V. The Legal Norms of the International Commercial and Financial Legal Order: Their Articulation and Ranking, and the Effect of the Absence of Legislative Power

Our last task is to identify the *lex mercatoria* itself. Its assumed vagueness has often been used as an argument against its validity, but it is in truth an issue not all that difficult to resolve. In my recent book on International Commercial Financial and Trade Law (2d ed. 2004), I mention the sources of law in the international commercial and financial legal order, and therefore of this *lex mercatoria*, and give their hierarchy as follows:

(a) fundamental legal principle;
(b) mandatory custom;
(c) mandatory uniform treaty law (to the extent applicable under its own scope definition and in its own territory);
(d) the contract (or party autonomy in matters at the free disposition of the parties);
(e) directory custom;
(f) directory uniform treaty law (to the extent applicable under its own scope definition and in its own territory);
(g) general principles largely derived from comparative law, uniform treaty law (even where not directly applicable or not sufficiently ratified), ICC Rules and the like; and
(h) residually, domestic laws found through conflict of laws rules.

This hierarchy should be strictly applied in the order in which it is given. Thus only if there are no higher rules or principles, should rules or principles that are lower in the hierarchy be applied.

As to the fundamental legal notions or principles, which come first and form the basis of the whole system, they are

(a) the principle of *pacta sunt servanda*, as the essence of all contract law;
(b) the principle of ownership including the transferability of assets, as the essence of all property law. In international business and finance, we are here concerned mainly with chattels and intangible assets like receivables and similar claims;
(c) liability for one's own actions, especially (i) if wrongful (certainly if the
wrong is of a major nature) as the essence of tort law, (ii) if leading to detrimental reliance on such action by others, as another fundamental principal of contract law, (iii) if resulting in principals creating the appearance of authority in others, as an essential tenet of the law of agency, or (iv) if resulting in owners creating an appearance of ownership of their assets in others, as an additional fundamental principal in the law of ownership and the heart of the protection of the bona fide purchaser.

There are other fundamental principles in terms of

d) fiduciary duties in contract and in agency leading to special protections of counter parties, especially where those parties are weaker or in a position of dependence (including consumers against wholesalers, workers against employers, individuals against the state, smaller investors against brokers), and duties of disclosure and faithful implementation of one's commitments;

(e) the notion that one should give back what is owned by others leading to notions of unjust enrichment and restitution;

(f) respect for acquired or similar rights, traditionally particularly relevant to outlaw retroactive government action, but also used to support owners of proprietary rights in assets that move to other countries;

(g) equality of treatment between creditors, shareholders and other classes of interested parties with similar rights unless they have postponed themselves or acquired better proprietary interests in the debtor's assets; Then there are also the:

(h) fundamental procedural protections in terms of impartiality, proper jurisdiction, proper hearings and the possibility to mount an adequate defense, now often related to the more recent (and also internationalized) standards of human rights and basic protections (in Europe Article 6 of the 1950 European Convention on Human Rights).

(i) fundamental protections against fraud, sharp practices, excessive power, cartels, bribery and insider dealing or other forms of manipulation in market-related assets (also in their civil and commercial aspects) and against money laundering;

Finally there may also be fundamental principles of

(j) environmental protection, although this is developing; and

(k) labor law protections.

[...]

86 See L.J. Mustill, The New Lex Mercatoria, supra note 1, at 149.

87 No fundamental distinction is here made between principles and rules. At least in the ‘realist’ schools, it is thought that even rules are in practice never more than guidelines, at least if they cannot be literally applied through syllogism. See Llewellyn, supra note 25. I follow that lead for which there are many other reasons not here directly relevant. It is not to say of course that the fundamental and general principles may not benefit from more precise formulation in contract, custom and practices.

88 It was not considered fundamental in the natural law school but is increasingly considered a human rights-related notion. See Protocol One to Convention for the Protection of Human Rights and Fundamental Freedoms, Nov. 4, 1950, art. 1, Eur. T.S. No. 5, available at http://www.echr.coe.int/Eng/BasicTexts.htm; see also supra text accompanying note 19.

Referring Principles:

- II.4 - Agency by estoppel / apparent authority
- IV.1.2 - Sanctity of contracts
- IV.7.2 - Invalidity of contract due to bribery
- IX.1 - Basic rule
- XIII.3.1 - Arbitral due process