one may wonder if his action will be arbitrary and may not reflect the expectations of the parties involved. The decision of the arbitrator may be anyone's guess until the arbitrator renders it. How the arbitrator will apply his reason and logic in his decision-making process in order to give effect to the parties' interests and the international business community's expectation is a matter of conjecture. Thus, predictability and certainty, which are the two cardinal elements of the law for its effective operation in society, may be somewhat missing or cannot be guaranteed in such a theory. In such circumstances, the legal process will be marred by instability. This does not deny that a certain degree of judicial creativity is necessary in the practical circumstances when the law is not well articulated or it alone cannot achieve justice. The issue of predictability or certainty is not to question the suitability of the *lex mercatoria*.²⁶³ Instead, the concern lies with how usefully the arbitrator should make his choices out of various rules or norms and how he should subordinate or coordinate them in varying circumstances. It is not clear from the different versions of the theory of the *lex mercatoria* whether in the arbitrator's creative decision-making process, a higher norm has any role to play as the guiding light. For example, it is not clear whether the general principles of law or transnational public policy²⁶⁴ could operate as a higher norm as against national practices that could be subordinated to the former.

While an arbitrator's creative decision-making process is well recognized, there remains grave concern about idiosyncratic approaches, which could be a threat to the sound growth of the *lex mer-*

263. See Lando, *supra* note 3, at 148-49 (examining the efficacy of *lex mercatoria* with predictability).

264. See LALIVE, *supra* note 218, at 257 et seq. (examining transnational public policy and public international law); *see also* ICC Case No. 4695, 11 Y.B. COM. ARB. 149 (1986).

catoria. This issue is illustrated by selected cases analyzed in the following section.

IX. IMPEDIMENTS TOWARDS THE GROWTH AND DEVELOPMENT OF THE *LEX MERCATORIA*

These impediments may be traced in various ways. This section concentrates on certain principal phenomena that may have a negative impact on the growth and development of the *lex mercatoria*.

A. PSYCHO-LEGAL DIMENSION OF ARBITRAL APPROACH AND INSUFFICIENT REASONING IN ARBITRAL AWARDS

The arbitral approaches to the applicable law issues over the last few decades have marked a new trend in the choice-of-law process. The new trend may be described as the "psycho-legal dimension." In the context of State contracts, this new dimension is quite prominent. It reflects arbitrators' preferences, preconceived views, or mental attitudes in their legal reasoning. In the particular circumstances of a case, arbitrators sometimes tend to be idiosyncratic to uphold their convictions in whatever way possible. In their approaches, they have resorted to both the subjectivist and objectivist theories of choice of law in private international law. Sometimes they have abused the theories.²⁶⁵ This is where the fear lies about the arbitral development and refinement of the *lex mercatoria*. As explained earlier, the arbitrators' role in the development of the *lex mercatoria* will be discredited if they are overtaken by their subjective convictions and are not careful and balanced.²⁶⁶

Arbitrators' psycho-legal approach to the choice-of-law process has been geared to such anational theories of law as "internationalization" or "transnationalization."²⁶⁷ Under one pretense or another,

265. See Delaume, *supra* note 27, at 583-93; Ahmed S. El-Kosheri & Tarek F. Riad, *The Law Governing a New Generation of Petroleum Agreements: Changes in the Arbitration Process*, 1 ICSID REV.-FOREIGN INVESTMENT L.J. 257, 275-77 (1986).

266. See *supra* pt. II.F (analyzing the arbitrators' *ex aequo et bono* application to decision-making).

267. See generally Richard B. Lillich, *supra* note 164, at 61-114 (explaining the viability of using public international law or general principles of law as a sound policy).

arbitrators invented these theories, initially in oil arbitration cases involving oil rich countries such as Abu Dhabi,²⁶⁸ Qatar,²⁶⁹ Iran,²⁷⁰ and Libya,²⁷¹ where western interests were at stake. In harboring these theories, arbitrators have broken away from the traditional positivist conflicts rules, as they were not found suitable for international transactions²⁷² in the ever-growing circumstances of interdependence of the international community. The efforts of western jurists towards the development of a universal *lex mercatoria* are aimed at securing their multinational corporations' foreign investment in the developing world and the preservation of the political and economic power of the western world. As two authors have recently observed:

The law and legal practices directed to the north-south disputes, for example, developed to reflect the interests of western businesses in avoiding national courts and laws. And merchants found the services useful and valuable also because the perceived autonomy and universality of the *lex mercatoria* enabled the western merchants to ensure—at least statistically—their domination and their profits in their business relations with ex-colonial governments. Stated simply, autonomy and universality are not only consistent, but also closely related to the subordination of law to economic and political power.²⁷³

268. Petroleum Development (Trucial Coast) Ltd. v. Sheikh of Abu Dhabi, 18 I.L.R. 144 (1951) (per Lord Asquith).

269. Ruler of Qatar v. International Marine Oil Co., Ltd., 20 I.L.R. 534 (1953) (per Alfred Buknill).

270. Sapphire International Petroleums Ltd. v. National Iranian Oil Co. (1963), 35 I.L.R. 136 (1963) (per Cavin).

271. See generally Texaco v. Libya, 53 I.L.R. 389, 389 (1979) (per Dupuy) (affirming that contractual rights expressly created cannot be altered except by mutual consent of the parties involved).

272. Cf. Patrick J. Borchers, *The Internationalization of Contractual Conflicts Law*, 28 VAND. J. TRANSNAT'L L. 421, 428-42 (1995) (examining how United States contractual conflicts law assumed an international perspective).

273. YVES DEZALAY & BRYANT G. GARTH, DEALING IN VIRTUE: INTERNATIONAL COMMERCIAL ARBITRATION AND CONSTRUCTION OF A TRANSNATIONAL LEGAL ORDER 98 (1996); see also Frank E. Nattier, *International Commercial Arbitration in Latin America: Enforcement of Arbitral Agreements and Awards*, 21 TEX. INT'L L.J. 397, 407 (1986).

International commercial arbitration is seen as a potent weapon to bring about a new *lex mercatoria* Functioning as an active element to denationalize (or internationalize) the contract, arbitration, by removing a dispute from resolution by local courts

Another western scholar has also noted that "the so-called *lex mercatoria* is largely an effort to legitimize as "law" the economic interests of Western corporations."²⁷⁴ Thus, if arbitrators are perceived as the instrumentality of western economic and political power, arbitration as an institution will not prosper globally. Hence, it proves to be a challenge for arbitrators to develop a balanced arbitral jurisprudence that will be acceptable universally.

In this context it would not be out of place to point out certain arbitral awards that have created so much confusion and controversy that their authority as arbitral case law is dubious. In three Libyan nationalization cases, *Texaco v. Libya*,²⁷⁵ *B.P. v. Libya*,²⁷⁶ and *Liamco v. Libya*,²⁷⁷ the arbitrators interpreted the common choice-of-law provision in the Libyan deeds of concession in three different ways. One scholar noted, "Trois arbitrages, un même problème, trois solutions."²⁷⁸ No doubt, different arbitrators with different philosophies in three different cases are likely to reach different conclusions on the same issues, especially considering the different arguments of the lawyers pleading the cases. A complex choice-of-law provision, such as the one in the Libyan deeds of concession, allows the arbitrator a margin to maneuver in the interpretation. While this is tolerable to a certain extent, it is a matter of great concern when arbitrators go too far beyond the parties' legitimate expectations. The sole arbitrator in the *Texaco* case, despite the express choice-of-law provision in the relevant deed of concession, approached the applicable law issue as if he were required to determine the implied choice by the parties.²⁷⁹

applying local laws, takes it to a plane where the rules are made by the great international commercial interests, a process from which Third World countries normally are excluded.

Id. (quoting Signor Huck).

274. TOOPE, *supra* note 74, at 96.

275. *Texaco v. Libya*, 53 I.L.R. 389 (1979).

276. *BP Exploration v. Libya*, 53 I.L.R. 297 (1979).

277. *Liamco v. Libya*, 20 I.L.M. 1 (1981).

278. BRIGITTE STERN, *REVUE DE L'ARBITRAGE* 1, 3 (1980) (translation, "Three arbitrations, the same problem, three solutions.").

279. See Christopher Greenwood, *State Contracts in International Law: The Libyan Oil Arbitrations*, 1982 BRIT. Y.B. INT'L L. 27, 46 (analyzing Professor Dupuy's interpretation of clause 28(7) as being primarily a choice of public international law); Robert B. von Mehren & P. Nicholas Kourides, *International Arbitra-*

He resorted to both the subjectivist and objectivist tests.²⁸⁰ In fact, he was overcome by his conviction in support of the theory of internationalization and made all possible efforts to justify its application to the case in hand.²⁸¹ The *Texaco* award is an extreme example of maneuvering the implied choice-of-law theory. It has thus attracted considerable criticism by jurists from both capital exporting and capital importing countries.²⁸²

Anationalist or internationalist arbitrators have often tried to avoid the otherwise applicable law of the host State. This tendency is apparent in some recent ICSID cases. At one time, it was justified to apply anational principles when the relevant applicable law of the host State was found inadequate.²⁸³ Even though the relevant applicable law of the host State could have been well developed to deal with the issues in hand, techniques have been adopted to avoid its application by reference to the law of the colonial master of the State on the ground that the latter's laws were drawn from the former. Both the *Klöckner*²⁸⁴ and *MNE*²⁸⁵ cases were subject to ICSID annulment

tions Between States and Private Parties: The Libyan Nationalization Cases, 75 AM. J. INT'L L. 476, 500-04 (1981) (explaining the factors Professor Dupuy considered in deciding issues of jurisdiction and choice of law in the *Texaco* case).

280. See Von Mehren & Kourides, *supra* note 279, at 499-506.

281. See Greenwood, *supra* note 279, at 43-47 (discussing reasons for the application of international law to the *Texaco* case); see also F.V. Garcia-Amador, *State Responsibility in Cases of "Stabilization Clauses,"* 2 J. TRANSNAT'L. L. & POL'Y. 23, 41-42 (1993).

282. See Robert E. Freer, Jr., *Expropriation: United States Claimants' Rights and the Future of Cuba*, 4 U. Miami. Y.B. Int'l L. 169, 171 (1996) (stating that in *Texaco Overseas Petroleum Company v. Libya*, all the industrialized countries with market economies have abstained or voted against the charter's adoption). Bilateral Investment Treaties ("BITs") arose to protect the investments "originating from one contracting party in the territory of the other contracting party." *Id.* at 171-72. BITs are intended to counter what capital exporting countries view as deterioration of customary international law principles. *Id.* at 172.

283. See LORD MCNAIR, *supra* note 251, at 1 (discussing the evolving need for contracts amongst countries, and the difficulty in choosing a universal law to settle disputes).

284. Klöckner Industrie-Anlagen Gmbh Klöckner Belge SA. v. Cameroon, 10 Y.B. COMM. ARB., 71 at VI, 2 (1995).

285. See Maritime Int'l Nominees Establishment v. Government of Guinea, 5 ICSID REV.-FOREIGN INVESTMENT L.J. 95, 95-134 (1989) (discussing a dispute that arose out of a contract between Guinea and a French company).

proceedings on the ground of an alleged failure to apply Article 52(1) of the ICSID Convention. The original tribunals somehow ignored the laws of the host States and relied heavily on French law, which is the source of both Cameroonian and Guinean laws respectively. What the original tribunals failed to notice was the differences of those laws respectively from French law in their respective details although the latter is the source of the former. In the *Klöckner* case, the original tribunal's resort to French law was prompted by the motive to compare the relevant French legal principles with similar ones of both English and international law and to generalize them. This was an ardent effort on the part of the arbitrators to vitalize the theory of internationalization²⁸⁶ by undermining the otherwise applicable national law. As one writer has observed:

The attempt to undermine these laws by over-emphasising the link with the European laws from which they are drawn so as to apply the latter, without doubt suggests a thinking process based on the assumed inferiority of the legal systems concerned. It also indicates a determined attempt to subordinate these laws to a different and preferred legal order—an objective which has been so well achieved by the process of internationalization.²⁸⁷

In arbitral practice it seems to be a striking feature that in many cases arbitrators leave out the analysis or any discussion while applying any principle of law.²⁸⁸ Much worse is that at times, the tribunal hardly specifies what law it is actually applying. As one scholar, while examining the bulk of the Iran-United States Claims Tribunal's earlier decisions, aptly remarked, "My search for opinions containing explicit discussions of the legal principles upon which awards were based left me asking, somewhat in the manner of the little old lady in the hamburger commercial, where's the beef?"²⁸⁹ The same sort of

286. See generally Lillich, *supra* note 164, at 61-114 (outlining the parameters of the theory of internationalization).

287. George Elombi, *ICSID Awards and the Denial of Host State Laws*, 11 J. INT'L ARB., June 1994, at 61, 65 (1994).

288. See *supra* notes 275-282 and accompanying text (analyzing the arbitrary invocation of substantive law in three separate cases involving Libyan nationalization of oil fields).

289. Azizah Al-Hibri, *Decisions of the Iran-United States Claims Tribunal*, 78 AM. SOC'Y INT'L L. PROC. 221, 227-28 (1984) (remarks made by Ted L. Stein).

doubt also was expressed by Dr. Mann, in view of the decision of the Tribunal in the *Aminoil* case²⁹⁰ on the choice-of-law provision which states, "The law governing the substantive issues between the Parties shall be determined by the Tribunal, having regard to the quality of the Parties, the transnational character of their relations and the principles of law and practice prevailing in the modern world."²⁹¹ He observed:

The Tribunal did not in clear terms decide this conflict, (whether the Tribunal was to determine the proper law or whether it was to interpret the proper law as fixed by the parties by taking certain matters, including 'the transnational character of their relations' into account) or express its views on the proper law to be applied by it; it used some elegant phrases to gloss over the issue, so that it is impossible to say with precision what rules it applied.²⁹²

In many cases where even the rules and principles of law are clearly specified, their sources are left quite unclear.²⁹³ In view of the

290. Frederick A. Mann, *The Aminoil Arbitration*, 54 BRIT. Y.B. INT'L L. 213, 216 (quoting Article III(2) of the Arbitration Agreement) (1983).

291. *Id.*

292. *Id.*

293. This has been illustrated well by one scholar in his remarks on the Iran-U.S. Claims Tribunal's decisions that:

Questions such as the extent of control that must be exercised by the Government of Iran before an entity is considered government controlled for jurisdictional purposes, the extent to which a company is liable for preincorporation promoters' contracts, or the extent to which an invalidly executed contract will be ratified by accepting performance, have been decided without reference to any particular legal system and largely without citation of authority. This is all the more surprising since the choice of law clause in article 5 virtually invites express consideration of governing law problems. Even if we accept that the Tribunal's heavy caseload operates to suppress the instinct to extended flights to the further reaches of the conflicts of laws stratosphere, the almost complete absence of choice of law discussions would still be notable. In similar fashion, important questions of public international law such as the compensation standard in expropriation cases are given extremely summary treatment and, remarkably, are decided without reference to the bilateral Treaty of Amity which contains directly relevant language and has been held to be a treaty in force by the International Court of Justice. Presumptions determinative of important cases are announced without any attempt at formal justification. In many cases a concurring or dissenting opinion does attempt a full-dress argument; the author of such an opinion seems to be shadow boxing, since the principal opinion offer no affirmative view of existing authorities or policies to which a separate opinion can react.

Iran-United States Claims Tribunal's inconsistent treatments of the expropriation and compensation issues in many cases, one scholar remarked, "Expropriation awards are a can of worms from which every academic angler can pick up baits of any kind to catch all manner of doctrinal fish."²⁹⁴

The truth of the above observations reveals itself if one carefully reads the awards. In the context of breach of contract, the Tribunal has largely determined whether a breach of contract has occurred after an examination of the facts and the terms of the contracts. The Tribunal has made little reference to the specific legal principles relating to the claim. Thus, for instance, in *R.N. Pomeroy v. Iran*²⁹⁵ the claimant had entered into a contract with the Iranian Navy for specialist administration services. The contract was terminated by the Navy in March 1979 and Pomeroy ceased providing services after this date.²⁹⁶ The Iranian Navy ceased payments on the contract in 1978.²⁹⁷ Without directly explaining the relevant legal principles, the Tribunal took the view that "[t]he Navy having terminated the contract for no fault of Pomeroy Corporation, the Tribunal finds that the Claimants are entitled to compensation for their losses caused by the termination."²⁹⁸ The Tribunal reached this conclusion on the basis of the terms of the contract and the factual circumstances.

Even if the Tribunal referred to relevant legal authority in some cases concerning the validity or binding effect of the contract, it left the identification of the law or legal principle somewhat uncertain. In *Charles T. Main International, Inc. v. Khuzestan Water & Power Authority*,²⁹⁹ the Tribunal analyzed the validity of the contract and the

Stein, *supra* note 289, at 228-29.

294. RAHMATULLAH KHAN, THE IRAN-UNITED STATES CLAIMS TRIBUNAL 266 (1990).

295. 2 Iran-U.S. Cl. Trib. Rep. 372 (1983).

296. *Id.* at 374-75 (noting that a telex dated March 10 and received March 12, 1979, notified Pomeroy that Navy was terminating the contract).

297. *Id.* at 375 (stating that claimants allege that Iran ordered that an issue check by Navy for November 1978 not be paid).

298. *Id.* at 383 (noting that claimants sought \$1,821,922 for the profits Pomeroy lost through the contract's termination).

299. 3 Iran-U.S. Cl. Trib. Rep. 156 (1983) (discussing a contract between Main International, a Boston company, and the KWPA, an Iranian company).

two letters that were exchanged between the parties, which were directly relevant to the contract. In the first letter, Iran's Ministry of Energy authorized the Khuzestan Water and Power Authority ("KWPA") to issue a work order for the performance of engineering services.³⁰⁰ The second letter, signed by KWPA, consented "to the start of engineering services as soon as possible in accordance with the attached details."³⁰¹ In considering these two letters, the Tribunal stated that, "[s]uch letter, which was signed by KWPA, the Claimant and Mahab, reflected more than an intention to contract. It was in reality a contract authorizing the Claimant and Mahab to perform the following listed work. . . . An invitation to commence preliminary work creates an obligation to pay for that work."³⁰² Following this letter, the Claimant and Respondent exchanged a number of letters and telexes concerning additional work. The Tribunal needed to ascertain whether the Claimant was entitled to do the work; whether the work had actually been done; and, most significantly, if it was not covered by the original contract, whether the undertaking of the work had been ratified by KWPA.³⁰³ In respect of the third issue, the Tribunal noted: "In this connection it should be noted that the law of Iran and the US both recognise that such subsequent ratification is the equivalent of mutual consent preceding the performance of the work."³⁰⁴

This was the only reference to any legal authority in the award. It is notable that the Tribunal did not determine whether the Iranian or United States law was applicable. It seems that the Tribunal's concern was more to show that the legal principle of part performance had general acceptance.

Similarly, in *DIC of Delaware v. Tehran Redevelopment Corporation*³⁰⁵ the validity of an assignment was at issue. The Tribunal up-

300. See *id.* at 157.

301. *Id.* at 162.

302. *Id.*

303. See *id.* at 163.

304. *Id.*

305. 8 Iran-U.S. Cl. Trib. Rep. 144, 147 (1987) (discussing a claim against Tehran Redevelopment Corporation ("TRC") for an alleged debt of payment to DIC, a Delaware corporation, arising under four contracts relating to the construction of a large development of apartment buildings).

held the validity of the assignment despite an express contract clause prohibiting unapproved assignments, a governing law clause in the contract designating Iranian law, and arguments by the respondent that the assignment was invalid under Iranian law.³⁰⁶ Despite the express stipulation of Iranian law as the proper law of the contract, the Tribunal seemed to swing hesitatingly between the United States law and Iranian law when it said:

[T]he assignment presumably was made in the United States. Thus, the interpretation and effect of the assignment as between the assignor and the assignees is governed by the United States law. Issues concerning assignability may be governed by the law of the debt or contract, which could be considered Iranian law.³⁰⁷

The Tribunal avoided directly ruling on the applicable law question even as it recognized the relevance of Iranian law to the issues in *DIC*. It declared instead that there was “no showing that the laws of Iran and United States are significantly different with respect to the legal principles applicable to this case.”³⁰⁸ Then the Tribunal proceeded to general principles of contract law. Nevertheless, even in this case, although the Tribunal referred to general rules of contract interpretation, it did not identify the core legal principles it relied upon as general principles of law:

Prohibitions on the assignment of rights are strictly construed. For example, a contractual prohibition against assignment is *generally interpreted* as applying only to a delegation of obligations and not to the assignment of rights—particularly the simple right to receive monies. Even express prohibitions against assignments of rights are *generally interpreted* not to apply to an assignment of a claim or of the proceeds of a claim.³⁰⁹

The Tribunal thus avoided an express contract prohibition of assignments by applying the general rules of contract interpretation that such prohibitions are to be strictly construed and do not generally extend to an assignment of a claim or an assignment of the proceeds of a claim arising out of the contract.

306. *See id.* at 156.

307. *Id.* at 156-57.

308. *Id.* at 157.

309. *Id.* (emphasis added).

The scant attention to the exposition on the applicable law relating to the validity of contract is also found in the *Harnischfeger v. Ministry of Roads and Transportation*³¹⁰ claim. The claimant argued in that case that it had contracted with an Iranian government entity to sell it cranes that had been manufactured and shipped to port where they were held pending receipt of a letter of credit in payment, in accordance with the past practice of the parties. When the claimant was informed by telex that the deal was off, it sold the cranes to other buyers and brought this claim for damages against the Iranian entity.³¹¹ The respondents denied that they had entered into a contract.³¹² The majority in Chamber Three agreed with the respondents that no contract had been entered into but did not indicate the law it was relying on, citing only insufficient evidence as its reason.³¹³ In a dissenting opinion Judge Mosk chided the majority for not addressing the applicable law issue in the following words:

The majority's opinion in this case . . . might be more comprehensible if it contained a discussion of the source of the law applied. . . . [T]here appear to be choice-of-law issues. Indeed, in the Partial Award, the Tribunal specifically discussed its choice of law with respect to transactions similar to those involved. . . . Yet, in the instant matter, the Tribunal gives little indication that it considered the possibility that different law might apply to different transactions and to different issues involved in the case. One cannot discern from the majority's opinion how the majority derived whatever legal principles it invokes.³¹⁴

Mosk then took the opportunity to express his own view, stating that it is extremely unfair to exempt the Ministry of Roads and Transport from all responsibility.³¹⁵

The foregoing cases give the general impression about the Tribunal's unsatisfactory approach to such an important issue as which law to apply. In many cases such as these, the different Chambers of

310. *Harnischfeger Corp. v. Ministry of Rds. and Trans.*, 8 Iran-U.S. Cl. Trib. Rep. 119 (1985).

311. *See id.* at 129.

312. *See id.* at 130.

313. *See id.*

314. *Id.* at 141 (Mosk, J., dissenting).

315. *See id.* at 143.

the Tribunal adopted respectively incoherent approaches to the issues. Such a diverse and arbitrary application of substantive law stands in the way to a general uniform approach.

These are some of the sample features of arbitral practice that explain the impediments to the development of a coherent and sound body of rules applicable to international contracts.³¹⁶ It is no surprise that arbitral approaches varying from cowboy style to intellectual anarchy have failed to maintain decisional harmony on the same type of legal issues. Sometimes arbitrators are inclined to refer to the decisions of other arbitral tribunals rendered in a different context, which may not be helpful for the identification of precise rules.³¹⁷ Further, since arbitrators, unlike judges of a country, are not bound to follow each other's decisions and different arbitral tribunals may interpret certain circumstances and trade usages or the same legal principles differently, the evolving *lex mercatoria* may be consequently inconsistent.³¹⁸ Therefore, it is not surprising that some doubt exists as to whether such conflicting arbitral awards are a good source of law.³¹⁹ In addition, there are many legal issues that "remain be-

316. See Louise Doswald-Beck, Book Review, 59 BRIT. Y.B. INT'L L. 248, 249 (1988) (reviewing CHRISTINE GRAY, JUDICIAL REMEDIES IN INTERNATIONAL LAW (1987)). The problem is not only peculiar to international arbitral practice but is also found in international judicial practice. Thus one reviewer noted:

The PCIJ and the ICJ only actually awarded damages in the *Wimbledon* and the *Corfu Channel* case respectively, and the European Court of Human Rights has done so on several occasions in an unpredictable way, apparently for what it regards as serious breaches or for victims with whom it sympathizes. Not only do international tribunals seldom refer to the case law on reparation of other tribunals, but even their own previous practice is rarely alluded to. This means that tribunals in effect act in isolation so that awards granted seem arbitrary and inconducive to legal predictability.

Id.

317. See Georges R. Delaume, *State Contracts and Transnational Arbitration*, 75 AM. J. INT'L L. 784, 818 (1981) (discussing State contracts and the enforceability of arbitration agreements).

318. See Stoecker, *supra* note 55, at 121 (discussing the historical background of the *lex mercatoria* as its ramifications on the international community today).

319. See ANTOINE KASSIS, THÉORIE GÉNÉRALE DES USAGES DE COMMERCE paras. 782-87 (1984); see also René David, *Le Droit Commerce International: Une Nouvelle Tache pour les Legislateurs ou une Nouvelle Lex Mercatoria?*, 1 UNIDROIT, New Direction in International Trade Law, 5, at 5-6 (1977) (disparagingly stating that the way commercial disputes were being administered was "nonsensical and an embarrassment for the jurists").

clouded by scholarly controversies, conflicting opinions between the tenets of the traditional legal order and the advocates of a new economic order in the making, and the lack of concordance of arbitral awards, some of which appear questionable.”³²⁰ Thus, in the context of State contracts, one scholar opines:

The controversies surrounding the theories involved in the determination of the foundation and domain of the law applicable to the State contracts and the contrariety of the arbitral awards in the field of protective clauses are such that no one can any longer predict with a semblance of certainty the outcome of any dispute.³²¹

Perhaps this unpredictable state of affairs and the arbitral tribunals’ indulgences in the internationalist approach to the choice-of-law process have led many developing countries to the internalization or relocalization of their economic development agreements with foreign investors by expressly providing for the application of the law of the host State.³²²

320. Delaume, *supra* note 317, at 786.

321. Ahmed Z. El Chiati, 204 ACADEMIE DE DROIT: RECEUIL DES COURS [Collected Courses of the Hague Academy of International Law] 140, para. 168 (1987).

322. See 8 MARTIN BARTELS, CONTRACTUAL ADAPTATION AND CONFLICT RESOLUTION 107 (1985) (discussing unrestricted reference to the laws of the host country). The author notes that, “[c]lear rules of this kind direct the judge or arbitrator, should problems of interpretation arise, to fill in gaps in the contract with relevant provisions from the laws of the host country.” *Id*; see also JUHA KUUSI, THE HOST STATE AND THE TRANSNATIONAL CORPORATION 145 (1979) (noting that within ten years of publication, arbitrators dealt with State contracts containing choice of law or other issues of non-municipal law). Towards the end of the 1960s, representatives of developing countries began to claim that there “was an investor-oriented bias in the traditional rules of international law relating to foreign investment, and no longer accepted that would-be contractual rules of the suggested non-municipal law applicable to State contracts with transnationals would adequately safeguard the interests of host countries.” KUUSI, *supra*, at 165. For a review of the recent developments, see Georges R. Delaume, *The Proper Law of State Contracts and the Lex Mercatoria: A Reappraisal*, 3 ICSID REV.-FOREIGN INVESTMENT L.J. 79, 79-81 (1988) (discussing the *lex mercatoria* and the choice-of-law process); Georges R. Delaume, *The Proper Law of State Contracts Revisited*, 12 ICSID REV.-FOREIGN INVESTMENT L.J. 1, 1-28 (1997).

B. INSUFFICIENT REPORTING OF ARBITRAL AWARDS

Apart from the lack of sufficient reasoning in many arbitral awards,³²³ there remains another important problem that proves to be a stumbling block for the growth and development of the *lex mercatoria*.³²⁴ A very significant number of arbitral awards are not reported and published for various reasons such as confidentiality,³²⁵ political considerations, and others. Furthermore, the awards that are published are found mostly in denatured versions, again for confidentiality, from which it is difficult to assess the exact factual matters and circumstances on which arbitrators based their legal reasoning.³²⁶ Additionally, there is no system of reporting the pleadings of the arbitral cases, which could be used as valuable source materials to develop law in the field.³²⁷ Unless this situation can be changed in some way or another,³²⁸ the prospect of the *lex mercatoria* as a developed body of legal rules or principles remains doubtful. This is because the *lex mercatoria* is not made or created instantly but rather is supposed to grow and develop over time.

323. See Klöckner v. Cameroon, 1 ICSID REV.-FOREIGN INVESTMENT L.J. 89 (1986) (decision of ad hoc committee); Guinea v. MINE, 16 Y.B. COM. ARB. 40, 48-52 (1991).

324. See Stoecker, *supra* note 55, at 121; Cremades & Plehn, *supra* note 3, at 336 (discussing problems of confidentiality and lack of binding precedent serve as stumbling blocks for the new *lex mercatoria*).

325. See Martin Hunter, *Publication of Arbitration Award*, LLOYD'S MAR. & COMM. L.Q., May 1987, at 139.

326. For examples of publications reprinting denatured renditions of arbitral awards, see, e.g., *Commercial Arbitration*; *Lloyd's Arbitration Reports*; *International Arbitration Reports*; *International Legal Materials*; *Clunet, Journal du droit International*; *Collection of ICC Arbitral Awards*; *ICSID Reports*; and *Iran-United States Claims Tribunal Reports*.

327. For example, the pleadings of the Iran-United States Claims Tribunal cases could have been a very good source of the *lex mercatoria* and those of other well-known institutional and ad hoc arbitration cases.

328. See Kenji Tashiro, *Quest for a Rational and Proper Method for the Publication of Arbitral Awards*, 9 J. INT'L ARB. 97, 98-102 (1992) (explaining that the number of arbitral institutions that "take the position that the principle of secrecy in arbitration can be moderated with regard to the publication of arbitral awards, has recently been on the increase."); see also Paul Bowden, *A Preliminary Report (Common Law Countries) and Suggested Study*, ILA Report of the 64th Conf. 136, 142 (Queensland, Australia) (1990).

C. ABSENCE OF GLOBAL INSTITUTIONALIZATION OF ARBITRATION

It is true that numerous institutional and ad hoc arbitrations take place around the world every year and numerous awards are rendered accordingly. Arbitral awards are not binding on other arbitrators on similar matters. Arbitral awards are, at best, persuasive precedents. This reality allows arbitrators to be idiosyncratic in their interpretations of and approaches in different cases to the same type of legal issues arising from similar factual circumstances. As arbitrators may come from diverse legal backgrounds, such as common law, civil law, socialist law, and Islamic law, their interpretations of the same customs and usages of international commerce are unlikely to be consistent. The development of a consistent body of the rules of the *lex mercatoria* thus may be impeded because of this tendency for divergences. Recently, views have been expressed by some renowned jurists in favor of the global institutionalization of arbitration. Professor Reisman has emphasized the utility of such a "standing" international institution.³²⁹ Various names have already been offered by others such as "International Arbitral Court of Appeal"³³⁰ and "International Court of Arbitral Awards."³³¹ Judge Holtzman and Professor Schwebel have proposed an "International Court of Arbitral Awards" that:

329. See REISMAN, *supra* note 94, at 7 (stating that a permanent international institution would at the very least serve as some guidance to the international community).

330. See MAURO RUBINO-SAMMARTANO, INTERNATIONAL ARBITRATION LAW 511 (1990) (proposing to institutionalize the appellate instance by entrusting the appointment and supervision of appellate proceedings to an International Arbitral Court of Appeal). Each party to such proceedings would be entitled to appoint an arbitrator. *See id.* The International Court would appoint the Chairman. *See id.* The appellate panel would be controlled by the International Arbitral Court of Appeal, which would also administer the appeal proceedings. *See id.*

331. See Judge Howard Holtzmann and Stephen M. Schwebel, in THE INTERNATIONALIZATION OF INTERNATIONAL ARBITRATION, THE LCIA CENTENARY CONFERENCE, 109, 109-124 (Martin Hunter et al. eds., 1995) (discussing ways to modify the New International Court of Arbitral Awards by analyzing the New York Convention); see also Jacques Werner, *The Trade Explosion and Some Likely Effects on International Arbitration*, 14 J. INT'L ARB., June 1997, at 5, 13-15 (discussing the effects of investment conventions such as the New York Convention on the finality of arbitral awards).

would have not only exclusive jurisdiction on the recognition and enforcement of arbitral awards as provided by the New York Convention, but would as well substitute national courts for the setting aside of arbitral awards on the grounds provided by the New York Convention in its Article V. In the Holtzmann/Schwebel proposal, the decision rendered by the International Court of Arbitral Awards would be executed by the officials of signatory States without reference by the national courts.³³²

Cremades and Plehn have also suggested the establishment of institutions:

[w]hich give arbitrators access to prior arbitration awards and require them to follow a more or less strict rule of *stare decisis*. Arbitration awards would be subject to an appeal within the institution to insure some degree of binding precedent.

Parties subjecting their disputes to such an institution would be shifting a great deal of the decision making power from the arbitrator to the institution. No longer would arbitration institutions serve a purely administrative function. Instead they would constitute a largely autonomous,³³³ judicial system capable of developing a coherent *New Lex Mercatoria*.

The importance of such an institution cannot be overemphasized at the threshold of the twenty-first century with the ever-increasing cross-border commercial transactions and activities. It may play a significant role in monitoring the sound growth of the international arbitral jurisprudence and the consistent development of the corpus of the *lex mercatoria*. One may wonder whether a global institutional control system for international commercial arbitrations on the model of the ICSID's annulment procedure, albeit in a more careful and restrictive form, would be welcomed towards the goals as proposed.³³⁴

332. Werner, *supra* note 331, at 14.

333. Cremades & Plehn, *supra* note 3, at 336-37. The late Judge Jessup also predicted in a different context that if an international institution were created to adjudicate contract disputes between States and private parties it would "develop rather rapidly a most useful body of jurisprudence." PHILIP C. JESSUP, A MODERN LAW OF NATIONS 141 (1948); see also Dimitra Kokkini-Iatridou and Paul J.I.M. De Waart, *Economic Disputes between States and Private Parties: Some Legal Thoughts on the Institutionalization of their Settlement*, 33 NETH. INTER. L.R. 289, 289-91 (1986) (discussing the development of a New International Economic Order (NIEO) (the Seoul Declaration)).

334. See generally David D. Caron, *Reputation and Reality in the ICSID An-*

A caveat must be made, however, that the global institutionalization of international arbitration is to be finely balanced with the parties' expectations of "confidentiality," for which they choose the private justice system rather than court litigation.³³⁵

CONCLUSION

Having thus made observations and cautionary remarks on the various important aspects of the *lex mercatoria*, a few conclusions may be drawn. Although, from the positivists' point of view, the *lex mercatoria* is not a legal system per se and hence cannot be itself the proper law of an international commercial contract, there seems to be a recent trend to endorse the view, in both national and international arbitration practice, that "rules of law," which could include the *lex mercatoria*, may be applied in certain circumstances as well as on their own.³³⁶ The philosophy seems to be that if "rules of law" provide suitable resolutions to a dispute, it is not necessary to consider whether they constitute a legal system.³³⁷

Since there still remains serious disagreement among jurists as to the sources, methodology, and contents of the *lex mercatoria*, some are content to hold the view that the *lex mercatoria* may serve the purpose, at best, of subsidiary rules for the settlement of a dispute in

nulment Process: Understanding the Distinction Between Annulment, 7 ICSID REV.-FOREIGN INVESTMENT L.J. 21, 21-56 (1992) (discussing the future of the ICSID and whether an annulment or appeal process will help solidify international arbitration); Jan Paulsson, *ICSID's Achievements and Prospects*, 6 ICSID REV.-FOREIGN INVESTMENT L.J. 380, 380-99 (1991) (stating that while the ICSID has been nearly accepted universally, and seems to be serving its purpose, the future of the ICSID lies with the evolving international community); W. Michael Reisman, *The Breakdown of the Control Mechanism in ICSID Arbitration*, DUKE L.J. 739, 739-807 (1989) (emphasizing that the international community needs an arbitration system that has reliable methods and has some sort of control system).

335. See *supra* notes 324-326 and accompanying text (revealing parties' need for confidentiality as a reason for choosing arbitration over litigation).

336. See RUBINO-SAMMARTANO, *supra* note 330, at 269 (discussing the development of interest in the concept of *lex mercatoria* as a "spontaneous law consisting of usages, of arbitral awards and of the reoccurring solutions concerning international trade which are found in conventions on uniform laws and in national law").

337. *Id.* at 270 (noting that *lex mercatoria* could be called a legal system that "does not depend on any national system.").

hand.³³⁸ Professor Lowenfeld has considered that the status of the *lex mercatoria* "is not, in other words, supposed to be revolutionary. What it does do, if properly used, is to clarify, to fill gaps, and to reduce the impact of peculiarities of individual countries' laws, often not designed for international transactions at all."³³⁹

Even in the corpus of the *lex mercatoria*, some may claim that certain rules belong to it, while others are doubtful that those rules apply. Thus, the differences in formulation may lead to an incoherent body of rules to be claimed as the *lex mercatoria*, which, in turn, may cause the unpredictability of the outcome of any dispute.⁴⁴⁰

It should be noted that the application of the *lex mercatoria*, or the third legal order, has been found to be acceptable either as an express choice-of-law provision or directly as applicable substantive law, in the absence of any choice of law, without reference to any conflict rules. In the present state of development of law, the application of the *lex mercatoria* to an international contract contrary to an express choice of a different law is not tolerated.

Sometimes arbitrators seem to be overtaken by their preconceived views and legal dogma, even in disregard of the actual context of the case. In many arbitral awards, arbitrators fail to provide sufficient reasons for their decisions on substantive matters, which may lead to ambiguous interpretations among jurists. This state of affairs in the context of international commercial arbitration is not favorable for the sound growth and development of the *lex mercatoria*. A global institutional control mechanism should be established to standardize international arbitral practice and jurisprudence and to help develop a consistent body of arbitral *lex mercatoria*.

On the threshold of the twenty-first century, international commercial arbitration as an institution, with its growing popularity

338. See *id.* at 270-72 (discussing the viewpoints of various supporters and critics of *lex mercatoria*). *Lex mercatoria* is criticized by some authors who see the signs of danger and uncertainty in each judge or arbitrator assigning his own personal formula to it. See *id.* at 270.

339. Lowenfeld, *supra* note 55, at 90; see also Goode, *supra* note 6, at 13

340. See Derek W. Bowett, *State Contracts with Aliens: Contemporary Developments on Compensation for Termination or Breach*, 1988 BRIT. Y.B. INT'L L. 49, 52 (stating that the *lex mercatoria* offers few predictable rules and leaves wide discretion to the arbitrators).

amongst the international business community, faces a tremendous challenge to develop a consistent body of international jurisprudence on the *lex mercatoria* that may be universally acceptable.