Annual Survey of International & Comparative Law

Volume 2
Issue 1 *01/01/1995*

Article 8

1995

Lex Mercatoria in European and U.S. Trade Practice: Time to Take a Closer Look

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LEX MERCATORIA IN EUROPEAN AND U.S. TRADE PRACTICE: TIME TO TAKE A CLOSER LOOK*

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I. *LEX MERCATORIA* AS THE CHOSEN LAW TO GOVERN A CONTRACT

The activities of private parties should not be ignored in any study of the current trends in the development of harmonized legal standards to govern international trade. After all, private parties are the predominant players in international commerce. By and large, private parties to commercial contracts have the freedom to select the laws which will govern their agreements. They may also include specific provisions in a contract which derogate from the law which would otherwise govern the agreement. In this way, the activities of private traders, and the actual manner in which they choose to do business, have a direct bearing on the degree to which international conventions regarding commercial contracts can ultimately harmonize international commercial trade practices.[1]

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* This is an expanded version of the talk presented at the Fifth Annual Fulbright Symposium on International Legal Problems, Fourth Regional Meeting of the American Society of International Law, "Current Developments in International Trade Cooperation and the Protection of the Environment and Human Rights," held on March 17, 1995, at Golden Gate University School of Law in San Francisco. Edited by Jeffrey A. Chen.

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1. To give one small example, the United Nations Convention on Contracts for the International Sale of Goods ("CISG") will have little practical effect if private parties consistently exercise their right to derogate from its provisions under

On the other hand, if private parties to international commercial contracts select an "internationalized" or "de-nationalized" law to govern their contracts, an analogous development of harmonized international commercial trade practices brought about by purely private action could emerge *de facto*. The present study concerns the use of just such an "internationalized" or "de-nationalized law" — *lex mercatoria* — as a choice of law for the interpretation of contracts. Until now, *lex mercatoria* has not been widely considered as a desirable choice of applicable law, but the recent publication of *Principles of International Commercial Contracts* by UNIDROIT[2] makes it worthwhile to take a second look at this subject.

The term *lex mercatoria,* often translated into English literally as "law merchant," or in its more Anglicized version, "mercantile law," needs definition. *Lex mercatoria* has been aptly described as "a uniform system of law to regulate international commercial transactions, avoiding the vagaries of differing national systems."[3] This definition may be concise and cogent, but it is entirely devoid of content. The same problem afflicts other definitions of *lex mercatoria.*[4]

Given such a lack of specific content, the question arises whether any use is in fact made of *lex mercatoria.* There are a surprising number of current commentaries and academic writings on the subject of *lex mercatoria,* especially as a rule to be applied in international commercial arbitration.[5] Although

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Article 6 by selecting the law of a particular nation to govern their agreement. Annex I of the Final Act of the U.N. Conference on Contracts for the International Sale of Goods, 1980 (A/CONF.97/19). The U.N.-certified English language text has been reprinted at 52 C.F.R. § 6264 (1987).

2. International Institute for Unification of Private Law (UNIDROIT), Rome (1994).

3. The author acknowledges his indebtedness to MESSRS. REDFERN & HUNTER,INTERNATIONAL COMMERCIAL ARBITRATION 117 (2d ed. 1991).

4. For example: "This system of law comprises the rules which have been developed to regulate and facilitate international trade relations and the customs and practices which have attained universal (or at least very extensive) recognition in international trade." LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION ¶343 at 436 (Oceana 1978).

5. *See, e.g.,* Karyn S. Weinberg, *Equity in International Arbitration: How Fair is "Fair"? A Study of Lex Mercatoria and Amiable Composition,* 12 B.U. INT'L L.J. 227 (1994); Francis A. Gabor, *Symposium: Reflections on the International Unification of Sales Law: Stepchild of the New Lex Mercatoria: Private International Law*

actual arbitration awards are discussed in these writings, the assertions found in them concerning the popularity of *lex mercatoria* as a choice of law are not founded on any empirical data.[6]

It appears that arbitrators do apply *lex mercatoria* at times, but most of the reported instances seem to be in the absence of any agreement by the parties as to the governing law.[7] The more fundamental question is the extent to which parties to international commercial contracts purposely select *lex mercatoria* to govern the interpretation of their contracts. There is no simple way to survey the content of existing private contracts.[8] In an extremely unscientific attempt to answer this question, surveys were sent to a number of attorneys around the world, active in international commercial matters. Virtually every recipient replied that he had not had a client

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from the United States Perspective, 8 NW. J. INT'L L. & BUS. 538 (1988); Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria (Eason-Weinmann Center for Comparative Law Colloquium: The Internationalization of Law and Legal Practice),* 63 TUL. L. REV. 575 (1989); Keith Highet, *The Enigma of the Lex Mercatoria,* 63 TUL. L. REV. 613 (1989). All of these authors build upon the extensive publications of Berthold Goldman, Clive M. Schmitthoff, and others.

6. For instance, Ole Lando, *The Law Applicable to the Merits of the Dispute,* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION (Lew ed. 1985), states: "A choice of the *lex mercatoria* is becoming more and more frequent in international contracts . . . Furthermore parties often choose a combination of the *lex mercatoria* and equity (*amiable compositeur*)." Lando cites Goldman, *La lex mercatoria dans les contrats et l'arbitrages internationaux: réalités et perspectives,* THE INFLUENCE OF THE EUROPEAN COMMUNITIES UPON PRIVATE INTERNATIONAL LAW OF THE MEMBER STATES 211 (Brussels 1981), but Goldman is more modest in his contribution to Lew's work, THE APPLICABLE LAW: GENERAL PRINCIPLES OF LAW — THE LEX MERCATORIA, *supra* at 116: "One may meet clauses that expressly exclude the application of every municipal law, and provide for the exclusive application of general principles and usages of international trade," citing ICC Award, Case No. 1569/70, Derains, *Le statut des usages du commerce international devant les juridictions arbitrales,* [1973] *Revue de l'arbitrage* 122, 135, and Derains, 105 *Clunet* 997 (1978).

An exception is Professor Trakman's study of contract practices in the international petroleum industry, *see infra* note 8.

7. *See, e.g.*, examples discussed in Carlo Croff, *The Applicable Law in an International Commercial Arbitration: Is it Still a Conflict of Laws Problem?,* 16 INT'L LAW 613, 636-37 (1982).

8. *See* LEON TRAKMAN, THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW (1983), for an analysis of the use of *lex mercatoria* in the international petroleum industry. For criticism of Trakman's survey method, *see* Chris Williams, *The Search for Bases of Decision in Commercial Law: Llewellyn Redux,* 97 HARV. L. REV. 1495, 1500-3 (1984) (Book Review).

enter into a contract incorporating *lex mercatoria* as a choice of law in the past ten years. Most went on to add that they would strongly advise against such a provision, if a client were foolish enough to propose it.[9]

The next question relates to the reasons for the study of something that is rarely if ever used in practice. In some cases there are valid substantive reasons to prefer a "de-nationalized" law, for instance when the logical choice of national law does not adequately address the type of commerce in question.[10] The point has been made that this is rarely the case anymore, as the laws of most countries have been modernized to address standard international commercial concerns,[11] but national regulations regarding export, import, currency flow, or intellectual property can still make a specific national law undesirable from the point of view of one party or the other.

Quite apart from the possibility that a national law may be undesirable or unacceptable, *lex mercatoria* may operate more fairly, because it is not tied to either trading partner's home law, nor to any single third country's law. This is particularly true when one party is a state-controlled entity, for whose benefit the law might be changed,[12] but it would also apply to situations in which the legal system of a nation is generally skewed in favor of domestic importers or exporters, so long as the distortion has not resulted in the adoption of any mandatory laws.

Another potential advantage to the widespread use of *lex mercatoria* would be the lower transaction costs associated with trade conducted according to its terms, assuming that *lex mercatoria* actually consists of uniform principles, uniformly

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9. Some implied that it was equally foolish for anyone to ask the survey question.

10. *See, e.g.*, Amin Rasheed Shipping Corp. v. Kuwait Ins. Co. (the Al Wahab), 2 ALL E.R. 1983 (H.L.), where a marine insurance contract did not specify any choice of law. The place where the policy was issued and was to be performed (Kuwait) did not have a commercial code applicable to such subjects, so the court applied British law.

11. Highet, *supra* note 5, at 619. Regarding contracts to which a state is a party, *see* Delaume, *supra* note 5, at 610.

12. C. Czarnikow, Ltd. v. Centrala Handlu Zagranicznego Rolimpex, 3 W.L.R. 274 (1978) [Award of June 19, 1958].

applied. The need for guidance regarding a national law prior to accepting it as the choice of law to govern an agreement would be avoided if there were a truly "internationalized" set of commercial laws which could be selected.[13]

II. PARTIES' CHOICE OF *LEX MERCATORIA* AS THE GOVERNING LAW OF THE CONTRACTS

The vagueness and uncertainty which surround the substantive content of *lex mercatoria* have prevented it from being considered for more widespread use. There are some new sources from which a more specific and exhaustive description of the content of *lex mercatoria* could be derived, but to determine whether this would make a difference, the current perception of a lack of content requires further in-depth exploration.

Some commentators say that *lex mercatoria* simply does not exist as law.[14] Others find in it only the most general and inoffensive principles of law, such as *pacta sunt servanda*.[15] Definitions such as "rules of law which are common to all or most of the States engaged in international trade . . . [and] where such common rules are not ascertainable, . . . the rule . . . which appears to [the arbitrator] to be the most appropriate and equitable considering the laws of several legal systems"[16] do not inspire confidence when setting off on a search for rules of decision which can be applied to a particular set of facts.

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13. The choice of *lex mercatoria* to govern substantive aspects of contract disputes can be analogized in this respect to the "delocalisation" of procedural law for international arbitration. *See* REDFERN AND HUNTER, *supra* note 3, at 81-95.

14. Keith Highet has referred to *lex mercatoria* as "a sort of shadowy, optional, aleatory, international commercial congeries of rules and principles." Highet, *supra* note 5, at 618. Professor Chris Williams argues that no legal standard should be drawn from international commercial behavior without proof that those arrangements result from "mutually understood and commonly accepted trade customs," rather than sheer economic power. *See* Williams, *supra,* note 8 at 1508. Other distinguished jurists and commentators have concurred, including LORD JUSTICE MUSTILL, *THE NEW LEX MERCATORIA,* IN LIBER AMICORUM FOR LORD WILBERFORCE 149 (M. Bos & I. Brownlie eds. 1987).

15. REDFERN AND HUNTER, *supra* note 3, at 119-20.

16. Ole Lando, *The Lex Mercatoria in International Commercial Arbitration,* 34 Int'l & Comp. L.Q. 747 (1985).

The real questions here are what development in the *lex mercatoria* would be necessary to make it a palatable choice, and is that goal within reach? Although rare, the use of "denationalized" law in international contracts is not wholly unknown today. One unusual example of a contractual choice of "internationalized" law is found in the agreement for construction of the Channel Tunnel, between Eurotunnel (the owner and operator) and Transmanche Link (the group of English and French construction companies), which provides that it shall "be governed by and interpreted in accordance with the principles common to both English law and French law, and in the absence of such common principles by such general principles of international trade law as have been applied by national and international tribunals." Although there is common ground between these two exemplars of the common law and civil law systems — English law and French law — it has proved difficult to fashion a comprehensive set of laws from their conjuncture, and the Dispute Review Board and the arbitral panels have had to rely on general principles such as "pacta sunt servanda" and "actor incumbit probatio" (plaintiff bears the burden of proof).

Another well-known example is the *Sapphire Petroleum* case,[17] where the agreement incorporated "principles of law common to Iran and the several nations in which the other parties to this Agreement are incorporated, and in the absence of such common principles, then by and in accordance with principles of law recognized by civilized nations in general." Arbitral tribunals also occasionally apply "general principles of law" to resolve disputes in the absence of any effective choice of law by the parties.[18] Despite these examples, the reality ap-

17. Sapphire International Petroleum Ltd. v. The National Iranian Oil Company, 13 Int'l & Comp. L.Q. 1011 (1964).

18. *See e.g.,* Soc. Pabalk Ticaret Sirketi v. Soc. Anon. Norsolor, Award of October 26, 1979, English translation in 1984 Y.B. Commercial Arbitration 109, where the arbitrators (sitting in Vienna) applied the principle of *lex mercatoria* requiring good faith in the execution of contracts to a dispute arising from the termination of an agreement between a French company and a Turkish company. The Supreme Court of Austria held the arbitrators had not violated any mandatory rule of law through the use of a general principle which underlies the French, Turkish and Austrian systems of law. *Id.* at 161. The award was eventually enforced in France. *See also,* English translation in 24 I.L.M. 360 (1985), XI Y.B. Commercial Arbitration 484 (1986); Thompson, *Norsolor v. Pabalk,* 17 J. World Trade L. 358 (1983).

pears to be that *lex mercatoria* is not often incorporated into contracts by the parties, nor explicitly applied in resolving contract disputes. Should the inquiry therefore be stopped at this point? If there are no real-world implications to a more fully-developed *lex mercatoria* why continue this inquiry? At the risk of being accused of conjuring up illusions of practical import from the thin air of academic discourse, the reality is that there is more to it here than meets the eye.

The reluctance of commercial parties to incorporate *lex mercatoria* into more international commercial contracts is not caused by a lack of power to make this choice of law. There is broad acceptance of the proposition that party autonomy to choose the law which will govern an agreement ("proper law of the contract") requires that the parties' choice be respected under most circumstances. In judicial proceedings in Western Europe, this is set forth in Article 3(1) of the Convention on the Law Applicable to Contractual Obligations (Rome, 1980).[19]

The doctrine of party autonomy is widely accepted in the United States as well. A few years ago, the California Supreme Court held that the Hong Kong choice of law provision in a shareholders' agreement was enforceable even though the causes of action alleged by the plaintiff under California law apparently did not exist under Hong Kong law.[20] In a recent very closely-watched case, the U.S. Supreme Court delivered an important ruling regarding the effect of a choice of law clause on the powers of arbitrators, but never questioned the right of the parties to agree that their contract, entered into in Illinois, should be governed by New York law.[21] International

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See also, Petroleum Development (Trucial Coast) Ltd. v. The Sheikh of Abu Dhabi, 1 Int'l Comp. L.Q. 247, 250 (1952), where the arbitrator held that an oil concession agreement in Abu Dhabi which provided that it should be interpreted according to "goodwill and sincerity of belief" could not be subjected to the law of Abu Dhabi or England, but required application of "principles rooted in the good sense and common practice of the generality of civilized nations."

19. "A contract shall be governed by the law chosen by the parties." 19 I.L.M. 1492 (1980), in force for all of the member states of the European Union as of December 31, 1994.

20. Nedlloyd Lines B.V. v. Superior Court, 3 Cal. 4th 459, 11 Cal. Rptr. 2d 330 (1992).

21. Mastrobuono v. Shearson Lehman Hutton, __ U.S. __, 115 S. Ct. 1212 (1995) (Federal Arbitration Act 9 U.S.C.A. §1, *et seq.* preempts provisions of New

arbitral tribunals also are specifically directed to respect party autonomy.[22]

Some legal systems require a relationship between the agreement and the law chosen to govern it, but these restrictions are rarely an issue, since it is rare for parties to select a law to govern their contract which does not have "some reasonable basis" for its use.[23] Presumably, there would be a "reasonable basis" for selecting *lex mercatoria* to govern a contract for transnational trade. Other limits on party autonomy, *e.g.*, the inapplicability of provisions which conflict with the mandatory law of the forum or place of arbitration, are beyond the scope of this study, except to confirm that the same limitations may be applied to restrict the parties' choice of provisions found in the *lex mercatoria* which conflict with such basic principles of the forum state.[24]

III. REASONS FOR NOT RECOMMENDING *LEX MERCATORIA* AS A CHOICE OF LAW

As the survey respondents made clear, when lawyers advise their clients on a contractual choice of law, they recommend selection of a definitive and provable law. By "definitive"

York law which preclude arbitrator from awarding punitive damages).

22. *See, e.g.*, UNCITRAL Arbitration Rules, Art. 33.1: "The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute."; ICC Rules, Art. 13.3: "The parties shall be free to determine the law to be applied by the arbitrator to the merits of the dispute."; Washington Convention, Art. 42: "The Tribunal shall decide a dispute in accordance with such rules of law as may be agreed by the parties." [Convention on the Settlement of Investment Disputes Between States and Nationals of Other States, opened for signature March 18, 1965, 17 U.S.T. 1270, T.I.A.S. No. 6090, 575 U.N.T.S. 159.]; European Convention on International Commercial Arbitration of 1961, Art. VII.: "The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute." [Made in Geneva April 21, 1961, 484 U.N.T.S. 349.]; CAL. CIV. PROC. CODE § 1297.281 (West 1994): "The arbitral tribunal shall decide the dispute in accordance with the rules of law designated by the parties as applicable to the substance of the dispute."

23. RESTATEMENT (SECOND) OF CONFLICT OF LAWS § 187(2)(a) requires a "substantial relationship" or "some other reasonable basis." U.C.C. § 1-105 requires a "reasonable relation."

24. There may also be an argument for permitting the parties *more* freedom when they select *lex mercatoria*, on the ground that an "internationalized" law should be subject only to negative mandatory (that is, prohibitory) provisions of local law, *i.e.* the law of the forum, but that too will have to wait for another day.

it is meant that the chosen law consists of a comprehensive set of decision-making rules which can be applied to resolve a dispute. "Provable" refers to those rules embodied in a fixed form which can be presented to a dispute resolution forum. The essential point of this advice is to make sure that the parties have determined in their contract the substantive content of the rules which a judge or arbitrator should apply in resolving any future dispute.

By these criteria, *lex mercatoria* simply has not stood up. The problem is both in its "provability," and in finding a comprehensive set of principles within *lex mercatoria.* For problems with determining the existence of any purported principle of *lex mercatoria,* just look at its sources: practices followed since time immemorial, or at least since the Roman *ius gentium;* ancient cases in dusty tomes; writings of erudite scholars who passed away about the time the steam engine was revolutionizing industry.[25] There is also the current literature in law reviews and academic publications, in a variety of languages. As a collection of commercial practices, the content of *lex mercatoria* has not been discoverable in any one single place. Furthermore, those partial listings that did exist were not found in the normal places to which judges and arbitrators (and lawyers) turn. The occasional law review article is no substitute for a code or, in common law jurisdictions, line of judicial opinions.

Nor has *lex mercatoria* been "definitive" in the sense of supplying a comprehensive set of decision-making rules which can be applied to resolve a dispute. Its content instead has been described as "legal maxims which on the whole are admirable but scarcely add up to a complete and comprehensive system of law."[26] These include the principle that contracts

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25. *See, e.g.,* FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA (1992), who traces early development of the *lex mercatoria* from Roman origins through the medieval law merchant, 14th century English statutes, and the opinions of Lord Mansfield, beginning in 1756. *Id.* at 9-20. *See also* Croff, *supra* note 7, at 634: "[*lex mercatoria*] has its origins in the *"ius gentium"* of Roman law, developed in the medieval merchants community in Italy, and reached its zenith between the eighteenth and the nineteenth century in England."

26. REDFERN & HUNTER, *supra* note 3, at 119-20. *See also* Highet, *supra* note 5, at 619.

should be performed according to their terms (*pacta sunt servanda*), and in good faith; that when unforeseen difficulties intervene, the parties should negotiate in good faith to overcome them; that substantial breach of the contract by one party relieves the other, but that injured parties must take steps to mitigate their losses, and must not delay unreasonably in asserting their rights.[27]

There are more recent sources, however, and one new source in particular which could make a difference. At the end of 1994, UNIDROIT published its *Principles of International Commercial Contracts;* 119 articles describing the basic governing principles of international contracts. This, together with other modern sources, brings us closer to the point where we can say that *lex mercatoria* is definitive and provable. At the very least, it makes it worthwhile to take a second look at the use of *lex mercatoria* as a choice of law.

IV. THE AVAILABLE MODERN SOURCES FAVORING PARTIES' CHOICE OF *LEX MERCATORIA*

Before discussing in detail the UNIDROIT *Principles,* it is useful to identify another modern source of international contract law, the United Nations Convention on Contracts for the International Sale of Goods (CISG).[28] When seeking a definitive and provable set of rules to govern international contracts, not derived exclusively from any single national law, the CISG is an obvious document to consider. At its heart, the CISG provides a set of "transnational" rules regarding the formation and performance of contracts, even though it applies directly only when ratified by the country whose law is to govern the contract.[29]

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27. REDFERN & HUNTER, *supra* note 3, at 119-20; LOWENFELD, *Lex Mercatoria: An Arbitrator's View,* LEX MERCATORIA AND ARBITRATION 54-55 (Thomas Carbonneau, ed. 1990), *citing* LORD JUSTICE MUSTILL, *THE NEW LEX MERCATORIA* IN LIBER AMICORUM FOR LORD WILBERFORCE 149 (1987).

28. *Supra* note 1.

29. For most states which have ratified the CISG, the provisions of the Convention supply the law which will be applied whenever the state's conflict of law rules lead to the application of the law of a contracting state. The United States has stated a reservation to Art. 1(1)(b) of the CISG, and consequently will only apply the provisions of the Convention when the parties to a contract within the scope of the Convention have their respective places of business in countries which

The CISG's provisions are the product of compromise between long-standing legal traditions which could be used, *a priori,* as a source of law. In fact, as those provisions are utilized, by deliberate incorporation into contracts or by default, they will become a part of the custom and practice of traders. In this sense, they evidence a kind of international mercantile law, at least regarding the limited subjects addressed in the CISG.

The primary contribution of the CISG in this arena is the level of specificity which it adds to the generally-accepted, but ill-defined principles acknowledged throughout the history of *lex mercatoria.* One small example of this added level of specificity is found in Article 79, which elaborates on the concept of *force majeure.* Under Article 79, a party is not liable for failure to perform under a contract if the failure is due to an impediment beyond his control, and he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome the impediment or its consequences. Article 79 even extends the rule of *force majeure* to failure caused by the failure of a third party to perform, under stated conditions. Under the convention, a party entitled to rely on Article 79 must give notice of that fact within a reasonable time, a concept which accords with the general principles found throughout the older descriptions of *lex mercatoria.*

The UNIDROIT *Principles* constitute a newer and even more interesting development in what can be viewed as a trend toward a more definitive and provable *lex mercatoria.* The introduction to the *Principles* describes them as a step toward "an international restatement of general principles of contract law," and states: "The objective of the UNIDROIT Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied." It should be remembered that the *Principles* are the product of compromise between representatives of various legal systems. In this sense, they are not

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have ratified the CISG.

only a "restatement", but also an effort toward harmonization, which implies that they may lean in the perceived direction of "progress," and may not always reflect the actual trading practices now in use.

The Preamble to the *Principles* suggests they may be useful in several situations: (1) when chosen by the parties to a contract; (2) when the parties have referred to *lex mercatoria* or general principles of law to govern their contract; (3) to supplement or replace domestic law which does not provide a clear rule for the issue at hand; (4) to interpret or supplement international conventions on uniform commercial law; and (5) as a model for domestic legislation.

The actual practical significance of collecting any set of principles regarding international contracts in a single volume may outweigh all of the self-described attributes found in the opening pages of the *Principles*. In a sense, the great importance of the *Principles* is that the volume exists. It can be taken to court, it can be referred to by page and article number, and persons who are referred to its provisions can locate and review them without difficulty. This alone is a great contribution toward making *lex mercatoria* definitive and provable.

The contents of the *Principles* are also helpful in that they add specific definition to acknowledged concepts, such as good faith, *force majeure*, and the right of termination. The obligation to act in good faith is a basic tenet of *lex mercatoria* and, indeed, of most legal systems,[30] but Article 2.15 goes much further in defining an obligation to negotiate in good faith: "(1) A party is free to negotiate and is not liable for failure to reach an agreement; (2) However, a party who negotiates or breaks off negotiations in bad faith is liable for the losses caused to the other party; (3) It is bad faith, in particular, for a party to enter into or continue negotiations when intending not to reach an agreement with the other party."

30. REDFERN & HUNTER, *supra* note 3, at 119-120. *See also*, Highet, *supra* note 5, at 619; LOWENFELD, *supra* note 27.

On the subject of *force majeure,* Article 7.1.7 of the *Principles* generally tracks the language of the CISG (without specifying a right to rely on the failure of a third party to perform), but a significant advance is found in Articles 6.2.2 and 6.2.3, defining "hardship" and its consequences. In level of specificity, these terms far exceed the Uniform Commercial Code's references to "commercial impracticability."[31]

The definition of "hardship" found in the *Principles* is located within the context of a general obligation to perform contract obligations, even though performance has become more onerous (Article 6.2.1). "Hardship" itself is defined in Article 6.2.2 as "the occurrence of events [which] fundamentally alters the equilibrium of the contract either because the cost of a party's performance has increased or because the value of the performance a party receives has diminished," providing the events themselves meet specific requirements designed to ensure that they were outside the scope of the risk undertaken in the contract. When hardship does exist, Article 6.2.3 grants a specific right to request renegotiation, and to resort to judicial determination (in U.S. terms, a "declaratory judgment") of the parties' rights under the contract.

Section 3 provides a final example of the extent to which the *Principles* render *lex mercatoria* more definitive. Article 7.3 describes in detail a party's right to terminate a contract upon "fundamental non-performance" by the other party. Article 7.3.1 in particular focuses the determination on the question whether one party's non-performance has "substantially deprived the aggrieved party of what it was entitled to expect under the contract," the extent to which strict compliance with the obligation was of essence to the contract, and the nature of the breach and the consequent loss. The concept of anticipatory breach, procedural requirements regarding notice, and provisions concerning the effects of termination are all set forth in the five articles which follow.

None of these provisions may be very startling in terms of national law, but they have now been set forth in a way which

31. U.C.C. § 2-615.

makes them accessible within the parameters of *lex mercatoria*. They give specific content to previously vague precepts, making *lex mercatoria* more definitive, and by the very fact of their publication, more provable.[32]

V. THE APPLICATION OF *LEX MERCATORIA* BY JUDGES AND ARBITRATORS IN THE ABSENCE OF THE PARTIES' DESIGNATION OF THEIR CHOICE OF LAW

There are several situations in which a dispute resolution forum has the authority to apply *lex mercatoria,* even though it has not explicitly been selected by the parties to govern their contract. First, this may occur when the parties can be said to have incorporated (or at least not excluded) *lex mercatoria* by implication. Second, it may occur because the forum is specifically authorized by its rules of procedure to apply *lex mercatoria* where no choice of law has been made by the parties, or to supplement the choice of law which has been made.

Courts and arbitral tribunals may use *lex mercatoria* where it is incorporated into domestic law by reference, for instances in which domestic law does not provide the rule of decision. German law, for instance, requires reference to the customs and practices which are in effect in trade and commerce ("*Handelsbrauch*"), when interpreting commercial agreements between merchants.[33] In the United States, Uniform Commercial Code §1-103 provides: "Unless displaced by the particular provisions of this code, the principles of law and equity, including the law merchant . . . shall supplement its provisions."[34] Belgian law provides that an agreement "does not only bind in respect of what has been explicitly set forth, but in respect of consequences which equity, custom, or the law

32. If nothing else, following the suggestion in the Preamble to the *Principles* that parties incorporate the *Principles* as their choice of law certainly would be an improvement over a simple reference to *"lex mercatoria,"* even if the *Principles* themselves do not elevate *lex mercatoria* to the status of the preferred choice of law.

33. HANDELSGESETZBUCH (HGB) § 346.

34. In Pribus v. Bush, 118 Cal. App. 3d 1003, 173 Cal. Rptr. 747 (1981), the court relied upon this provision in applying *lex mercatoria* to determine the propriety of an *allonge* to a promissory note.

attach to the obligation, taking into account its nature."[35]

According to the survey respondents, France, Italy, The Netherlands, and the United Kingdom all provide the possibility for judges and arbitrators to make use of general principles of law, and of custom and usage, in interpreting a contract, although there seems to be little or no experience with the use of these legal provisions to draw upon *lex mercatoria* in resolving contract disputes. A little further afield, Article 1 of the Korean Commercial Code states that matters not provided for by the code will be governed by "commercial customary law." In the Philippines, the Supreme Court described the Uniform Customs and Practices for Documentary Credits (UCP) as a part of *lex mercatoria* in a 1993 case,[36] and under Section 2 of the Spanish Code of Commerce in effect in the Philippines, applied the UCP to decide a dispute between a Philippine advising bank and the beneficiary of a letter of credit.[37] Panama's law provides a similar opportunity: "if commercial rights and obligations issues can not be resolved by the text of the commercial law [code], its spirit, or analogy to other cases stipulated therein, commercial usage generally observed in each situs will be applied."[38]

In the past, the existence of such provisions has not led to widespread reference to *lex mercatoria.* In this country, it is true that the U.C.C. allows a court or arbitrator to apply "the law merchant," but practical matters of proof have largely precluded litigants and their counsel from relying on this provision. Until now, the difficulty of proving the rule of law which a party claims to find in the *lex mercatoria* has been substantial. The publication of the UNIDROIT *Principles* eases this burden, making it more likely that a court or arbitrator will actually use some of the authority granted by these statutory provisions.

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35. Article 1135, Judicial Code.

36. Bank of America NT & SA v. Court of Appeals, 228 S.C.R.A. 357 (3rd 1993).

37. Section 2 provides that, in the absence of provisions in the Commercial Code, contracts are governed by "the commercial usages generally observed in each place [of business] and in the absence of both, by the rules of the civil law."

38. Commercial Code, Art. 5.

In arbitration, it is even clearer that the tribunal may refer to international commercial principles or trading practices in interpreting a contract, because this is provided for in the applicable rules. The UNCITRAL Model Law and UNCITRAL Arbitration Rules each provide that in the absence of any designation of the applicable law by the parties, the arbitral tribunal shall apply "the law determined by the conflict of laws rules which it considers applicable,"[39] and "shall take into account the usages of the trade applicable to the transaction."[40] The wording of the European Convention on International Arbitration of 1961, Art. VII(1), is nearly identical.[41]

The International Chamber of Commerce Rules of Arbitration, Article 13.3 provides: "In the absence of any indication by the parties as to the applicable law, the arbitrator shall apply the law designated as the proper law by the rule of conflict which he deems appropriate." Article 13.5 continues: "In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages. Where the parties could not agree on which national law to apply, an arbitrator's use of *lex mercatoria* in an ICC arbitration has been upheld by the French *Cour de Cassation.*"[42]

Some legislation takes an even more direct approach. Rather than require the arbitrator to apply any particular conflict of laws rule, California Code of Civil Procedure § 1297.283 provides: "Failing any designation of the law . . . by the parties, the arbitral tribunal shall apply the rules of law it considers to be appropriate given all the circumstances surrounding the dispute." Article 1496 of the French Code of Civil Procedure, Decree No. 81-500 of May 12, 1981, is similarly liberal: "The arbitrator shall settle the dispute in accordance

39. UNCITRAL Model Law, Art. 28(2); UNCITRAL Arbitration Rules, Art. 33(1).

40. UNCITRAL Model Law, Art. 28(4); UNCITRAL Arbitration Rules, Art. 33(3).

41. "Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable . . . the arbitrators shall take account of the terms of the contract and trade usages."

42. Cour de Cassation Judgement of October 22, 1991, No. 1354, Compania Valenciana de Cementos Portland S.A. v. Primary Coal, Inc. [cited in Pointon & Brown, *France: Resolving Disputes*, EUROMONEY 13 (Supp. Sept. 1991)].

with the rules which the parties have chosen, and in the absence of such a choice, in accordance with those rules which he considers to be appropriate."

VI. PARTIES' REFERENCE TO *LEX MERCATORIA* IN THEIR CONTRACTS AS A CHOICE OF LAW OR AN INCORPORATION OF STANDARD CONTRACT TERMS

The Preamble to the UNIDROIT *Principles* notes the existing dichotomy between national court systems, which traditionally require that a contract be grounded in a domestic legal system, and arbitration, in which the parties are more free to select "rules of law" which are not tied to any such system. The Preamble suggests that while the *Principles* would be merely a set of incorporated contract terms in national court, they could be true "rules of law" in international arbitration, binding and exclusive, with the exception of mandatory rules of the forum. A number of the respondents to the survey volunteered that, under their national legal systems, the *Principles* could not be selected by contract parties as rules of law because they had not been ratified or enacted by any sovereign power.

It is not the purpose of this study to delve any further into this subject except to point out that some commentators have called for a re-examination of this position.[43] Another solution would be to enact domestic legislation adopting the UNIDROIT

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43. For example:

> [W]e must overcome the traditional distinction between binding national rules of commercial law and other forms of operative principles which result from self-determinative interaction in the commercial sphere, reflecting the concordant wills and accepted behavior of individuals at a given point of time . . . Certainly, some definitions of law would seem to exclude international law merchant. Yet insistence that there are no rules governing the relations between merchants other than those resulting from governmental action or judicial creation, is inspired by the old dogmatism that any form of social and economic structure that is not backed by judicial enforceability can only be a form of rule falling short of law.

Werner F. Ebke, *The Law Merchant: The Evolution of Commercial Law, by Leon E. Trakman,* 21 INT'L LAW 606, 614 (1987) (book review).

Principles automatically to govern international commercial contracts, unless the parties expressly choose to apply another law. At first glance, this proposal may seem to generate even more uncertainty, but in fact it accords nicely with the law now in place in all countries which have ratified the CISG.

In California for instance, the CISG applies automatically to international commercial contracts, unless excluded. This already causes international contracts to be governed by a law different in some respects from that governing domestic contracts. Adoption of the *Principles* would expand the narrow focus of the CISG into a far more comprehensive legal structure to govern those contracts, and would be most appropriate in supporting international arbitration in California, for which a separate statutory regime is already provided.[44]

VII. FUTURE USE TO BE MADE OF *LEX MERCATORIA*

The final question is whether *lex mercatoria* is now definitive enough and provable enough to be selected by parties as a choice of law to govern international commercial contracts or, to rephrase the question, whether counsel should begin recommending the selection of *lex mercatoria* to govern the contracts. The answer today is "No". However, increased use of *lex mercatoria* can be foreseen, especially as it is reflected in the UNIDROIT *Principles*. This increased usage is likely first to appear in the context of dispute resolution, as judges and arbitrators continue to grapple with international commercial disputes in which no national law has been chosen, or where the selected law does not specifically provide for the situation. In those settings, the detailed and specific provisions which can now easily be located in a single volume will make it far easier to propose and prove the content of *lex mercatoria* as the law to apply in resolving the dispute.

If the *Principles* are in fact referred to in arbitral awards and court decisions, their interpretation may eventually reach a level of consistency which is capable of offering concrete

44. CAL. CIV. PROC. CODE § 1297.11, *et seq.* (West 1994).

guidance to attorneys and satisfying the basic need of international commercial traders for predictability. At that point, we may well find ourselves recommending the UNIDROIT *Principles* as a choice of law during the negotiation of problematic agreements. It is the commercial entities themselves, actively participating in international commerce, that would benefit most from a more uniform set of legal rules. It will be interesting to observe the extent to which the clients and the lawyers may share in taking a greater interest in the continuing development of *lex mercatoria.*[45]

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45. The author wishes to acknowledge here the generous contributions of time and information by the respondents to this survey. If there are any inaccuracies in the translation or the interpretation of the laws of other nations, it is due to the author's error, and to the fact that each respondent has not been asked to double-check the author's use of the information supplied. By country, thanks are expressed to Koen Vanhaerents, Charles Price, Howard Liebman, Belgium; Philippe Xavier-Bender, Christian Camboulive, Daniel Carton, Gordon Orenbuch, Olivier d'Ormesson, Jean Thibaud, Dominique Voillemot, France; Peter Waltz, Detlef Bähr, Joachim Kaffanke, Germany; Franco Ferrari, Francesco Gianni, Gian Origoni, Stefano Faldella, Italy; Shigehiko Goto, Japan; Gary Sullivan, Korea; Peter Roorda, The Netherlands; Fernando Berguido, Panama; Custodio Parlade, Philippines; Michael Kay, United Kingdom.