Lex Mercatoria: Of Arbitrators and their Awards (London, 1622)

The second Mean or rather ordinarie course to end the questions and controversies arising between Merchants, is by way of Arbitrement, when both parties do make choice of honest men to end their causes, which is voluntary and in their own power, and therefore called Arbitrium, or Free will, whence the name Arbitrator is derived: and these men (by some called good men) give their judgments by Awards, according to equity and conscience, observing the Custome of Merchants, and ought to be void of all partiality more or less to the one and to the other; having only care that right may take place according to the truth, and that the difference may be ended with brevity and expedition: Insomuch that he may not be called an Arbitrator, who to please his friend maketh delays, and propagateth their differences, but he is rather a disturber and an enemy to justice and truth; wherefore the manner to elect Arbitrators is worthy the observation. Some are contented to name four or six persons on either side in Writing, and refer the naming or electing of four out of them by reciprocal proceeding, when one named the first person, another the second, and then again the third, and the other the fourth person. Others putting several names in a paper, are contented that a mean Stranger shall upon the backside of the paper prick their names with a Pin, or that (as they are numbred) the Dice shall be cast upon them accordingly by the number.

Others put their names in several papers, and cause them to be mingled and drawn by way of Lot, by an indifferent person; which course may be thought allowable, as we have noted in the Chapter of dividing of Commodities by Lots. Others will do the same by nomination of them, and drawing the longest or shortest Straw, or by any other extraordinary means of pointing, numbring, or describing, all tending to one end, to have indifferency, and that partiality may by all means be avoided.

Consideration must be had also, whether two, three, or all four shall have authority to determine the cause, if they can, to be done within a limited time, wherein their Award is to be delivered up, and whether they may name an Umpire or not. All which must be declared in the Bond of Compromise, unless the question be only upon one point to be determined, wherein no Bond is needful but by way of assumpsit, by delivering a piece of Coin each to other, and thereby binding themselves reciprocally upon the penalty of a sum of Money to stand to the Judgment, it is ended.

And the said penalty or forfeiture by assumpsit may be recovered by Law and the Merchants Courts, as well as the forfeitures upon Bonds, if the party do not perform the sentence or award, if the award by lawfully made: to which end Arbitrators are to take notice of the five points following, which by the Law do make void all awards.

1. That the award be given up in writing within the time limited, by the bonds of Compromise made between the parties.

2. That there be limited or appointed by the Award some reciprocal act to be done by each party to other, which the Law requireth to be Quid pro quo, albeit never so small.

3. That they make a final end, and do determine upon all the points or differences produced before them by specification or otherwise, if they be required so to do, and authorised thereunto.
4. That they do not award any of the parties to do or perform any unlawful act, or thing prohibited and against the Law.

5. That they do not award any thing whereby any matter, already determined by Decree in Chancery, or Judgment at the Common-Law, or any sentence judicially given in the cause, be infringed or medled withal.

These points ought to be observed for the reasons following. For touching the first, if the Award be not delivered up in Writing under the Arbitrators hands and seals, if the condition of the Bond do so limit the same; then have they no authority to do the same after the time limited unto them by consent of the parties.

For the second point reason requireth, in all human actions, a reciprocal Act from one man to another, by deed of performance, called *Quid pro quo*, although it were a man’s Salary for his pains; which in some cases causeth men to Award, that each party shall pay so much to the Scrivener or Notary for Writing the said Award: But this is no collateral act between the parties, neither is it any matter compromised to the Arbitrators; it is therefore better to Express and Award, That each party shall seal and deliver, either general acquittances each to other, or with some exceptions therein, as the Award will lead them.

The third point is considerable, where the differences are by both parties, or either of them, delivered in Articles in Writing to the Arbitrators; for herein it is not sufficient to say, That the said Arbitrators shall have power and authority to determine all questions, differences, doubts, controversies, matters of accounts, reckonings, or any other usual or general words, from the beginning of the World until the date of the Bond: But they must give their Award upon every particular Article and upon them all.

The fourth point, That the Arbitrators do not award anything which is unlawful, is to be understood of things which are evil in themselves, called *Malum in se*, and of things called evil, because they are upon some respects and considerations prohibited, and therefore termed *Malum prohibitum*; as the wearing of Hats at all times,\(^2\) transportation of Corn,\(^3\) eating of Flesh in Lent,\(^4\) and the like, wherein there is a further consideration which requireth a distinction. As for example,

\[^2\] an Arbitrator or many Arbitrators do Award, that a sum of money shall be paid to such a man during all the time he is unmarried, is good in Law; but to bind the party by Award that he shall not marry, because he should enjoy the Money still, is unlawful, and void by the Law.

The fifth point is of very great consequence, to bind the actions of men to the obedience of the Law, whereunto such reverence is due, that Decrees, Judgments, and Sentences of Judicial Courts of Record are always of a higher nature than Arbitrators Awards. Nevertheless in many doubtful questions the Civilians themselves (after long and Curious debates) do assign them to be determined by Arbitrators having skill and knowledge of the Customs of Merchants, which always do intend expedition. And that is the cause wherefore an Umpire chosen upon Arbitrable matters, hath an absolute authority, to himself given, to end the matter alone, without hearing the Arbitrators, if he will: For albeit this is not without some danger, and that the ending of Arbitrators is to be preferred; yet brevity and expedition of justice in Merchants affairs is much regarded, that by all means the same ought to be furthered. Hence it proceeded that the Merchants Courts governed by Priors and Consuls (whereof we entreat in the next Chapter)\(^5\) have authority to reform or confirm the sentence of Arbitrators, when Merchants will appeal their Arbitrement before them, rather than to go to Law: And with this Proviso, That the appellation of the sentence of the said Arbitrators shall not be received by the said Prior and Consuls, before the Arbitrement be performed by the party that doth appeal, conditionally that restitution shall be made, if there be cause, upon the end of the Process. And the said Prior and Consuls are to note, That no Merchant nor other, being of their Jurisdiction, can transport or make over their interest to any person privileged, and not subject to the said Jurisdiction, be it by Gift, Sale, or Exchange, or by any other means, to the end thereby to avoid their Authority; upon pain that the same transports and possessings shall be of none effect, and the loss of their Right and Cause. And all Notaries who shall receive any such transports, shall be punished by the said Prior and Consuls in a Penalty arbitrable: and further shall be condemned to pay unto the adverse Party all his costs and charges, which he hath sustained by means thereof.
And to the end this Expedition may by all means be furthered, the said Prior and Consuls may distribute and refer Causes unto the most ancient and expert Merchants in the matters in question, to make a true report of the state of the Cause, according to the allegations and proof of the Parties, without any Salary to be given to the said Merchants; howbeit in Italy some reward is given upon the Ricourse of the Merchants.

These Merchants are to take the advice of the Advocate, Counsel, and Attorney of the said Prior and Consuls in matters difficult, the better to discern the right of the Cause, to make the Report more complete, for the sooner ending of it according to Reason and Right, by the true Affirmations of the Merchants, and not by feigned, subtile and crafty Writings, which oftentimes do darken the Truth, under the colour of fair Phrases declared in them, causing protraction and delays.

Marcus Tul. Cicero hath truly set down the difference which is between Judges of the Law, and Arbitrators, inclining to the most easy and less chargeable course, saying, That the one is servile, the other is noble; the one is bound to the Law, the other is not; the one doth consist in Fact, the other in Justice, the one is proper to the Magistrates, the other is reserved to the Law: the one is written in the Law, the other is without the Law; the one is without the power of Magistrates; howbeit it is not forbidden but all Justices in Peace may compound Differences, and their Authority doth enable them beter thereunto. And in this regard it is said, That an Umpire doth represent the Lord Chancellor's Authority, because that Commissioners report of the Masters and others of the Chancery, or of Merchants, is the Ground-work whereupon the Lord Chancellor doth deliver his Sentence, and maketh up his Decrees. And the said Commissioners have a further authority and power than Arbitrators; for they may examine Witnesses upon Oath, upon any thing in question where there wanteth proof; or they may minister the said Oath to either party, upon pregnant occasions to bolt out the truth. The like Authority have the Prior and Consuls of Merchants; and, moreover, their Authority doth far exceed the power of Commissioner: for, as Arbitrators have a determinate power to make an end of Controversies in general terms, without declaration of particulars, so hath the Prior and Consuls power to do the like; whereas Commissioners are to give a reason and declaration of their proceedings to the Lord Chancellor. Finally, the Arbitrator's Authority implieth a voluntary Command proceeding from both parties, which the Commissioners have not, but the Merchants Court hath.

* Editors' Note: Gerard Malyncs published in 1622 'Consuedo, vel, Lex Mercatoria: or, the Law Merchant: Divided into three parts, according to the Essential Parts of Traffick Necessary for All Statestmen, Judges, Magistrates, Temporal and Civil lawyers, Mint-Men, Merchants, Mariners, and all Others Negotiating in all Places of the World'. From about 1586, Malynes had been a commissioner of trade in the Low Countries and a frequent adviser to the Privy Council under Queen Elizabeth 1 and James 1 (he died in 1641). This work was one of many on commercial, economic and monetary affairs; and it contains one of the first legal commentaries on international commercial arbitration in England. (This text is taken from Chapter XV of Volume 1 of the work's 1686 edition, at pages 305-307; it was recently re-published in facsimile by Professional Books Limited, Abingdon, 1981 The footnotes below have been added by the Editors). As Scrutton recited in his 'General Survey of the History of the Law Merchant', Select Essays in Anglo-American History, Vol III, 1909 at page 8, the Ancient Law Merchant, or 'Lex Mercatoria' was an old-established special law administered by special tribunals for a special class of people; and he cited with approbation Malynes' introduction to this work: 'I have entitled the book according to the ancient name of Lex Mercatoria, and not just Jus Mercatorum, because it is a customary law approved by the authorities of all kingdoms and commonweales, and not a law established by the sovereignly of any prince.' For modern English commentaries on 'Lex Mercatoria', see Boyd (1990) 6 Arbitration International 122, and Kerr (1991) Am. Rev. Int. Arb., 377; Contrast Mustill in (1988) 4 Arbitration International 86.).

1 This refers to Chapter XL of Malynes' work: 'On dividing Commodities by Lots' (Volume 1, page 145 ff).
2 The compulsory wearing of hats appears to have been introduced in 1570 under Queen Elizabeth 1 (xiii El. cap. xix): 'Every Person above the age of seven years shall wear upon the Sabbath and Holiday... upon their Heads, a Cap of Wool knit, thicked and dressed in England, made within this Realm, and only dressed and finished by some of the Trade of Cappers, upon Pain to forfeit for every Day not wearing three Shillings four pence: Except Maids, Ladies, Gentlewomen, Noble Personages, and every Lord, Knight and Gentleman of Twenty Marks Land and their Heirs, and such as have been born Office of Worship in any City, Borough, Town, Hamlet or Shire and the Wardens of the Worshipful Companies of London.' (This particular statute was repealed by 39. El. c18 s.45).
3 From early times, the English farmer was encouraged by the prohibition of the import of corn unless it was sold above a certain fixed price; and the consumer was protected by controls over re-sale and transport, particularly overseas: see Holdsworth's *History of English Law*, Vol 2 at page 472 and Vol 4 at page 374ff.

4 For example, the 1604 Statute of James 1 (ii Jac. cap xxviii) provided for 'what sorts of flesh, Licences to eat Flesh in Lent shall not extend, What Sort of Flesh shall not be killed in Lent to be put to Sale.'

5 This refers to Chapter XVI of Malynes' work: 'Of the Merchants' Courts, or Office of Prior and Consuls' (Volume 1, page 308ff).