

LEX MERCATORIA: IS IT RELEVANT TO INTERNATIONAL COMMERCIAL ARBITRATION?

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Abstract:

This Paper looks at *lex mercatoria* from the point of view of the author as an English lawyer, and considers the following - before seeking to draw some conclusions:

1. *Lex Mercatoria*: is it relevant to cross-border contracts?”
2. Does the *lex mercatoria* exist as a separate system of law capable of use in cross-border commercial disputes? The Mustill view 25 years ago
3. What is the attitude of the English Courts to the *lex mercatoria*?
4. The UNIDROIT Principles and the UN Convention on Contracts for the International Sale of Goods (CISG)
5. Transnational Law Database: www.tldb.de
6. The *lex mercatoria* 25 years later: Professor William W. Park
7. Conclusions

I. *Lex Mercatoria*: is it relevant to cross-border contracts?”

A business man is embarking for the first time on a cross-border transaction. He consults a commercial lawyer. The commercial lawyer must consider various contractual matters, including provisions dealing with potential disputes between the parties:

The drafting of an arbitration clause

Institutional or *ad hoc* arbitration?

If institutional, which institution, eg ICC, LCIA, AAA, etc

The place and language of the arbitration;

The governing law (or the “proper law”) of the contract, and so on.

As to the governing law: say the contract is between English and French companies. The lawyer is likely to consider either English or French law as the governing law of the contract, that is, the law to be applied to the substance of any dispute that may arise in relation to that contract.

And as he and his client are English, he will aim for English law.

Say the contract is between English and German corporations for the construction of a factory in Italy. English, German or Italian law as the governing law?

These are simple examples of international commercial contracts. I would suggest that no sensible lawyer would advise his client, in either of those examples of day –to –day cross- border contracts, to choose the *lex mercatoria* as the governing law.

Or at any rate, not if he wants to continue acting for his businessman client.¹

II. Does *lex mercatoria* exist as a separate system of law capable of use in cross-border commercial disputes?

The Mustill view

If the *lex mercatoria* is potentially relevant to cross-border contracts, the next question to ask is: “What is the *lex mercatoria*?”

Or as Lord Justice Mustill (as he then was) put it, what does the label actually mean? More bluntly, he described the *lex mercatoria* as, “an anational system of which only the smallest minority of businessmen can ever have heard”²

¹ If the lawyer omitted to include a choice of law clause, it would still be difficult to see why in either example the *lex mercatoria* should be chosen. The more obvious choice would be one of the national laws with the “closest connection” to the contracts, ie the law of England, France, Germany or Italy.

² “The New *Lex Mercatoria: The First Twenty –five Years*”, by the Rt Hon Lord Justice Mustill, *Arbitration International*, 1988, 86 et seq at 98 and 101.

It is 25 years ago that Lord Mustill's article - "The New *Lex Mercatoria*: The First Twenty –five Years"- was published in *Arbitration International*, the journal of the London Court of Arbitration.

Michael Mustill is an eminent arbitration specialist. He has been closely involved in arbitration, both as Counsel and as a Judge, for many years. He has been a Judge of the English High Court, the Court of Appeal and the Appellate Committee of the House of Lords. He retired from full-time judicial sittings in 1991, returning to his old Chambers where he continues to act as arbitrator.

It is perhaps not surprising that Lord Mustill, writing in 1988, took what might be regarded as an Anglo-Saxon sceptical approach to the subject:

"FEW readers are likely to welcome an article on the *lex mercatoria* by an English lawyer. The common lawyer will not look kindly on an addition to the extensive literature on what he may be tempted to regard as a non-subject, having no contact with reality save through the medium of a handful of awards which could well have been rationalised more convincingly in terms of established legal principles. Conversely, a scholar nurtured in other disciplines may well anticipate yet another reactionary response to any doctrine lying outside the tradition of Anglo-Saxon jurisprudence."

He said that the debate about *lex mercatoria* "is about whether it can or does exist as a viable system". He envisages this scenario:

"Imagine that a practical lawyer is retained to advise a client who has become involved in a dispute which may lead to an international arbitration. The lawyer knows enough about modern theory to have heard of the *lex mercatoria*, and can envisage the possibility that if the matter does come to arbitration, he may find that the arbitrators, whose identities are at present unknown, may at least consider the application of the *lex*. A conscientious practitioner, he recognises the need to warn his client of this, and seeks to anticipate, and prepare himself to answer, the questions likely to be asked by a businessman who encounters the doctrine for the

first time. These are likely to be on the following lines. What is the *lex mercatoria*? What kind of law is it? When does it apply? Does it enable the arbitrator to decide in equity, according to his own inclinations? How does the *lex mercatoria* relate to national law? What are its sources? How are its rules to be ascertained? What are the rules, when so ascertained?"

Indeed, how do you define the *lex mercatoria*? Various definitions are quoted:

"A set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law." [Goldman]

Or: ". . . an anational *lex mercatoria* or ...hybrid legal system finding its sources both in national and international law and in the vaguely defined region of general to principles of law called "Transnational Law". [H.A. Grigera Naon]

Having studied the literature, Lord Mustill concludes that "the theoretical foundation of the doctrine has not yet been made explicit". Nevertheless – and notwithstanding the difficulty in discovering a definition of the *lex*- he set out a number of general propositions.

First, that the *lex mercatoria* is "anational". The rules governing it do not derive from any particular national body of substantive law: it is "an autonomous legal order".

Second, the prime sources of the *lex* are the principles of law common to trading nations and the usages of international trade - the latter including standard form of contracts.

Against that background, Lord Mustill listed seven sources of the law merchant:

1. Public International Law
2. Uniform Laws
3. The General Principles of Law

4. The Rules of International Organisations
5. Customs and usages
6. Standard Form Contracts.
7. Reporting of Arbitral Awards

Having listed what he saw as the seven sources of the law merchant, Lord Mustill then listed his view of the Rules of the *lex*. He set out twenty: “a modest haul for 25 years of international arbitration”. His Rules include the following (noted against each is a similar Trans-Lex Principle ³):

1.A general principle that contracts should *prima facie* be enforced according to their terms: *pacta sunt servanda* [*Trans Lex Principle No. IV.1.2*] ⁴

5. A contract should be performed in good faith [*No.I.1.1*]

³ The Trans-Lex Principles are referred to later in this Paper.

⁴ Was there a concept of *pacta sunt servanda* in Anglo-Saxon times?

“Written law in England dates back to the Anglo-Saxons. The Laws of King Alfred the Great (about AD 886) contained a series of 77 laws. While including a ‘tariff’ of compensation payable for wrongs and injuries caused, his laws also included other provisions: for example, provisions dealing with traders. The first of King Alfred’s list of Laws is of particular interest:

‘First we insist that there is particular need that each person keep his oath and his pledge carefully. If anyone be compelled to give either of these wrongly, either to support treachery to his lord or to provide any unlawful aid, then it is better to forswear than to fulfil. But if he pledge himself to that which it is right for him to fulfil and fails, let him submissively hand over his weapons and his possessions to his friends to keep, and stay 40 days in prison in a property of the King. Let him undergo there whatever the bishop prescribes as penance...’

A sanctity of contracts rule? An Anglo-Saxon Law on *pacta sunt servanda*?

Compare King Alfred’s Laws to the Vienna Convention on the Law of Treaties, which came into force over a thousand years later. Article 26 provides that: “Every treaty in force is binding upon the parties to it and must be performed by them in good faith.”

Anthony Connerty, Commonwealth Secretariat’s *Manual of International Dispute Resolution*, page 21-22. Published by the Commonwealth Secretariat, Marlborough House, Pall Mall, London SW1Y 5HX.

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6. A contract obtained by bribes or other dishonest means is void, or at least unenforceable [No. IV.7.2]
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 [No. IV.2.3]
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 [No. II.2 – the group of companies doctrine]
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 [No. IV.6.7]
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 [No.VI.1- fundamental non-performance]
14. Damages for breach of contract are limited to the foreseeable consequences of the breach [No. VII.2]
15. A party which has suffered a breach of contract must take reasonable steps to mitigate its loss [No.VII.4]
19. Contracts should be construed according to the principle *ut res magis valeat quam pereat* [No.IV.5.3- interpretation in favour of upholding a contract]

Returning to the businessman: do these sources and rules help him? At best, Lord Mustill was doubtful:

“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 he 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.

“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?”

Lord Mustill’s answer? “No – or at any rate not yet”

III. What is the attitude of the English Courts to the *lex mercatoria*?

Lord Mustill’s scepticism raises the matter of recognition and enforcement. Will the English courts recognise clauses providing for arbitration based on *lex mercatoria*? Will arbitration awards based on *lex mercatoria* be honoured? And in case of challenge, will awards based on the *lex* be enforced in national courts? What has been the attitude of the English courts?

A medieval law merchant existed in England for centuries. It was administered by courts in which merchants themselves were the judges. These courts dealt with disputes involving both English traders and foreign merchants. The law applied was not the domestic law of England but a general law based on mercantile codes and practices. Foreign traders from all parts of Europe were “content to have their disputes resolved by tribunals which, though locate in England, were required to have an equal number of English and foreign merchants as jurors, and were conversant with foreign mercantile usage and with the concepts of the civil law as well as the common law.” These English courts of the Middle Ages ultimately became redundant “because of the adaption of the common law itself to commercial needs and usages”.⁵

⁵ Goode on Commercial Law, Fourth Edn, 2010:

So the concept of the law merchant is not unknown in England. This section of the Paper now looks at a number of cases which illustrated the changing attitude of English judges to the *lex mercatoria*, and then considers the effect of the English Arbitration Act, 1996.

With the case law we start in 1922 in what might be described as the “Alsatia period”.

(1) The Alsatia view

1922: *Czarnikow v. Roth, Schmidt and Company* 6, a decision of the Court of Appeal.

The parties to the appeal entered into a contract for the sale and purchase of a quantity of sugar f.o.b. Antwerp. The contract was made on the terms of the Refined Sugar Association, which included provisions for disputes to be referred to arbitration and a clause – rule 19- which stated that “the obtaining an award from the tribunal shall be a condition precedent to the right of either party to sue the other in respect of any claim arising out of any such contract”. The Court of Appeal considered a ground of objection to rule 19 that “as an agreement it ousts the jurisdiction of the Courts of law, and is consequently against public policy and void”.

In considering ouster point, the Court dealt with the issue of extra-legal standards. Lord Justice Bankes stated that an arbitral tribunal is not entitled “to be a law unto itself, and free to administer any law, or no law, as it pleases. I cannot but think that this is against public policy.”

Lord Justice Scrutton stated that the Courts “do not allow the agreement of private parties to oust the jurisdiction of the King’s Courts. Arbitrators, unless expressly otherwise authorized, have to apply the laws of England... In my view to allow English citizens to agree to exclude this safeguard for the administration of the law is contrary to public policy. There must be no Alsatia in England where the King’s writ does not run. It seems quite clear that no British Court would recognize or enforce an

⁶ [1922] 2K.B.478

agreement of British citizens not to raise a defence of illegality by British law.”⁷

Lord Justice Atkin in his judgment stated his concern at arbitrators “at liberty to adopt any principles of law they pleased. In the case of powerful associations such as the present, able to impose their own arbitration clauses upon their members, and, by their uniform contract, conditions upon all non-members contracting with members, the result might be that in time codes of law would come to be administered in various trades differing substantially from the English mercantile law.”

1962: *Orion Compania Espanola De Seguros v. Belfort Maatschappij Voor Alemagne Verzekgringeen*⁸ The decision of the Court of Appeal in *Czarnikow v. Roth* was relied upon some 40 years later in the *Orion* case.

Belgian and Spanish parties to a reinsurance agreement had agreed to an arbitration clause which provided that the arbitrators “are relieved from all judicial formalities and may abstain from following the strict rules of law. They shall settle any dispute under this Agreement according to an equitable rather than a strictly legal interpretation of its terms...”

⁷ “In the seventeenth century, there existed, just outside the walls of the City of London, in the ward of Farringdon Without, from Fleet Street down to the banks of the Thames, between the Temple and St Brides, an area famed and feared for its lawlessness. This was the ‘sanctuary’ or ‘liberty’ of Whitefriars, colloquially known as Alsatia, named after Alsace, then undergoing the depredations of the Thirty Years War.

Following the dissolution of the Carmelite order that gave Whitefriars its name, the jurisdiction of this territory had become unclear. Ownership was uncertain; the authorities responsible for the area after the reformation ill-defined; and the entitlements attached to the monastery may not have disappeared with the monks. Most importantly, the right of ‘sanctuary’ was still a part of the law, and this area could still apparently grant immunity from arrest.

The charter granted in 1608 by King James I to the inhabitants of Whitefriars appeared to acknowledge a certain measure of self-government, and so it soon became populated with the criminalised, especially debtors seeking refuge from bailiffs. Notoriety followed, as tales of murderers hiding out and mobs repulsing sheriffs spread. It was not until 1697 that legislation and raids put an end to Alsatia. But even after that, there were still places in London that claimed to be outside the purview of the authorities.” **Alsatia:** <http://alsatia.org.uk/sit>

⁸ 3 [1962] 2 Llloyd’s 257

Mr. Justice Megaw referred to the judgements of the three members of the Court of Appeal in the *Czarnikow* case and concluded that “it is the policy of the law in this country that, in the conduct of arbitrations, arbitrators must in general apply a fixed and recognisable system of law, which primarily and normally would be the law of England, and that they cannot be allowed to apply some different criterion such as the view of the individual arbitrator or umpire on abstract justice or equitable principles...”

Later in his judgment, Megaw, J stated that, if parties choose to provide that decisions be made not in accordance with law but in accordance with some other criterion such as what the arbitrators consider fair and reasonable, there would be no contract and therefore no binding arbitration clause, and any award “would not be an award which the law would recognise”.

(2) Post – Alsatia: “Modern Days”

A change in the view taken after the Alsatia period can be seen in two cases: the 1978 decision in the *Eagle Star* case and the 1987 decision of the Court of Appeal in the *Rakoil* case.

1978: *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* 9

This decision of the Court of Appeal is particularly significant because of the statement by Lord Denning— one of England’s greatest Judges- that the approach of the English Courts to arbitration has changed in what he called “modern days”.

The plaintiffs, Eagle Star, through their brokers, negotiated a reinsurance agreement with the defendants’ agents in 1967. Under the agreement, the defendants, Yuval, were liable for a proportion of the claims made under policies issued by the plaintiffs and received a corresponding proportion of premiums, based on the plaintiffs’ estimated premium income. Eagle Star’s brokers included a Mr. Delbourgo, described by Lord Denning, Master of the Rolls ¹⁰, as “one of those smart young men who

⁹ [1978] 1 Lloyd’s 357

¹⁰ The Keeper or Master of the Rolls and Records of the Chancery of England, known as

get a lot of business in a short time but leave a lot of troubles behind them”.

The treaty of reinsurance contained an arbitration clause that provided that the Arbitrators and Umpire “shall not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable rather than a strictly legal interpretation of the provisions of this Agreement...”

Dealing generally with arbitration, Lord Denning said that “At one time the Courts used to be very jealous of arbitrations. They used to find all sorts of reasons for interfering with arbitrators and their awards. But the approach to arbitration has changed in modern days. The Courts welcome arbitrations in commercial disputes. They encourage references to arbitration by commercial men in the City of London. They do not lightly interfere with their awards.”

Later, dealing with the wording of the arbitration clause itself, Lord Denning said that he was prepared to hold “that this arbitration clause, in all its provisions, is valid and of full effect, including the requirement that the arbitrators shall decide on equitable grounds rather than a strict legal interpretation.” He reached that decision having considered the earlier cases of *Orion* and *Czarnikow*.

The other members of the Court of Appeal, Lord Justice Goff and Lord Justice Shaw, agreed with Lord Denning.

1987: *Deutsche Schachtbau- und Tiefbohrgesellschaft mbH v Ras Al Khaimah National Oil Co and Shell International Petroleum Co. Ltd*¹¹. This was also a decision of the Court of Appeal. The members of the Court were Sir John Donaldson, Master of the Rolls, Lord Justice Woolf and Lord Justice Russell.

the Master of the Rolls, is the second most senior judge in England and Wales. The Lord Chief Justice is the most senior. The Master of the Rolls is the presiding officer of the Civil Division of the Court of Appeal and is the Head of Civil Justice. The first record of a Master of the Rolls is from 1286.

¹¹ [1987] 2 Lloyds 246

Sir John Donaldson set out the background to the case “Disputes arose between Deutsche Schachtbau- und Tiefbohrergesellschaft mbH (DST) and Ras Al Khaimah National Oil Co (Raknoc) under an oil exploration agreement dated 1 September 1976. The agreement contained an ICC arbitration clause and, in March 1979, DST referred its claims to an arbitral tribunal sitting in Geneva. In April 1979 Raknoc instituted proceedings in the court of R’as Al Khaimah for the rescission of the agreement on the ground that it had been obtained by misrepresentation and also for damages. Neither party took any part in the proceedings instituted by the other. DST succeeded in the arbitration, the award dated 4 July 1980 being for \$US 4,635,664. Raknoc succeeded in the litigation, judgment being given on 3 December 1979 whereby the agreement, or perhaps more accurately an earlier underlying agreement, was rescinded and DST was held liable to Raknoc in the sum of \$US 1,424,891.4323 and UAE Dh 110,687,839.4361.

At this stage honour, but little else, was satisfied, since neither party could find a way of enforcing these decisions. That situation might have continued indefinitely, but for the fact that in about June 1986 rumours reached DST that Shell International Petroleum Co Ltd (Shell) had been buying oil from Raknoc and would, presumably, be paying for that oil. Shell was an English subsidiary of the Anglo-Dutch group and DST set about trying to satisfy the award out of Shell’s payments to Raknoc.”

In pursuance of their duties under the ICC Rules, the arbitrators determined that the proper law governing the substantive obligations of the parties was “internationally accepted principles of law governing contractual obligations”.

Sir John Donaldson said that, in his judgment “there are three questions which the court has to ask itself when confronted with a clause which purports to provide that the rights of the parties shall be governed by some system of ‘law’ which is not that of England or any other state or is a serious modification of such a law.”

In summary these were:

- (1) *Did the parties intend to create legally enforceable rights and obligations?*
- (2) *Is the resulting agreement sufficiently certain to constitute a legally enforceable contract?*
- (3) *Would it be contrary to public policy to enforce the award, using the coercive powers of the state?*

The Judge continued: “Asking myself these questions, I am left in no doubt that the parties intended to create legally enforceable rights and liabilities and that the enforcement of the award would not be contrary to public policy. That only leaves the question of whether the agreement has the requisite degree of certainty. By choosing to arbitrate under the rules of the ICC and, in particular, art 13.3, the parties have left the proper law to be decided by the arbitrators and have not in terms confined the choice to national systems of law. I can see no basis for concluding that the arbitrators’ choice of proper law, a common denominator of principles underlying the laws of the various nations governing contractual relations, is outwith the scope of the choice which the parties left to the arbitrators.”

Lord Justice Woolf and Lord Justice Russell agreed with the Master of the Rolls.

(3) The English Arbitration Act 1996

The Act recognises that parties to an arbitration agreement may agree that their dispute is not to be decided in accordance with a recognised system of law.

Section 46(1) provides that an arbitral tribunal *shall* decide the dispute “..in accordance with the law chosen by the parties ... or, if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.”

Section 46(3) states that, where there is no such choice or agreement, the tribunal shall apply “the law determined by the conflict of law rules which it considers applicable.”

Article 28 of the UNCITRAL Model Law dealing with the Rules applicable to the substance of the dispute provides, where the parties have made a choice, that:

“(1) The arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute. Any designation of the law or legal system of a given State shall be construed, unless otherwise expressed, as directly referring to the substantive law of that State and not to its conflict of laws rules.”

Where no choice has been made by the parties, Article 28(2) states:

“Failing any designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.”

Article 28(3):

“The arbitral tribunal shall decide *ex aequo et bono* or as *amiable compositeur* only if the parties have expressly authorized it to do so.”

The Departmental Advisory Committee on Arbitration Law (advising Parliament on the proposed legislation relating to arbitration) advised that there should be a new and improved Arbitration Act for England, Wales and Northern Ireland. However, the Committee stated that such new Act should not adopt the Model Law- although it might have the “same structure and language of the Model Law...”

The DAC comment on what was Clause 46 of the Bill was that it reflected much but not all of Article 28. Section 46(1)(b) “recognises that the parties may agree that their dispute is not to be decided in accordance with a recognised system of law but under what in this country are often called ‘equity clauses’ or arbitration ‘ex aequo et bono’ or ‘amiable

composition' ie general considerations of justice and fairness etc." The Committee noted that "we have avoided using the Latin and French expressions found in the Model Law".

Is Section 46, with its reference to "the law" rather than "rules of law", sufficient to cover *lex mercatoria*? Is the *lex* covered by "or, if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal" ?

Whatever the answer to that question, it is clear that the situation in England has change considerably from the Alsatia views of 1922, and has moved into Lord Denning's "Modern Days".

IV. The UNIDROIT Principles and the UN Convention on Contracts for the International Sale of Goods (CISG)

In addition to the *Lex Mercatoria*, there are two sets of rules of contract law that are available to assist parties in international commercial transactions.

(1) The UNIDROIT Principles of International Commercial Contracts represent a system of rules of contract law. Their relevance to *lex mercatoria* is that "they may be applied when the parties have agreed that their contract be governed by general principles of law, the *lex mercatoria* or the like": the Preamble to the Principles.¹²

The Preamble states that the Principles set forth general rules for international commercial contracts, and shall be applied when the parties have agreed that their contract be governed by them, and may be also be applied when the parties have not chosen any law to govern their contract. They may be used to interpret or supplement international uniform law instruments.

¹² <http://www.unidroit.org/english/principles/contracts/main.htm>

A suggested model clause for Parties wishing to provide that their agreement be governed by the Principles might use the following words, adding any desired exceptions or modifications:

“This contract shall be governed by the UNIDROIT Principles (2010) [except as to Articles ...]”.

Parties wishing to provide in addition for the application of the law of a particular jurisdiction might use the following words:

“This contract shall be governed by the UNIDROIT Principles (2010) [except as to Articles...], supplemented when necessary by the law of [jurisdiction X]”.

The Principles are contained in 11 Chapters dealing with matters such as formation of contracts; validity and grounds of avoidance; performance; non-performance, termination and damages; set-off; assignment; and limitation.

(2) The purpose of the **UN Convention on Contracts for the International Sale of Goods (CISG)** is to provide “a modern, uniform and fair regime for contracts for the international sale of goods. Thus, the CISG contributes significantly to introducing certainty in commercial exchanges and decreasing transaction costs.

“The contract of sale is the backbone of international trade in all countries, irrespective of their legal tradition or level of economic development. The CISG is therefore considered one of the core international trade law conventions whose universal adoption is desirable.

“The CISG is the result of a legislative effort that started at the beginning of the twentieth century. The resulting text provides a careful balance between the interests of the buyer and of the seller. It has also inspired contract law reform at the national level.

“The adoption of the CISG provides modern, uniform legislation for the international sale of goods that would apply whenever contracts for the sale of goods are concluded between parties with a place of busi-

ness in Contracting States. In these cases, the CISG would apply directly, avoiding recourse to rules of private international law to determine the law applicable to the contract, adding significantly to the certainty and predictability of international sales contracts.

“Moreover, the CISG may apply to a contract for international sale of goods when the rules of private international law point at the law of a Contracting State as the applicable one, or by virtue of the choice of the contractual parties, regardless of whether their places of business are located in a Contracting State. In this latter case, the CISG provides a neutral body of rules that can be easily accepted in light of its transnational nature and of the wide availability of interpretative materials.”¹³

A database containing case law on the UNIDROIT Principles and the UN Convention on Contracts for the International Sale of Goods (CISG) is at <http://www.unilex.info>

The General Editor of UNILEX is Professor Michael Joachim Bonell.

V. Transnational Law Database: www.tldb.de

The TransLex Principles (at www.trans-lex.org) is an innovative project operated by the Center for Transnational Law (CENTRAL) at Cologne University, Germany, and intended to “provide international legal practice with an easily, freely and globally accessible Web-based platform to allow for the application of the (New *Lex Mercatoria*) in everyday arbitration and drafting practice.”

The *Principles* “are based on the concept of the ‘Creeping Codification’ of Transnational Law: a non-exhaustive, open list of principles and rules of the *lex mercatoria* that is constantly updated but never completed. This list-concept has met with approval in international legal practice”.

The Principles may be used for a number of purposes, for example:

¹³ http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html

- “ - to determine the applicable rules in a dispute if the parties have chosen ‘transnational commercial law’, ‘general principles of law’, ‘the lex mercatoria’ or the like;
- to determine the applicable law, if, absent a choice of law by the parties, the arbitrators decide to apply this concept to the dispute before them;
- to allow for an autonomous interpretation of and for the filling of internal gaps in international conventions and other uniform law instruments.”¹⁴

There are over one hundred Principles which are divided into 14 Chapters. These include:

- general provisions (including good faith);
- agency; set-off and assignment;
- contract, covering matters such as sanctity of contract, conclusion of contracts and contracting on standard terms, contractual obligations and invalidity;
- performance, non- performance and damages;
- unjust enrichment/ restitution;

Chapter XIII contains a section dealing with International Arbitration: the agreement, the tribunal, procedure, the award and termination of proceedings, and confidentiality

Chapter XIV covers Private International Law: the law applicable to international arbitration agreements and to international contracts; and the rule of validation (“If a contract has contacts to more than one jurisdiction and the parties have not agreed on the applicable law, it is in the presumed interest of the parties to apply the law, both as to form and to substance, that validates the contract”).

¹⁴ <http://www.trans-lex.org/content.php?what=8>

The Principles contain a Commentary which includes examples of arbitral awards: eg, No. IV.1.2 (sanctity of contracts) lists 10 ICC awards and a number of ICSID awards.

The Founder and Executive Director of CENTRAL is Professor Dr. Klaus Peter Berger.

VI. The *lex mercatoria* 25 years later: Professor William W. Park

Some 25 years after the publication of Lord Mustill's article "The New *Lex Mercatoria: The First Twenty –five Years*" came the publication of Professor William W. Park's "Arbitration of International Business Disputes: Studies in Law and Practice" [OUP, 2nd Edn, 2012].

William Park is Professor of Law at Boston University and is "one of the finest scholars of international arbitration" (Gabrielle Kaufmann - Kohler). He is President of the London Court of International Arbitration. The President of the United States appointed him to the Panel of Arbitrators for the International Centre for Settlement of Investment Disputes.

His co –authors on the section of his book dealing with *Lex Mercatoria* are the well-known international arbitrators Laurence Craig and Jan Paulsson.

Like Lord Mustill, the authors begin by asking what is meant by *lex mercatoria*.

They suggest three different notions: an autonomous legal order, a body of rules sufficient to decide a dispute, or a complement to otherwise applicable law, viewed as nothing more "than the gradual consolidation of usage and settled expectations in international trade".

They say that the debate on the issue was revitalised by Lord Mustill's "thoughtful and clear-eyed essay... a rare and fortunate contribution to the field..."

The aim of the authors is simply to shed light on what may be relevant to current practice. Their view is that “for all its intellectual fascination” *lex mercatoria* “does not appear to have had more than a marginal impact on the practice of international arbitration”. The proponents of the *lex* have the disconcerting habit of “announcing the existence of an entire planet on little more evidence than blips on the radar screen...”

They go on to consider the three heads.

Of the first head, the view is that the strongest objection to regarding the *lex mercatoria* as an autonomous legal order is that – at present at any rate- “it is simply not sufficient to deal with all aspects of an international commercial dispute”. The authors quote Lord Mustill’s comment that there appeared to be no or only rare instances of the *lex* being used in cases of tort, or fraud in the making of a contract, and no claim that it has the power to create rights *in rem* valid against third parties.

The second head - a body of rules sufficient to decide a dispute- is similarly rejected. The authors quote the Mustill approach: what principles of trade law “apart from those which are so common as to be useless”, are common to the legal systems of the members of the international business community?

And they add a comment on the UNIDROIT Principles: a saviour or a competitor to the *lex mercatoria*?

The third head of international trade usage – the notion of international usages which are so sufficiently established that parties consider themselves to be bound by them- is the concept that the authors “deem to be practically significant today. They hold it to be important and useful, but recognize that this proposition may be so mundane that learned commentators would doubtless have found it unworthy of new schools of thought. Nor would a skeptic like Mustill find in it the occasion to tax his wit and his pen, because he would accept it as the most natural thing in the world. In ‘The new *lex mercatoria*’ he gives the concept but a passing glance.”

The authors then move on to another topic: ICC awards as precedents: by publishing selected awards, the ICC “has contributed toward the development of the *lex mercatoria*”.

A number of principles emerge that have been applied in ICC arbitrations without reference to national law. Twenty such principles are listed, which include *pacta sunt servanda*, good faith in relation to performance and renegotiation, *force majeure*, mitigation of damages, limitation of damages to foreseeable consequences, set-off, and estoppel (“a creation of Anglo-American law”).

The authors note that Lord Mustill listed twenty rules representing rules said to constitute the *lex mercatoria*.

William Park, Laurence Craig and Jan Paulsson- like Michael Mustill- take a somewhat sceptical view of the *lex mercatoria*.

VII. Conclusions

One of the major benefits of arbitration in cross-border disputes is that it enables the parties to agree at the contracting stage that any disputes that arise will not be dealt with in their national courts, but will instead be determined in a neutral place by a tribunal whose members are conversant with international arbitration. And to some extent the parties may have a say in who shall be the members of the tribunal (or some of them).

It is also open to the parties to choose what law shall govern their contract.

In the type of day -to -day international commercial transactions mentioned earlier -a contract between English and French companies or a contract between English and German corporations for the construction of a factory in Italy- the choice of governing law should not raise serious problems. And even if the parties omit to provide which law is to govern, the arbitrators are likely to have little difficulty in choosing an appropriate national law.

But where a national law cannot be applied – say where one of the parties is a state or a state entity - is an arbitral tribunal likely to be helped by recourse to the *lex mercatoria*? Or would the tribunal – like Lord Mustill, William Park, Laurence Craig and Jan Paulsson – react by saying “What is the *lex mercatoria*?”

But if the tribunal were minded to opt for the *lex*- either as a system of law or as a complement to a national law or as a general guide – assistance in discovering the rules or principles of the *lex mercatoria* is available in the Transnational Law Database.

Assistance may also be found in the UNIDROIT Principles (a supporter or a competitor of *lex mercatoria*?) and in the CISG ¹⁵

Is the *lex mercatoria* relevant to international commercial arbitration? The hostility of the English courts to the *lex* has changed, and the English Arbitration Act permits arbitrators (where the parties agree) to decide disputes “in accordance with such other considerations as are agreed by them or determined by the tribunal.”

My view is that the *lex mercatoria* is available to be used – but only if absolutely necessary.

Anthony Connerty

April 2013

¹⁵ The UNILEX database contains a report of a CIETAC arbitration between PRC and Swiss parties in which the Tribunal decided (in a case where the parties had not specified a choice of law) that the proper law of the contract was Chinese law, which entitled the Tribunal to look at the CISG: “In the Tribunal’s opinion, there has been an implied choice by the parties of Chinese Law as the proper law of the Contract... the Tribunal is of the opinion that the proper law of the Contract is the Law of the People’s Republic of China. And therefore, this Tribunal in determining the rights and obligations of the parties, is entitled to have regard to CISG as read with the Law of the People’s Republic of China.” <http://www.unilex.info/case.cfm?pid=2&do=case&id=1441&step=FullText>

