THE NEW *LEX MERCATORIA* THE FIRST TWENTY—FIVE YEARS PART II

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IV. DOES THE *LEX MERCATORIA* EMPOWER THE ARBITRATOR TO DECIDE IN EQUITY?

Much of the unease about the *lex mercatoria* stems from the idea that it frees the arbitrator to apply his own unfettered standards of justice to the individual case. The fact that this misconception is so widespread is due in part of the ambivalence in much of the literature about the relationship between the *lex mercatoria* and the concept of *amiable composition*,[54] a concept which is itself hard for the common lawyer to grasp.[55] Nevertheless, a misconception it undoubtedly is, at least by classical mercatorist standards.[56] The *lex mercatoria* is a *lex*, albeit not yet perfected. It creates norms which an arbitrator must seek out and obey in every case to which the *lex* applies. Whether the reason for its application is understood to be an express or implied agreement between the parties, or the concept that it forms the essential juridicial context of the bargain, there is no room here for the arbitrator to impose his own ideas, unless of course they happen to coincide with the rules of the *lex mercatoria*: for if he does so, he falsifies the transaction. Naturally, everyone hopes that the *lex mercatoria* will in every case yield a solution which will seem fair to all. But even if this expectation is disappointed, the *lex mercatoria* must still prevail; otherwise it would not be a law. Thus, since the prime maxim of the *lex mercatoria* is that *pacta sunt servanda*; an arbitrator who smoothes the corners of a contract which seem to him too sharp is not complying with his mandate.[57]

More difficult is the reciprocal relationship between the two concepts. It has been said[58] that an agreement to make the arbitrator an *amiable compositeur* enables, even if it does not require, the arbitrator to take note of the *lex mercatoria*. To an outsider, this seems strange. The essence of *amiable composition* is to dispense the arbitrator from the duty of enforcing any system of law. Yet the *lex mercatoria* is a system of law. Why should an agreement to *amiable composition* summon up a reference

to *lex mercatoria* any more than to any other developed system of commercial law? The literature gives no convincing answer.[59]

Another idea is that the repetition of decisions in equity will generate rules apt to be applied even by an arbitrator who is not authorised to act as an *amiable compositeur*.[60] In practice, this seems far distant, as scrutiny of the reported awards will disclose. But the theory is also difficult. How can decisions by arbitrators who *ex hypothesi* are released from the duty of applying the law ever yield a system of law which all arbitrators are bound by?

V. WHAT IS THE RELATION BETWEEN THE *LEX MERCATORIA* AND NATIONAL LAW?

A hypothetical client is likely to ask how a conflict between the *lex mercatoria* and any national law which might otherwise have been relevant ought to be reconciled. His adviser would probably reply that the question has two aspects. First, what solution should the conscientious arbitrator adopt? Second, what is likely to be the attitude of the courts claiming jurisdiction over the matter—namely, the courts of the countries in which the arbitration takes place and the country in which enforcement of the award is sought?

On the first aspect, the bluntest question which the client may pose is this: If the contract expressly stipulates a choice of governing law, and if the arbitrator is not an *amiable compositeur*, can the arbitrator properly apply the *lex mercatoria* in preference to the chosen law? The answer must surely be an equally blunt no.[61] 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 no right to do this. However good his motives, he does a disservice to the parties and to the institution of international arbitration.

Most complicated is the situation where the parties have expressly chosen to apply both a national law and some variety of 'general principles of law'.[62] This does happen on occasion, particularly where one party is a State enterprise. In practice, this rarely creates problems, because most often either the State law[63] or the *lex mercatoria*[64] are silent on the crucial question, or the answers given by the two laws happen to coincide.[65] Occasionally, however, a hierarchy must be established. Here, the literature offers no clear solution, and there appears to be no reported award where the arbitrators have been forced to make a choice.

There is a similar lack of authority in the converse situation, where the contract contains no express reference to a national law or to the *lex mercatoria*.[66] This is not surprising. Classical mercatorist doctrine

requires the arbitrator to reject the choice of a national law before proceeding to choose the national law. A conflict between the two should not arise. This theoretical conclusion appears to be reflected in practice. Those few awards in which the topic is touched upon seem to avoid discussion of conflicts between the *lex* and national laws, but rather tend to call up concordant national laws as reassurance that the rules of the anational laws have been correctly stated.[67]

There has, however, been some degree of discussion about the relationship between the *lex mercatoria* and national rules of *ordre public*[68] and between the *lex* and what has been called international *ordre public*.[69] Regrettably, space does not permit a discussion of this interesting and elusive topic.

The second question concerns the likely reaction of national courts to an overtly anational award. A study of this question, which is difficult enough even when expressed in terms of a single national law, is far beyond the scope of the present essay, and indeed never appears to have been attempted. The question seems scarcely to have arisen in practice but if it had done so, the attention currently given to the world-wide claims of the *lex* would hardly have allowed it to be overlooked. It is, however, impossible to part from the subject without mentioning, much more briefly than the author would have wished, three[70] awards where the issue has come to the surface.

The first was rendered in the arbitration *Soc. Fougerolle v. Banque de Proche Orient*.[71] Arbitrators were authorised to decide what law was to be applied. Without the possibility being mentioned by or to the parties, the tribunal decided the dispute according to the principles generally applicable in international commerce. The Cour de Cassation in France rejected an attack on the award, but it is not clear from the economical reasons given by the court whether the decision was founded on the principles of contradiction or on the *lex mercatoria* itself. As a commentator has suggested, it may be unsafe to draw too many conclusions from it.

The second instance is the much debated case of *Pabalk Ticaret v. Ugilor/Norsolor*. The arbitrators found it difficult to choose between two national laws, and therefore elected to choose neither, applying the rule of the *lex mercatoria* which requires the parties to act in good faith in the execution of the contract.[72] Holding on the facts that one party had abused its position of strength in a manner which had led to the breakdown of the agreement, they awarded damages to the other.[73]

The award came under repeated scrutiny in the courts of two countries. In Austria, where the award had been made, the Oberster Gerichtshof confined itself to the question of whether the award should be annulled on one of the grounds set out exhaustively in ZPO, Article 595, of which only paragraphs five and six were relied upon. These dealt respectively with situations in which a tribunal had entered upon matters beyond

those confined to it, and those in which an award violated mandatory provisions of law. As to the first, the court held that an award resulting from an unauthorised application of equity was not an award on matters outside the powers of the tribunal. As to the second, there was no evidence that the application of equity contradicted any statutory imperative of the two laws in question. Thus, it appears that the decision was not an endorsement of the *lex mercatoria* so much as a recognition of a court's limited powers where a tribunal's reasoning is under attack.[74]

In France the successful party sought *exequator.* It was first granted, then denied, and later the denial was made the subject of cassation, each decision following the fortunes of the proceedings in the Austrian courts. The decision of the Cour de Cassation certainly does lend support to the mercatorists, to the extent that the court did not repudiate the notion of the *lex mercatoria,* which would have furnished a short answer to the problem. Whether it amounts to a vindication of the *lex,* as has been claimed, is an altogether different matter; and it may be noted that Professor Goldman, amongst others, has expressed the opinion that it does not go so far.[75]

The third decision, arising from a dispute between *Deutsche Schachtbauund Tiefbohrgesellschaft mbH* and *The Government of Ras al Khaimal,* will be welcomed by mercatorists, and seems like to be the subject of extensive academic discussion. The circumstances were as follows.

An agreement relating to exploration for oil and gas was made between a government and a government oil company on the one hand, and a consortium of companies registered in various countries on the other, upon terms which included an ICC arbitration clause providing for the arbitration to be held in Geneva. Subsequently the government and the oil company declined to continue performance of the agreement, contending that it had been induced by misrepresentation. The dispute which then arose was submitted to arbitration. The government side took no part. In due course terms of reference were formulated, stating a number of issues for decision. The second was: 'What body or bodies of substantive law should be applied by the arbitral tribunal?' Ultimately, the arbitration was decided on the facts, the arbitrators holding that the alleged misrepresentation was not established and that there was no other ground for holding that the agreement was invalid. As the arbitrators themselves said in their award (ICC No. 3572) 'the choice of the law to be applied to the agreement is of little significance, if any, under the prevailing circumstances'. In spite of this the arbitrators went on to express a choice, presumably because they felt obliged to do so by the terms of reference. Rejecting the law of the state where the agreement was to be performed they held that internationally accepted principles of law governing contractual relations were 'the proper law'.

Understandable as it was, the election to include in the award a reference

to international principles which had no bearing on the outcome of the dispute proved to be unfortunate, since the oil company relied upon the choice of these principles as a ground for resisting enforcement of the award in England, thus postponing the time when the sums awarded would be recovered.

When it was discovered that the oil company might have assets in England various proceedings took place, including in particular a summary application to the Commercial Court, to enforce the award in the same manner as a judgment. This was granted. Subsequently there was an application to the same court to set the order aside on the grounds that it would be contrary to public policy for the court to grant enforcement, where the principles applied by the arbitrators were so uncertain. This application failed. The oil company appealed to the Court of Appeal, and failed again.

This is an important case for an English lawyer, as regards both the recognition by the court of a doctrine of *competenz competenz* applicable under the *lex fori*, and also the application of a narrow view of English public policy. The significance so far as regards the *lex mercatoria* is, however, substantially less than might at first sight appear. The starting-point of the judgment was a decision that the agreement to arbitrate was governed by the law of Switzerland. Since the oil company did not participate in the arbitration, there had been no contest on the propriety of a choice of general principles under that law. The company had not sought to set the award aside in Switzerland, nor did it offer any evidence to contradict the expert evidence of Swiss law tendered by the claimants to the effect that the general principles were a valid choice under the ICC choice of law clause. Thus, the English court could accept that the decision to apply the general principles was a permissible performance of the arbitrators' mandate under the choice of law clause according to both the *lex fori* and the *lex causae*. Against this background there was nothing in English public policy to preclude enforcement of the award in England.

Thus far, the import of the decision is clear, and it must greatly hearten the mercatorists. The wider implications, so far as concerns English law, will require careful analysis. As an immediate reaction, the present author would venture the following very tentative observations.[75b]

(i) The case was not concerned with transnationalism. The claimant's evidence proceeded on the assumption that Swiss law was the *lex causae*. Nobody suggested that there was no national *lex causae*.

(ii) Although the judgment contains a discussion of two English decisions on the effect on a contract of including various types of 'general principles' clauses, this was probably *obiter*, since (a) there was no such clause in the contract, (b) English law was neither the *lex causae*, the *lex fori*, nor the 'putative proper law', and (c) the issue had not been argued.

(iii) The judgment did not address the question whether, under English law, when a contract does not contain any explicit choice of the 'general principles' the arbitrators can validly purport to apply them. This extremely important question did not arise in the Court of Appeal, and could not have been decided without reference to certain reported cases, not cited in the judgment.

VI. WHAT ARE THE SOURCES OF THE *LEX MERCATORIA*?

It is, I believe, clear from a reading of the literature, that the proponents of the *lex mercatoria* do not wholly agree about the sources from which it is drawn, or about the relative importance of those sources which they regard as admissible. There is a wide gulf between those who look (for example) to sources such as standard form contracts and those who seek to distil the common features of national commercial law. Nevertheless, an adviser could not begin his task without first having an idea of the sources which the arbitrator might regard as relevant. For this purpose he could usefully have recourse to a list compiled by Professor O. Lando,[76] noting, however, the caution added by that author that it is not possible to provide an exhaustive catalogue of all the elements of the law merchant.[77] Reduced to its bare headings, this list is as follows:

A. Public International Law
B. Uniform Laws
C. The General Principles of Law
D. The Rules of International Organisations
E. Customs and usages
F. Standard Form Contracts
G. Reporting of Arbitral Awards

To this list one must evidently add the public policy of the country in which enforcement of the award is likely to be requested.[78]

Most of the items on this list are discussed elsewhere in this essay, but brief comments may be added about two of them. With regard to public international law, there is of course no question but that parties can expressly stipulate that their relationships shall be governed in whole or in part by public international law, and this does on occasion happen where one of the parties is a State or a State enterprise. The present author finds it hard to see why this fact should entail that the application of public international law in these instances should cause it to become part of an all-pervasive general law of commerce, applying between private parties even in the absence of express agreement; for the principles which are apposite to regulate the relationship between sovereigns are not a *priori germane* to the relationship between commercial persons or companies[79] and in practice, the express incorporation of public

international law into ordinary day-to-day trading contracts is, as far as the present author's experience extends, entirely unknown.[80]

The inclusion of uniform laws—such as the 1980 Convention on the International Sale of Goods—in the list of sources is qualified[81] by the suggestion that the arbitrator is bound to apply them only when the internal courts of those countries which are connected with the parties or the subject-matter of the dispute would be obliged to apply them, although in other cases the uniform laws may act as a guide to the arbitrator. If this is so, we have here another example of a 'micro' *lex mercatoria*, particularise in relation to the individual transaction.

VII. WHAT ARE THE RULES OF THE *LEX MERCATORIA*?

Plainly, it would be of great practical importance to the hypothetical adviser to know whether in any published work, and particularly in any published award, the view had been expressed that a particular rule forms part of the *lex mercatoria*. Setting aside for a moment the difficulties of time and access to the literature which the adviser would be likely to encounter, it seems that he would be able to put together a list somewhat on the following lines, as representing tolerably complete account of the rules which are said to constitute the *lex mercatoria* in its present form.[82]

1. A general principle that contracts should *prima facie* be enforced according to their terms: *pacta sunt servanda.*[83] 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.*[84] 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*,[85] and to a rule that unfair and unconscionable contracts and clauses should not be enforced.[86]
4. There may be a doctrine of *culpa in contrahendo.*[87]
5. A contract should be performed in good faith.[88]
6. A contract obtained by bribes or other dishonest means is void, or at least unenforceable.[89] So too if the contract creates a fictitious transaction designed to achieve an illegal object.[90]
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.[91]
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.[92]

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.[93]
10. 'Gold clause' agreements are valid and enforceable.[94] Perhaps in some cases either a gold clause or a 'hardship' revision clause may be implied.[95]
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.[96]
12. No party can be allowed by it own act to bring about a non-performance of a condition precedent to its own obligation.[97]
13. A tribunal is not bound by the characterisation of the contract ascribed to it by the parties.[98]
14. Damages for breach of contract are limited to the foreseeable consequences of the breach.[99]
15. A party which has suffered a breach of contract must take reasonable steps to mitigate its loss.[100]
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.[101]
17. A party must act promptly to enforce its rights, on pain of losing them by waiver.[102] 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.[103]
18. A debtor may in certain circumstances set off his own cross-claims to extinguish or diminish his liability to the creditor.[104]
19. Contracts should be construed according to the principle *ut res magis valeat quam pereat.*[105]
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.[106]

This list, incomplete as it may be, seems rather a modest haul for 25 years of international arbitration. The reader must form his own conclusions. The following comments may, however, suggest themselves.

First, the reported awards do not in all cases seem to sustain the wealth of commentary based upon them. By no means all of them make explicit reference to the *lex mercatoria* as an independent system of law. Those instances in which reference is made to commercial usage are equally explicable on the ground that the usage controlled the meaning of the contract, an approach which is just as consistent with national as with anational legal systems. Second, it may be said that 'whilst there can be found an abundance of sweeping formulation of legal principles, these are of little use for legal analysis'.[107] Third, where the rules are expressed

more specifically, they cannot in every case be derived from any world-wide generalisation of national laws.[108]

IX. HOW IS THE *LEX MERCATORIA* TO BE ASCERTAINED?

Under this heading, we must examine two distinct problems with which the adviser will be faced. First, how is he to discover the substantive content of the *lex mercatoria*? Second, how is he to predict, in a case where the relevant rule has not yet been firmly established by a consensus of opinion or by one or more reported arbitral awards what sources a tribunal will deploy when addressing the new issue of principle, and what conclusion it will reach?

The first question has been little addressed in the literature. Yet, mundane as it may seem, it is important in practice—and the practical superiority of the *lex mercatoria* is advanced by its proponents as the principal justification for its existence. Our hypothetical adviser is not an academic lawyer, established at an institution of learning in one of those European cities where the *lex* is most at home. Rather, he is a practitioner, established in a trade centre which may be in any part of the world, possessing such resources of time and knowledge and commanding access to such printed materials as can reasonably be expected of those holding themselves out as competent to advise on matters of international trade in the world-wide domain to which the *lex mercatoria* lays claim.

Here, the practitioner is likely to run into trouble at the outset. Some of the theoretical analysis is contained in periodicals which, if not available to him in his own country, might be forwarded to him by his correspondents. Assuming that he can read the language in which they are written, these articles will give him a broad idea of the doctrine, but perhaps not a great deal of detail. For this he would have to follow up references in footnotes, which will often be to publications of limited circulation or to works of reference now out of print or to volumes of the *Festschrift* variety which were printed in restricted numbers and are mostly found in private libraries. Even if he had the time, the practitioner could not achieve a full conspectus.[109] This being so, he would be likely to look for concrete examples of situations in which the *lex mercatoria* has been applied through awards rendered in international commercial arbitrations. Here again he would be in difficulties. Thousands of such awards are made every year. Some are published under the auspices of certain arbitral institutions,[110] but most are not. Moreover, the published awards are almost without exception concerned with the application of national laws.[111] Few can be claimed as clear examples of the working of the *lex mercatoria* in practice.

Closer to the point are awards made by tribunals which can be regarded

as 'de-localised', assuming this concept to have meaning. How many of these there are is impossible to say; but once again, only a few are published. There have been a few *ad hoc* awards and ICSID awards and a limited number of awards springing from references conducted under the auspices of the ICC. The practitioner could look these up, but they would not take him very far. The publication of extracts from ICC awards began in Clunet, *Journal de droit International,* in 1974 and, with some overlapping, in the Yearbook of Commercial Arbitration (YBCA) in 1976. Since then, a total of about 130 awards have been published, some of them dating from the 1950s and 1960s. This is only a small proportion of the total number of ICC awards, in which the *lex mercatoria* might be expected to exert the greatest influence. Of these, not many are even claimed by commentators to have any connection with the *lex mercatoria.* Although the number cited is rather greater, the present author believes that not more than about 25 are really concerned with it. Furthermore, as more than one author has pointed out,[112] the selection for publication is made, quite legitimately, to illuminate some aspect of the doctrine. The practitioner has no way of finding out whether there have been other awards in which the application of the *lex mercatoria* was raised and rejected, or never raised at all.[113] In addition, many reports are heavily edited, in the interests of confidentiality. For the commentator this is no hardship. But the practitioner or arbitrator who is asking himself whether a previous award is one which should be followed in the particular case before him will need to know: (i) the factual details of the dispute: (ii) the extent to which a non-mercatorist approach was advanced by the parties; (iii) the arguments addressed by the parties as to the mercatorist rule to be applied, and (iv) (and very importantly) the steps (if any) taken by the tribunal to inform itself accurately of the national laws from which it proceeded to derive its generally accepted rules. Many extracts are deficient in this respect, and some are so brief as to be almost useless. The same comment may be made *a fortiori* about unreported awards which are referred to in footnotes or in systematic collections.[114]

To the academic lawyer these considerations may seem trifling. Either the *lex mercatoria* is part of an international legal order, or it is not. Either a rule forms part of the *lex* or it does not. The difficulties which practising lawyers in various parts of the world may experience when trying to search it out cannot alter the position. Nor, it may be said, is it a valid objection to the doctrine as an intellectual construct that the adviser may find it difficult, and often impossible, to predict whether a tribunal not yet appointed will decide to apply the *lex mercatoria*; or what kind of *lex mercatoria,* whether 'macro' or 'micro' or some other kind, it will be; or what sources the tribunal will consider of greatest importance; or what weight will be attached to prior awards on the same question, if any exist and can be found.

All this is true enough. If the contract expressly directs the arbitrator

to apply the *lex mercatoria*, or if he conceives that the circumstances justify him in treating such a directive as implicit, he will find a way of doing so, notwithstanding the fragmentary nature of the norms so far established. But this is only a small part of the story. The purpose of a commercial legal order is to regulate transactions, not awards or judgments. For the businessman, proceedings in court or arbitration are a wretched last resort, to be avoided at almost any cost and in fact they are avoided in all but a minute proportion of cases. What requires is a legal framework, sufficient to inform him before any dispute has arisen what he can or must do next. If a dispute does arise he needs to be told whether he can insist or must yield, and how much room he has for manoeuvre. When asking such a question, the last answer which a businessman wants to hear is that it is a good question.[115]

In the light of all these considerations one may take stock of the *lex mercatoria* as it stands today by asking. Does it provide the businessman with a set of rules which is sufficiently accessible and certain to permit the efficient conduct of his transactions? Is the *lex* manifestly superior, in its content and methodology, to establish national systems of commercial law? If so, is its superiority so obvious that it can now be said to have imposed itself, whether by the very fact of its existence or by a notion of implied consent, on the international business community as a whole, and on all transactions in which it is not expressly excluded? In short, has the *lex mercatoria* stolen the international commercial scene, pushing national laws into the wings?

In each case, the detached observer must, I believe, be driven to answer 'no'. More sympathetically, he might add '. . . or at least not yet'.[116] What the future holds is hard to forecast. The *lex* has established a tenacious academic foothold in Continental Europe, and its cause is being vigorously promoted elsewhere. The three cases discussed above are encouraging, even if they do not amount to the explicit endorsement which some have asserted. On the other hand, there appears to be no sign that the *lex* is gaining a foothold in ordinary day-to-day business, through the medium of an express choice. It has not yet been put to the test by enforcement proceedings in jurisdictions where the most resistance is likely to be encountered. The conscious decision of those who framed the UNCITRAL Model Law to adopt the expression 'the law determined by the conflict of laws rules which [the arbitral tribunal] considers applicable' in Article 28(2), in preference to looser words such as 'the rules of law',[117] must have been a great disappointment to mercatorists, and, if the Model Law is reproduced on any scale in national legislation, it will be a serious obstacle to the growth of the *lex*. It may also be sensed that the tide of economic opinion is hardly running in its favour. Essentially, the *lex mercatoria* is a doctrine of *laissez-faire*. In very many parts of the world it is considered that the exercise of free consent by individual parties must be subordinated to broader economic and political considerations

bearing an international trade.[118] Furthermore, the disfavour with which 'transnational' groups or corporations are now regarded in some quarters cannot but hinder the general acceptance of a doctrine whose legitimacy is seen, rightly or wrongly, as derived at least in part from the existence of such bodies.

In addition, it is impossible to overlook the change in the character of arbitration which has occurred during recent decades. In the past, it might have been possible without excessive idealism to see arbitration as a vehicle for the pacific settlement of disputes, producing awards which would be honoured either because it did not occur to the loser to do anything else, or because a default would have exposed him to the censure of his peers and to a damaging loss of reputation. We now live in a harsher world. Winning is what matters. Whether because of a change in commercial attitudes or simply because the stakes are so much higher, many arbitrations are now fought as intensely and with as much zeal for taking every available advantage, whether procedural or otherwise, as any action in court.[119] No longer can it be taken for granted that awards will be honoured.[120] In such a climate, one must ask whether the foundations of the *lex mercatoria* are sound enough to sustain the blasts to which it may be subjected.

I would not wish to end in such a negative vein. Two final suggestions may be more constructive. First, the growth and strengthening of international commercial arbitration, which everyone in the field strives to promote, is not dependent on a solution to the problems here discussed. In most instances, the parties and the arbitrator need never look beyond the contract and the facts to arrive at the outcome of a dispute. There is no call for recourse to law at all; or if there is, the principle is so clear as to be taken for granted. In very many cases the applicable law is nominated by the contract. Even if it is not, and even if the members of a tribunal come from different legal backgrounds, it is rare to find that their instinctive reactions to a situation diverge sufficiently to demand a formal appraisal and resolution. If a contract appears insufficiently explicit to furnish a direct statement of the parties' rights, duties, powers, and liberties, then the arbitrators will construe it and fill the gaps in it by recourse to their own knowledge of how commerce works in practice, and of how commercial men in the relevant field express themselves. Whether an arbitrator who approaches the matter in this way feels it necessary to employ the *lex mercatoria* or some established technique of a national system, such as the implication of a term, or whether he does not rationalise what he is doing, but simply goes ahead and does it, is unlikely to make any difference in all but a small minority of cases. What is important is that the arbitrator should keep constantly in mind that he is concerned with international commerce, with all the breadth of horizon, flexibility, and practicality of approach which that demands. In keeping these features constantly in the public eye, the mercatorists

perform a most valuable function.

Finally, the person whose interests lie at the heart of the *lex mercatoria* as of all commercial arbitration, is the businessman. All the debates proceed upon rival assumptions about his opinions and wishes on this or that topic. Yet all the literature is written by lawyers. Perhaps the time has now arrived for the contestants to call a truce, and for the businessman to speak for himself.[121]

[54] Y. Derains moderately observes that the relationship between the two concepts is not free from ambiguity; see Clunet (1980) 967.

[55] It involves no disrespect to Loquin's authoritative treatise—indeed quite the reverse—to say that, at the conclusion of his meticulous examination, a reader accustomed to other disciplines is left with the feeling that the concept of amiable composition has not yet, even on its own native heaths, been fully brought to hand. (A common lawyer may read with especial interest the three recent decisions of French Courts discussed in [1985] *Rev. Arb.* 199 ff. Some reflections on amiable composition, from an English point of view, may be found in Mustill and Boyd, *Commercial Arbitration* (London, 1982), 605 ff.

[56] See Derains, Clunet (1979) 996; Goldman, 'Frontiers' 184-5, 187; id., *Contemporary Problems*, 117; id., 'Réalité et perspectives', 480; Lando, in *Contemporary Problems*, 110, and also 34 *ICLQ* 754. The difference between equity and rules of law was clearly stated in *Sapphire International Petroleum. NIDC* (*supra*, n. 46), 1015.

[57] There is a particular risk in those instances in which the tribunal consists of one arbitrator nominated by each party together with a chairman. As P. Schlosser has pointed out (in *What is International in the Legal Basis of International Arbitration* (Japan, 1984), 101-2), when left a free hand, such tribunals tend to gravitate towards a compromise. This does not necessarily reflect the ideas of justice of any individual member, still less what the parties have actually agreed. Significantly, Loquin states that the clause of amiable composition authorises the arbitrator to pronounce an award 'd'apaisement'.

[58] e.g. Loquin, *Apport*, Article 577, and Goldman, 'Réalité et perspectives', 480 ff.

[59] R. David suggests, in 'Arbitrage et Droit Comparé', [1959] *Rev. Int. dr. comparé*, 14, that two functions of amiable composition must be distinguished: first, where the parties look essentially for a solution by conciliation; and second, where they wish their disputes to be decided in conformity with law, but with a law which is not a national law. If so, some means must be found of deciding which of these antithetical solutions the parties to any given contract have actually chosen.

[60] See e.g., Y. Derains, Clunet (1975) 920.

[61] It is possible to find passages within the literature which might be read as indicating a contrary view. But there is so much room for ambiguity in the expression *lex mercatoria* that it would be unsafe to assume that they can be read in such an extreme sense.

[62] Such a reference has, of course, nothing to do with the trade custom or common forms of contract.

[63] This was the case in relation to the concessions negotiated before and after the Second World War with states in the Middle East for the extraction of crude oil. The local law incorporated, in the shape of the Majallah, a most refined legal system. But it was one which had nothing to say about mineral rights and petroleum exploitation. There could thus be no conflict between the local law and the additional rules which as everyone acknowledged, were necessary to make the concessions work. In theory, these rules might be regarded as anational. In practice they were conceived on both

sides as having a shape remarkably similar to that of traditional Western European law. (Thus, it is not surprising that when Lord Asquith had recourse to general principles in his renowned Abu Dhabi award, these proved to rest on a few English decided cases.) I suspect that it would have surprised the grantors as much as the concessionaires to learn that their contracts were governed by sources as heterogeneous as those called up by the literature on the *lex mercatoria.*

[64] As will very often be the case, except in so far as it consists of generalities which are unlikely to be in serious conflict with the relevant national laws.

[65] In which event the two laws can live in what Loquin, *Apport,* Article 16, has called 'peaceful coexistence'.

[66] The problem is touched on from time to time in the literature. See e.g. Lambert Matray, *Lib. Am. Sanders, 241 ff. and Grigera Naón, The Transnational Law of International Commercial Transaction,* (*supra,* n. 8).

[67] Thus, in the 'Pyramids' case (*supra,* n. 46) the tribunal proceeded by interpreting Egyptian law as conforming with the general principle exemplified in Article 42(1) of the ICSID convention, and then applying it in that sense. See also ICC No. 2478, Clunet (1976) 925, and No. 3540, Clunet (1981) 914 (amiable composition).

[68] Which laws are to be regraded as relevant for this purpose is nowhere clearly prescribed. If they include the putative proper law, then the arbitrator will have to carry out the conflicts exercise, the avoidance of which is claimed as one of the major benefits of the *lex mercatoria.* O. Lando suggests (*supra,* n. 4), 765) that the arbitrator must also give priority to the mandatory rules of countries closely connected with the contract and to the rules of the country in which the award is likely to be enforced (if the arbitrator can predict which country this will be, which is not always the case).

[69] The concept is developed in a number of interesting writings by P. Lalive, including *ICCA.* Recent treatises by the same author and by Y. Derains may be found in [1986] *Rev. Arb.* 329 and 375. It is important to note that international *ordre public* is not the same as the *lex mercatoria.* If the two conflict, as they may do, *odre public* must prevail. See the illustration provided by the 'creole' case, cited in Lalive, ICLA, 113.

[70] Some authors would add a fourth in the shape of the decision of the Corte di Cassazione dated 8 Feb. 1982. Although the judgment certainly does contain an excursus on the *lex mercatoria,* in terms which quite clearly assume its existence, the present author cannot read this as forming a link in the chain of reasoning which led to the award being upheld. Moreover, the supposed rule related to procedure and not to substance, which is the true province of the *lex mercatoria.*

[71] 9 Dec. 1981, *Rev. Arb.* [1982] 183, and note thereon, G. Couchez at 187.

[72] The sum awarded was 800,000 French francs, arrived at ('en équité) without calculation. It is reasonable to speculate on how this sum compared with the costs involved in proceeding to the highest tribunal in the courts of two countries. If the arbitrators had been chosen one national law or the other, rather than the *lex mercatoria,* the award would have been unassailable. Perhaps the victory of the *lex mercatoria,* if such it was, had its pyrrhic aspects.

[73] The award is reproduced in [1983] *Rev. Arb.* 525.

[74] On the Austrian aspects of this litigation, see W. Melis, 9 *YBIL* 163, and also B. Goldman [1983] *Rev. Arb.* 407-8.

[75] [1985] *Rev. Arb.* 438.

[75b] The litigation arising from this dispute has now reached the House of Lords, but it is understood that all points here discussed was not debated.

[76] *Supra,* n. 4.

[77] Quoting Fouchard (*supra,* n. 4), Articles 575-630, and the same author, 'L'arbitrage internationale en France aprés le décret du 12 Mai 1981', Clunet (1982) 374, 395.

[78] Lando (*supra,* n. 4). 766. He refers in this context to Article 26 of the ICC Rules of Arbitration, 1976, which requires the arbitration to 'make every effort to make sure that the award is enforceable at law'.

[79] See M. Virally, in *Etudes Goldman*, 381.

[80] As to the relationship between Article 38 of the statute of the International Court of Justice and the *lex mercatoria*, see Goldman, 'Réalité et perspectives' 486, citing A. Broches.

[81] Lando (*supra*, n. 4), 749.

[81a] The inclusion of this text in the present article when first published has been misunderstood. The author has set out to enumerate the rules which have been claimed in the literature as examples of the *lex*. He does not suggest that the claims can in every case be sustained, at least if the *lex* is given its 'macro' connotation: see the footnotes which follow.

[82] I have omitted from this list one or two rules, referred to in the literature, of a procedural nature (such as a rule that the arbitrator has power to adjudicate on his own jurisdiction) since the literature as a whole and the theoretical foundations which it proposes treat the *lex mercatoria* as a body of substantive law.

[83] So many authors have stated this principle, that citation would be superfluous. It is justly pointed out by M. Virally, in *Etudes Goldman*, 381, that *pacta sunt servanda* is not really a rule on its own, but is merely a reflection of the nature of a contractual obligation. The problem is to decide when the rule admits of exceptions.

[84] The very guarded nature of this proposition is demanded by the uncertain state of the authorities. B. Goldman Clunet (1979), 475, 494, calls it a principle, or at least a presumption. The fact that *force majeure* and frustration are similar in some respects, but quite different in others, may have misled some arbitrators (see the comments on Cremades and Plehn (*supra*, n. 4), 342). There is often no problem where a 'micro' *lex mercatoria* is involved, as in ICC No. 1512, Clunet (1974: 908 (India and Pakistan). But on a wider canvas some of the decisions cannot command general acceptance. If ICC No. 1703 decides that long-term contracts are subject to an implied right of suspension in cases of *force majeure*, this is inconsistent with the common law. So too are the 'nombreuses sentences' referred to in Fouchard (*supra*, n. 4), Article 620. Other ICC awards, including Nos. 1782, 2139, 2142, 2216, 2478 and 3093, have been cited on this subject, but to the present author they seem either irrelevant or insufficient to enable any clear statement to be made as to the present relationship between the first two general principles. In any developed legal system this is a troublesome topic, but in the *lex mercatoria* it seems to be particularly difficult. (See a valiant attempt at a synthesis by Derains, Clunet (1974) 944, and also B. Goldman, Clunet (1979) 494.)

[85] Goldman, 'Frontiers' 184 [cites] from a treatise by Fouchard an unpublished award to this effect. In an *ad hoc* arbitration YBIL (1982) 77, the arbitrators were *amiable compositeurs*, but expressed themselves to be applying the *lex mercatoria* and applied the concept of *abus de droit* to the giving of notice to terminate a commercial relationship. This concept cannot form part of a 'macro' *lex mercatoria*, since it is not known to the common law.

[86] To this effect, see Lando (*supra*, n. 4), 765. There appears to be no authority for such a radical proposition in the reported awards, and although there are a very few traces of something similar in the common law (e.g. in relation to liquidated damages and penalties and the equity against forfeiture), it would not, as stated in the text, form part of a 'macro' *lex mercatoria*.

[87] See Derains, Clunet (1976) 947 citing unreported ICC Award No. 2540. The observations of the arbitrators appear to have been *obiter*, since they decided according to national law. The doctrine is not known to the common law.

[88] Goldman, '*Contemporary Problems*', 116; id., 'Réalités et perspectives', 492, and Loquin, *Apport*. The latter states that the principle is wider than principles which are applicable by national laws to 'les operations internes', and the references to awards suggest that it is a generalisation from other rules. See e.g. ICC No. 2520, Clunet (1978) 992, and No. 2478, Clunet (1978), 925. The *Norsolor* case (*supra*, n. 73) is the most conspicuous example of this doctrine in operation.

[89] Loquin, 'L'Arbitrage', 765, citing ICC No. 1110, apparently unreported, but discussed in some detail in Lew, *Applicable Law* 553 (*supra*, n. 4), ff. Like ICC No. 3913, Clunet (1984) 920, and also No. 3916, Clunet (1984) 930 (which is to the opposite effect) this was a case on jurisdiction, and was therefore perhaps concerned with international *ordre public*, rather than the *lex mercatoria*. See also Lalive, *ICCA* 52, citing No. 2730, Clunet (1984) 914, also reported 9 *YBCA* 105. The latter could have been, and perhaps was, decided by direct reference to Yugoslav law, or by the *ordre public* of the *lex fori*. I suspect that the same is likely to be true in most, if not all, cases in this category.

[90] See e.g. ICC No. 2730 and *supra*, n. 89. The transaction involved a fraud on the Yugoslav exchange control authorities.

[91] To this effect, Goldman, *'Contemporary Problems'*, 123, and Lalive *ICCA* Articles 136-7. There appear to be few if any reported arbitral awards on the point. Perhaps it should be classed as a principle of international *ordre public* rather than *lex mercatoria*.

[92] The broader version of this principle is extracted by Derains from ICC No. 2375, Clunet (1976) 973. See also Goldman, 'Réalités et perspectives', 496. This case and the Dow Chemical case were both concerned with the question of whether associated companies were bound by the arbitration clause. Nos. 2375 and 1434, Clunet (1976) 978, are also referred to. I believe that most of these cases could, without recourse to this very far-reaching doctrine, which is certainly not part of the common law, have been decided simply by enquiring whether a consent to arbitration as between the associated company and the other parties could be spelt out of their words and conduct. See No. 2138, Clunet (1975) 934.

[93] See Loquin, *Apport*, Article 39 and Goldman 'Réalités et perspectives', 492, citing ICC No. 2478, Clunet (1975) 925 (and note thereon by Derains), also No. 2291, Clunet (1976) 989. The former is an example of the promisee's duty to mitigate his loss; the latter is referred to at n. 95. *infra*.

[94] Cremades and Plehn (*supra*, n. 4), 346. There are several awards to this effect, including ICC No. 1512, Clunet (1974) 905; No. 1990, Clunet (1974) 897; No. 2748, Clunet (1975) 925; No. 2291, Clunet (1976) 989. It may be doubted whether this is a separate rule, rather than an application of *pacta sunt servanda*.

[95] A common lawyer must step delicately here. Much attention has been given to *Soc. Européene d'Etudes v. Yugoslav Government* (1959), *J. de Dr. Int.* 1074, ad to ICC Award No. 2291, Clunet (1976) 989. Unfortunately, space does not permit a full discussion of these two awards and the interpretation which have been placed upon them. The former was a remarkable case in which the arbitrators implied into an engineering contract a guarantee against exchange losses, resulting in an award of 20 times the sum stipulated by the contract. This decision, described by Fouchard (*supra*, n. 4), Article 618 as 'audacieuse', could not be said to exemplify any *lex mercatoria* with claims to a world-wide perspective and one may detect a note of unease about it even among enthusiasts. The other award, ICC No. 2291, is an example of those cases where a commonplace dispute was given an extra dimension by unnecessary recourse to the *lex mercatoria*. It is, however, an instructive example of the dangers of making unsupported generalisations. In the award and commentary we find that Anglo-Saxon law is 'plus accessible à la revision des contrats en cas de déséquilibre même pour la cause économique (clause, de hardship)', as well as reference to 'le présence presque automatique de clauses de ce type dans les contrats internationaux'. The former is not a correct statement of the common law; and the inclusion of hardship and similar clauses in the routine type of transportation contract with which the arbitrators were concerned is almost, if not entirely, unknown.

[96] Award ICC No. 2583, Clunet (1976) 950, and note Derains; No. 3540, Clunet (1981) 915, 7. *YBCA* 124.

[97] Fouchard)*supra*, n. 4). 441, citing an unpublished award.

[98] A contract describing itself as 'vente d'équipement' was treated as embracing a contract of services in ICC No. 3242, Clunet (1982) 968.

[99] ICC No. 2404, Clunet (1978) 995.

[100] This rule appears on all the lists. Various awards are cited in support, including ICC No. 2478, Clunet (1975) 925; No. 2103, Clunet (1974) 902; No. 3344, Clunet (1982) 978; No. 2412, Clunet (1974) 892. The awards on mitigation rarely call up the *lex mercatoria* in so many words; they merely treat the principle as obvious.

[101] Fouchard (*supra*, n. 4), 441, citing an unpublished award.

[102] ICC No. 3344, Clunet (1982) 978; No. 3243, Clunet (1982) 968; No. 2250, Clunet (1976) 992, have been cited in support.

[103] Commentary on ICC No. 2520 (*supra*, no. 102), citing No. 2291.

[104] ICC No. 3540 (*supra*, n. 96). As given in *YBCA* 131 the conditions for the exercise of a set-off resemble those for set-off in 'in law' under English law, but are more restrictive than those of the set-off 'in equity'.

[105] ICC No. 1434, Clunet (1976) 978.

[106] ICC No. 3344, Clunet (1982) 978. This conclusion, said to be 'fortement influencé par le droit francais', is not consistent with the common law.

[107] P. Schlosser, op. cit., 107.

[108] There is, of course, a risk of unfairness here, It is too easy to say that if the rules form part of every nation's law, they are banal, and that if they do not, they cannot be the subject of a valid generalisation.

[109] Even with the help of colleagues here and abroad and generous access to libraries, the present author was unable to follow up by any means all the references cited in the more readily available literature.

[110] e.g., the Society of Maritime Arbitrators in the United States and various chambers of trade and arbitral institutions in Europe.

[111] Arbitral awards applying national laws, like the judgments of courts, form part of the corpus of national laws, from which, by a process of creative induction, an international, arbitrator may derive the rules of the *lex mercatoria*; but the adviser cannot safely treat them as directly establishing these rules.

[112] e.g., Cremades and Plehn (*supra*, n. 4), 342, and J. Lew, *Lib. Am. Saunders*, 231. See also Derrains, Clunet (1977) 931, on the editorial principles of that journal.

[113] Among published awards ICC No. 4237, 10 *YBCA* 52, may be an isolated example.

[114] Many instances are collected in J. Lew, *Applicable Law*, (*supra*, n. 4).

[115] See 'L'Objet essential du droit, la prévisibilité', in Fouchard (*supra*, n. 4) 435.

[116] Some large claims are made for the current acceptability of the *lex mercatoria*. For example, 'L'existence de régles transnationales qui régissent les relations économiques, notamment entre Etats et entreprises étrangéres, n'est plus sérieusement contestable aujourd'hui' (P. Leboulanger, *Les Contrats entre états et enterprises étrangeres* (1985), 221). It is however noteworthy that many commentators, including Goldman himself, express the position in much less extreme terms.

[117] There can be no doubt that the divergence between the language of Articles 28(1) and (2) was deliberate, and marks a real difference in meaning. See the Analytical Commentary on the draft text, prepared by the Secretariat of UNCITRAL, A/C No. 9/264, p. 62 and 63 (English version). A proposal to assimilate the language of Article 28(2) to that of Article 28(1) was discussed, but not adopted; see Analytical Compilation of Comments by Governments, A/C No. 9/263, p. 41 (English version).

[118] See e.g. Grigera Naón (*supra*, n. 11), 91.

[119] This is well recognised by Derains, Clunet (1977) 976 and Clunet (1980) 950, where he speaks of the 'banalisation' of arbitration.

[120] Of course, many awards are still honoured spontaneously. But it is much more common than it used to be for claimants to seek security for an eventual award, and the

disapprobation of colleagues is not the force it was. Interestingly, a commentator (Cremades and Plehn (*supra*, n. 4), p. 325. n. 39) cited. reinsurance as an example of a field where awards are spontaneously honoured. This was so in the past when the market was narrow, and default could be fatal. Nowadays, in the experience of the present author, reinsurance is the most bitterly litigious of all areas of commercial activity.

[121] Malynes, the first English author on the old *lex mercatoria*, was a merchant. His book, *Consueto, vel Lex Mercatoria* was addressed to a wide public. It was said to be of 'Necessary for Statesmen, Judges, Magistrates, Temporal and Civil Lawyers, Mintmen, Merchants and all others negotiating in any parts of the World'.