

SOLID, LIQUID AND GAS FORMS OF THE NEW LEX MERCATORIA: HOW DO THEY OPERATE IN PRACTICE?

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Introduction

When I first told my colleagues of my intention to organize a conference about the new *lex mercatoria*¹, the first reaction of most of them was to say that this is a conflictual issue. This was not surprising since the new *lex mercatoria* has always been a conflictual issue throughout its history. I believe that the discussions on different aspects of the new *lex mercatoria* has considerably enriched the literature on this subject; and therefore, we have been gathered to discuss.

When we look at the history of the debates on the new *lex mercatoria*, we may observe that each decade a new discussion was launched on a different aspect of this relatively new field of law.² These discussions

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² Gaillard summarizes the main lines of the debate as follows: “certain scholars readily recognized and promoted the transnational rules alternative. Others, however, denied its existence; then, when confronted with the reality of its existence, challenged its ad-

are related to each other. Every discussion lead to another and none of them can be considered completely terminated. Since the early days of the new *lex mercatoria*, in 1960's and 1970's, there was a debate on its very existence. The questions included, if it exists, what it was? Could the new *lex mercatoria* be considered as an "autonomous legal system"?³ Which rules it was composed of and how its rules were being produced? Then, the debate turned to focus on the applicability of its rules: if the

³ Early mercatorist authors, including Goldstajn, Schmitthoff, Popescu and Goldman started the debate in early 1960's by arguing that the new *lex mercatoria* was a universal and autonomous legal system. See, among others, SCHMITTHOFF, Clive - *International Business Law: A New Law Merchant, Current Law and Social Problems*, University of Toronto Press, 2 Current Law and Social Problems (1961), 129, also in CHENG (Ed.) Clive M. Schmitthoff's Select Essays on International Trade Law, Kluwer, the Netherlands, 1988, at 20 et seq. (SCHMITTHOFF, *International Business Law*); *The Law of International Trade, its Growth, Formulation and Operation*, in: SCHMITTHOFF, Clive (ed.), *The Sources of the Law of International Trade*, London 1964, at 3 et seq. (SCHMITTHOFF, *The Law of International Trade*); GOLDMAN, Berthold - *Frontières du Droit et Lex Mercatoria*, 13 Archives de Philosophie du Droit 1964, at 177 et seq.; *Nouvelles Réflexions sur la Lex Mercatoria*, in: Festschrift Pierre Lalive, Basel, Frankfurt a.M. 1993, at 241 et seq. (GOLDMAN, *Nouvelles Réflexions*); POPESCU, Tudor, *Le Droit du Commerce International: Une Nouvelle Tache pour les Legislaturs Nationaux ou une Nouvelle "Lex Mercatoria"?*, in: UNIDROIT (ed.), *New Directions in International Trade Law*, 2 Vols., New York 1977, at 21 et seq.; GOLDSTAJN, Aleksander, *The New Law Merchant*, 12 Journal of Business. Law, 1961 at 12 et seq. (GOLDSTAJN, *The New Law Merchant*); *The New Law Merchant Reconsidered*, in: Festschrift Schmitthoff, Frankfurt a.M. 1973, at 171 et seq. available at <http://www.trans-lex.org/112500> (GOLDSTAJN, *The New Law Merchant Reconsidered*)

Opponents to this view have argued that the new *lex mercatoria* could not be considered as a legal system and it exists only to the extent that sovereigns permit it in their territories. See, among others, MANN, Frederick Alexander, *Lex Facit Arbitrum* in *International Arbitration*, in Liber Amicorum for Martin Domke (1967), at 157 et seq., also in [1986] 2 *Arbitration International* at 241 et seq. (MANN, *Lex Facit Arbitrum*); *The Theoretical Approach towards the Law Governing Contracts between States and Private Persons*, 11 Rev. Belge de droit int. 1975, at 562 et seq.; LAGARDE, Paul, *Approche Critique de la Lex Mercatoria* in: Fouchard/Kahn/Lyon-Caen (eds.), *Le Droit des Relations Économiques Internationales, Études offertes à Berthold Goldman*, Paris 1982, at 125 et seq. (LAGARDE, *Approche Critique*); DELAUME, Georges R., *Comparative Analysis As A Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 Tul.L.Rev. 1989, at 575 et seq., reprinted in CARBONNEAU (ed.) *Lex Mercatoria and Arbitration*, 1998, at 111 et seq. (DELAUME, *Comparative Analysis*); HIGHET, Keith, *The Enigma of the Lex Mercatoria*, 63 Tul.L.Rev. 1989 at 613 et seq., reprinted in CARBONNEAU (ed.) *Lex Mercatoria and Arbitration*, 1998, at 133 et seq.

lex mercatoria was a law, could arbitrators apply its rules as “rules of law”? Were the awards based on the new *lex mercatoria* enforceable?⁴ In 1990’s, with the emergence of “creeping codification” movement of the new *lex mercatoria* discussions once more focused on its components and methodology.⁵ Another discussion in 1990’s and 2000’s was on the legitimacy

visability as an opinion available to the parties; and, when confronted with the wide acceptance of that opinion in practice, its availability as a choice open to arbitrators in the absence of any choice of law expressed by the parties ... Today, the debate has refocused on issues of sources and methodology.” GAILLARD, Emmanuel, *Transnational Law: A Legal System or a Method of Decision-Making?*, in K. P. Berger (ed.) *The Practice of Transnational Law*, 2001, Great Britain, p. 54 (GAILLARD, *Transnational Law*).

⁴ Territorialist authors criticized the autonomous conception of the new *lex mercatoria* by arguing that the validity of arbitration clauses, validity of the awards based on the *lex mercatoria*, recognition and enforcement of such awards would all have to be evaluated on the basis of a domestic law and therefore, would depend on the will of a sovereign. See, for instance MANN, *Lex Facit Arbitrum* (*op.cit.* 3); LAGARDE, *Approche Critique* (*op.cit.* 3); PAULSSON, Jan, *La Lex Mercatoria dans l’Arbitrage C.C.I.*, *Rev.d.Arb.* 1990. at 55 (PAULSSON, *La Lex Mercatoria*) available at <http://trans-lex.org/127800>; KASSIS, Antoine, *Théorie générale des usages du commerce: droit comparé, contrats et arbitrage internationaux, lex mercatoria*, Librairie générale de droit et de jurisprudence, Paris, 1984 (KASSIS, *Théorie générale*); PARK, William, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in CARBONNEAU (ed.) *Lex Mercatoria and Arbitration*, 1998, at 143 et seq. (PARK, *Control Mechanisms*). Mercatorist authors criticized this territorialist view on the basis of the case law developed by (mainly French) courts that did not adopt the territorialist view. See, FOUCHARD, Philippe, *L’arbitrage international en France après le décret du 12 mai 1981*, (1982) 109 *Journal du Droit International* (Clunet), at 374 et seq.; GOLDMAN, Berthold, *Une bataille judiciaire autour de la lex mercatoria, l’affaire Norsolor*, in: *Rev. Arb.* 1983, at 379 et seq. (GOLDMAN, *Une bataille judiciaire*); *Nouvelles Réflexions*, *op.cit.* 3; GAILLARD, Emmanuel, SAVAGE, John (eds.) *FOUCHARD/GAILLARD/GOLDMAN On International Commercial Arbitration*, Dodrecht, 1999, p. 800 et seq. (FOUCHARD/GAILLARD/GOLDMAN *On International Commercial Arbitration*); GAILLARD, Emmanuel, *Souveraineté et autonomie: réflexions sur les représentations de l’arbitrage international*, *Journal du droit international* (Clunet) n° 4, Octobre 2007, var. 8, pp. 1163 et seq.

⁵ See OSMAN, Filali, *Les principes généraux de la lex mercatoria, contribution à l’étude d’un ordre juridique anational*, Paris, 1992 (OSMAN, *Les principes généraux*); DE LY, Filip, *International Business Law and Lex Mercatoria*, The Hague, 1992 (DE LY, *International Business Law*); LANDO, Ole - *Eight Principles of European Contract Law*, in: CRANSTON (ed.), *Making Commercial Law, Essays in Honour of Roy Goode*, Oxford 1997, at 103 et seq.; BERGER, Klaus Peter, *The Creeping Codification of the Lex Mercatoria*, 2nd Ed. 2010, Great Britain; MARRELLA, Fabrizio - *La Nuova Lex Mercatoria*, *Principi Unidroit ed Usi dei Contratti del Commercio Internazionale*, *Trattato di Diritto*

of the rule making process of the new *lex mercatoria*.⁶ All these discussions are related to each other and the answers to these questions depend on how the *lex mercatoria* is conceived.

In this paper, I will attempt to illustrate how and to what extent the rules of the new *lex mercatoria* are being applied in practice in the second decade of the 21st Century. To that end, I will first briefly examine the views on the nature and content of the new *lex mercatoria*.

I. Presentations of the New *Lex Mercatoria*

The parties to the debate on the new *lex mercatoria* are traditionally categorized into two: “mercatorist” or “transnationalist” authors who

Commerciale e di Diritto Pubblico dell'Economica, Volume Trentesimo, Padova, 2003 (MARRELLA, *La Nuova Lex Mercatoria*); BONELL, Michael Joachim, *An International Restatement of Contract Law*, 2nd ed., New York, 1997. For the restrictive view on the content of the new *lex mercatoria*, see MUSTILL, Michael, *The New Lex Mercatoria: The First Twenty-five Years*, *Arb.Int'l* 1988, at 86 et seq., available at <http://trans-lex.org/126900> (MUSTILL, *The New Lex Mercatoria*) ; LOWENFELD, Andreas F., *Lex Mercatoria: An Arbitrator's View*, *Arb.Int'l* 1990, at 133 et seq. (LOWENFELD, *Lex Mercatoria*), available at <http://trans-lex.org/126000>; PAULSSON, *La Lex Mercatoria* (op. cit. 4). As regards the methodology issue, see among other works of the author, GAILLARD, Emmanuel, *Trente ans de la lex mercatoria*, *J.D.I.* 1, 1995, p. 5 et seq.

⁶ Since mid 1990's, some authors questioned the legitimacy of the law making process of the new *lex mercatoria* and international commercial arbitration under the paradigms of legitimacy of domestic law making process, See DEZALAY, Yves/GARTH, Bryant, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*, London, 1996; DE SOUSA SANTOS, Boevantura, *Toward a New Legal Common Sense*, Scotland, 2003, especially at 208 et seq.; CUTLER, Claire, *Private Power and Global Authority: Transnational Merchant Law in the Global Political Economy*, Cambridge, 2003. The state-centric perspective of these authors have been criticized by, among others, TEUBNER, Gunther, *'Global Bukowina': Legal Pluralism in the World Society*, in TEUBNER (ed.) *Global Law Without a State*, England, 1997 at 3 et seq. BERGER, Klaus Peter, *The New Law Merchant and the Global Market Place- A 21st Century View of Transnational Commercial Law* in K.P. Berger (Ed.) “The Practice of Transnational Law”, at 3 et seq. (BERGER, *The New Law Merchant*) available at <http://www.trans-lex.org/000002>, especially at 10-11; MICHAELS, Ralf, *The True Lex Mercatoria: Law Beyond the State*, *Indiana Journal of Global Legal Studies*: Vol. 14: Iss. 2 (2007), Article 11. available at <http://www.repository.law.indiana.edu/ijgls/vol14/iss2/11>

favor the new *lex mercatoria*; and “positivist” or “traditionalist” authors who oppose this concept.⁷

Early Mercatorist Authors’ Perspective:

The history of the new *lex mercatoria* started in 1950’s with the observation of the emergence of a new source of law and a new kind of law making process by early mercatorist authors: when the effects of the two World Wars and of the financial crisis of 1929 started to fade away, international economic relations started to rise, creating a need for special rules. There was an enthusiasm for unifying the rules governing international trade at international level. International organizations,⁸ trade associations and chambers of commerce⁹ started to produce new sources of law. Towards the end of 1950’s some eminent scholars observed that this phenomenon was a trend of “return to internationalism of commercial law”.¹⁰

⁷ For the two opposing positions see, among others, BERGER, *The New Law Merchant*, (*op. cit.* 6) at 1; GAILLARD, Emmanuel, *Transnational Law: A Legal System or a Method of Decision-Making?*, in BERGER (ed.) *The Practice of Transnational Law*, Great Britain, 2001, (GAILLARD, *Transnational Law*) at 53 et seq.; LANDO, Ole, *The Lex Mercatoria in International Commercial Arbitration*, 34 I.C.L.Q. (1985), (LANDO, *The Lex Mercatoria*) at 747 et seq. LYNCH, Katherine L., *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*, Great Britain, 2003, at 309 et seq. (LYNCH, *The Forces of Economic Globalization*)

⁸ For a brief history of the attempts towards the unification of international trade law by UNIDROIT and UNCITRAL, see FARNSWORTH, Allan, *Formation of International Sales Contracts: Three Attempts at Unification*, 110 U. Pa. L. Rev. 305, (1962) at 307 et seq.; WINSHIP, Peter, *Formation of International Sales Contracts under the 1980 Vienna Convention*, 17 *International Lawyer* (1983), at 1 et seq. 1957 ECE General Conditions for the Supply and Erection of Plant and Machinery for Import and Export and 1958 General Conditions of Delivery of Goods (Comecon Conditions) are worthy to mention as early examples of regional unification of international trade law by international organizations.

⁹ ICC’s INCOTERMS that were first codified in 1936 and the Uniform Customs and Practice for Commercial Documentary Credits, first published in 1933 are probably the best examples to this kind of rules.

¹⁰ See SCHMITTHOFF, *Modern Trends in English Commercial Law (1957)*, in CHENG (Ed.) *Clive M. Schmitthoff’s Select Essays on International Trade Law*, Kluwer, the Netherlands, 1988, at 3 et seq.; SCHMITTHOFF, *International Business Law*, *op. cit.* 3, at 27; TUNC, André, *English and Commercial Law*, (1961) *J. Bus. L.* 234, at 237; BERGER, *The New Law Merchant*, (*op. cit.* 6) at 3 et seq. Indeed, the efforts towards

In 1956, French comparatist Berthold Goldman argued that commercial companies that might not be classified as a company of one single country -such as the Suez Channel- were subject to “*l’ordre juridique international*”, stating that the latter was a new phenomenon.¹¹ In early 1960’s, Alexander Goldstajn from Yugoslavia and Clive M. Schmitthoff from England have been the first scholars to attempt to theorize this new law. In 1961, Clive M. Schmitthoff compared this law with the ancient, medieval *lex mercatoria* and called it the “new *lex mercatoria*” or the “new law merchant” on the basis of its common features with the medieval law merchant.¹²

Early mercatorist authors’ argument was that nationalized commercial legal systems were insufficient to satisfy the needs of international business transactions of the 20th Century. The international business environment of the growing world economy required a universal conception of commercial law.¹³ According to these authors, a new, universal,

re-internationalization of commercial law were already underway since the 19th Century in a certain parallelism with “nationalization of commercial law”. *L’Institut du Droit International* held a meeting in 1882 in Turin, where the Institute declared, among others, that “Plusieurs parties du droit commercial devraient être réglées par une législation uniforme, le moyen le plus radical et le plus efficace de faire disparaître les conflits de lois” MARRELLA, *La Nuova Lex Mercatoria*, *op. cit.* 5, at 76 (the author quoted from *Annuaire de l’Idi*, t. VI, p. 93 from 1873 to 1912)

¹¹ GOLDMAN, Berthold, *La Compagnie de Suez, société internationale*, *Le Monde*, 04.10.1956 available at <http://www.trans-lex.org/img/monde.jpg>

¹² SCHMITTHOFF, *International Business Law*, *op. cit.* 3, at 22. An important difference between the medieval *lex mercatoria* and the modern one however, lies in the political conditions in which they emerged: “When we compare the modern law of international trade, as analyzed by the reporters, with the medieval *lex mercatoria*, we notice that the modern development has one great drawback and one great advantage: the drawback is that the modern law of international trade has to overcome the barriers created by the relatively modern concept of the national state which originated a legal order of numerous municipal systems; and the advantage is that the technique and mechanism of deliberate formulation of the law of international trade is infinitely more developed today than it was in the middle ages.” SCHMITTHOFF, *The Law of International Trade*, *op. cit.* 3, at 37

¹³ “The essence lies in the fact that the influence of identical circumstances and needs has resulted in common or similar solutions. The background of such development is the existence of the world market. The law governing trade transactions is neither capitalist nor socialist; it is a means to an end, and therefore, the fact that the beneficiaries of such transactions are different in this or that country is no obstacle to the development

self-regulating society of merchants (a *societas mercatorum*) was born and started to produce its own rules by means of contracts, usages, activities of private law-makers that formulate these usages into customs,¹⁴ international legislation and arbitral case-law. Naturally, mercatorist authors considered international arbitration as the dispute resolution mechanism of this new, self-regulating society.

The early mercatorists' conception of the new *lex mercatoria* was an autonomous legal order and the law of the *societas mercatorum*.¹⁵ The distinctive feature of the rules of this legal order was that they were not originating from any state and that they were to apply without any reference to any municipal legal system. Therefore, the early mercatorist authors preferred to define the new *lex mercatoria* negatively as simply the opposite of state law.¹⁶

The Positivist School and the Birth of the Debate:

Schmitthoff's, Goldman's and Goldstajn's conception of the new *lex mercatoria* as an autonomous legal order and the autonomous conception of international arbitration as the judicial mechanism of the *societas*

of international trade. The law of international trade is based on the general principles accepted in the entire world." GOLDSTAJN, *The New Law Merchant Reconsidered*, *op. cit.* 3, at 174

¹⁴ Schmitthoff makes a terminological remark on the difference between "usages" and "customs": unformulated rules are called "usage", while they become "custom" by being formulated. SCHMITTHOFF, *The Law of International Trade*, *op. cit.* 3, at 16. Therefore, usages are "sometimes commercial custom *in statu nascendi*." SCHMITTHOFF, *International Business Law*, *op. cit.* 3, at 35

¹⁵ "Notwithstanding the differences in the political, economic and legal system of the world, a new law merchant is rapidly developing in the world of international trade. It is time that recognition be given to the existence of an autonomous commercial law that has grown independent of the national systems of law" GOLDSTAJN, *The New Law Merchant*, *op. cit.* 3, at 12

¹⁶ "Therefore we find justified the statement that within the framework of municipal law the autonomous law of trade can be negatively defined as the law which does not derive from the law-maker, or, as Professor Jørgensen puts it, a distinction should be made between the 'public and private creation of law'" GOLDSTAJN, *The New Law Merchant Reconsidered*, *op. cit.* 3, at 178; "This new branch of law is elusive: it is not found in the usual statute or case materials, but its main source is in custom and practice; in this sense, it is extra-legal." SCHMITTHOFF, *International Business Law*, *op. cit.* 3, at 20

mercatorum has been subject to criticisms of positivist authors, lead by F.A.Mann. In his works, Mann theorized the positivist criticism of the new *lex mercatoria* and his views found great favor among positivist scholars and practitioners.¹⁷

The positivist criticisms were focused on three main arguments: (1) inability of the new *lex mercatoria* to become a genuine legal order compared to domestic legal orders, (2) inapplicability of the rules that do not originate from any state authority and (3) the ambiguity of the rules of the new *lex mercatoria*.¹⁸

The positivist approach was based on state-centric conception of law. According to the positivist authors, no rule might exist if not implemented or at least approved by a state.¹⁹ This was true even for the freedom of contract.²⁰ Therefore, what might be produced by means of private law making systems was nothing more than formulated customs and usages that cannot be compared with a competent domestic legal

¹⁷ See, among others, BEGNIN, Jacques, *Le développement de la lex mercatoria menace-t-il l'ordre juridique international?* 30 McGill law Journal (1985) (BEGNIN, *Le développement*), at 478 et seq.; MUSTILL, *The New Lex Mercatoria*, *op. cit.* 5; LAGARDE, *Approche Critique*, *op. cit.* 3; DELAUME, *Comparative Analysis*, *op. cit.* 3; PAULSSON, *La Lex Mercatoria*, *op. cit.* 4

¹⁸ HIGHET summarizes these criticisms as follows, adding the alleged lack of fairness as a fourth criticism but without further reasoning this argument: "With the *lex mercatoria*, however, you do not even reach the issue of enforceability. There are several other tests that must be met before a body of rules achieves the characteristics of a system of law. The first test is accessibility or general applicability; the second is authoritativeness and consistency; the third is relative predictability; and the fourth is evident fairness." HIGHET, *The Enigma of the Lex Mercatoria*, *op. cit.* 3, at 140

¹⁹ Lando summarizes this position as follows: "The opponents of the *lex mercatoria* assert that it does not derive its binding force from any State authority and does not provide a sufficiently substantial and solid system. It cannot be called a legal order and it is therefore not fit as a basis for the settlement of legal disputes. [Referring to MANN, *Lex Facit Arbitrum* (*op.cit.* 3) at 157] ... Another school of thought (to which the present writer adheres) holds that the binding force of the *lex mercatoria* does not depend on the fact that it is made and promulgated by State authorities but that it is recognized as an autonomous norm system by the business community and by State authorities." LANDO, *The Lex Mercatoria*, *op. cit.* 7, at 752

²⁰ BEGNIN, *Le développement*, *op. cit.* 17, at 484.

system.²¹ Such customary rules might be employed only in exceptional circumstances where the parties did not determine the applicable law to their contract or the contract did not clearly have a close connection with a particular -domestic- legal system. Consequently, positivist authors conceived the new *lex mercatoria*, the extent to which it exists, only as a secondary source of law, and not as a legal order.²²

The positivist approach did not consider the application of the new *lex mercatoria* very desirable for various reasons: first, since the rules of the new *lex mercatoria* were not originated from any state authority, they could not be considered as “law”. Arbitral tribunals that apply these rules instead of a “law” would have exceeded their power granted by the parties²³ and thus, such awards would not be enforceable at law. Second, the content of the new *lex mercatoria* was so poor that only a few general principles could be determined as its rules and they were not adequate to govern international commercial disputes.²⁴

This brings us to the third concern by the positivist authors for the application of these rules and their third criticism towards the theory of the new *lex mercatoria*: the ambiguity of its rules. According to the positivist school, the rules of the new *lex mercatoria* were so ambiguous and hard to define that they could not answer the need for certainty in international transactions.²⁵ Skeptical positivist authors argued that arbitrators were using such rules in an arbitrary way and in order to avoid the normative rules of an applicable domestic law. In the words of Prof. William Park, “some arbitrators will be tempted to use the *lex mercatoria*

²¹ See, in particular LAGARDE, *Approche Critique*, *op. cit.* 3, KASSIS, *Théorie générale*, *op. cit.* 4 at 578 BEGNIN, *Le développement*, *op. cit.* 17 at 480 et seq.

²² PAULSSON, *La Lex Mercatoria*, *op. cit.* 4, at 71 ; MUSTILL, *The New Lex Mercatoria*, *op. cit.* 5, at 102

²³ This was one of the arguments of the Respondent in “Norsolor” case (ICC Case No. 3131, *Pabalk Ticaret Limited Sirketi v. Norsolor*, 1983 REV. ARB. 525) For an analysis of this argument, see GOLDMAN, Berthold, *The Applicable Law: General Principles of Law - the Lex Mercatoria*, in: Lew (ed.), *Contemporary Problems in International Arbitration*, London 1986, at 121

²⁴ MUSTILL, *The New Lex Mercatoria*, *op. cit.* 5, at 114

²⁵ MUSTILL, *The New Lex Mercatoria*, *op. cit.* 5, at 117

as a fig leaf to hide an unauthorized substitution of [the arbitrators'] own private normative preferences for ... the properly applicable law".²⁶

Mercatorists' Answers to the Positivist Criticisms

The developments in the last three decades helped mercatorist authors to answer to the criticisms raised by skeptical positivist authors.

Firstly, the rules that do not originate from a state or the community of states have been expressly recognized as "rules of law"²⁷ by many domestic legislators, as well as UNCITRAL and most arbitration institutions. In 1980's, the insertion of the expression of "rules of law" into articles that address to applicable law in domestic arbitration acts,²⁸ institutional arbitration rules,²⁹ into the UNCITRAL Model Law on International Commercial Arbitration³⁰ and into the Washington Conven-

²⁶ PARK, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in CARBONNEAU (ed.) *op. cit.* 4, at 143

²⁷ Indeed, this expression had been first used in Article 21 of the 1966 Strasbourg European Convention Providing a Uniform Law on Arbitration by the Council of Europe. However, this Convention never entered into effect as it has been signed only by Belgium and Austria and has been ratified only by Belgium. Article 21 of this Convention reads as follows: "Except where otherwise stipulated, arbitrators shall make their awards in accordance with the rules of law." <http://conventions.coe.int/Treaty/en/Treaties/Html/056.htm>

²⁸ The expression of "rules of law" has been inserted into Article 1496 (Now, Article 1511) of the French Code of Civil Procedure in 1981. This expression has subsequently been adopted by the Dutch Code of Civil Procedure in 1986 (Article 1054), by the Swiss Code of Private International Law in 1987 (Article 187) and by the Italian Code of Civil Procedure in 1994 (Article 834). Turkish International Arbitration Act of 2001 has adopted the same wording in Article 12/C. On this point see SILBERMAN, Linda/FERRARI, Franco, *Getting to the law applicable to the merits in international arbitration and the consequences of getting it wrong*, in FERRARI, Franco/KRÖLL, Stefan (eds.) *CONFLICT OF LAWS IN INTERNATIONAL ARBITRATION*, Munich, 2010, at 267 et seq. (SILBERMAN, FERRARI, *Getting to the law applicable*)

²⁹ Article 17(1) of the ICC Arbitration Rules of 1998 on the law applicable to the merits of the dispute replaced Article 13(3) of the 1975 version of the Rules and changed the expression of "law" with "rules of law". The same path has been followed by LCIA in Article 22(3) of the LCIA Rules of 1998, by AAA in Article 28 of the AAA International Arbitration Rules, by the Stockholm Chamber of Commerce in SCC Arbitration Rules of 1999.

³⁰ The expression of "rules of law" has been adopted by UNCITRAL in Article 28 (1) of the UNCITRAL Model Law of 1985.

tion³¹ has been interpreted by most authors, as well as many courts, as the recognition of the new *lex mercatoria* as a legal system.³²

Secondly, the case law on the application of the rules of the new *lex mercatoria* has developed considerably. On the one hand, arbitral awards that are based on or supplemented with the rules of law that do not originate from any domestic law have been rendered.³³ Although the number of such awards is still relatively few, we will see below that the application of the new *lex mercatoria* is not limited to them. On the other hand, case law by domestic courts of different countries left no doubt that the awards based on *lex mercatoria*, general principles of law or rules of law that do not originate from a state are fully enforceable at law.³⁴

³¹ Article 43(1) of the Washington Convention on the Settlement of Investment Disputes between States and Nationals of other States of 1965.

³² See, among others, GAILLARD, *Transnational Law*, *op. cit.* 2, at 59; GOLDMAN, Berthold, *The Applicable Law: General Principles of Law – The Lex Mercatoria*, in LEW, Julian D.M. (ed.), *Contemporary Problems in International Arbitration*, the Netherlands, 1987, (GOLDMAN, *The Applicable Law*) at 118; GOLDMAN, *Nouvelles réflexions*, *op. cit.* 3, at 248; FOUCHARD, *L'arbitrage international en France après le décret du 12 mai 1981*, (1982) 109 *Journal du Droit International (Clunet)*, 374, at 395; LANDO, *The Lex Mercatoria*, *op. cit.* 7, at 756; DE LY, *International Business Law*, *op. cit.* 5, at 219; For a study of the discussion on this issue, see SILBERMAN, FERRARI, *Getting to the law applicable*, *op. cit.* 28 at 270 et seq.

³³ On the normative character of arbitral case-law, see OSMAN, *Les principes généraux*, *op. cit.* 5, at 310 et seq. For a detailed study of the arbitral awards referring to *lex mercatoria*, see the first part (pp. 18-256) of the same volume. Most of these awards are available at www.trans-lex.org

³⁴ In particular, the decisions by French and Austrian courts in *Fougerolle*, *Pabalk Ticaret v. Norsolor* and *Valenciana* cases paved the path for the case law on this issue. It is worthy to mention that decisions by French Courts in the first two of these cases were rendered a few months before the abovementioned reform in the French Code of Civil Procedure in 1981, by which the juridicity of *lex mercatoria* had been recognized. For a study of the case law on the enforceability of the awards that are based on *lex mercatoria*, see, GOLDMAN, *Nouvelles Réflexions*, *op. cit.* 3; GOLDMAN, *The Applicable Law*, *op. cit.* 30 at 120 et seq.; and GOLDMAN, *Une bataille judiciaire*, *op. cit.* 4; LANDO, *The Lex Mercatoria*, *op. cit.* 7 at 756 et seq.; OĞUZ, Arzu, *Lex Mercatoria*, Ankara, 2004, at 192 et seq. In England, however, these developments have been followed by English courts a few years later; *Home and Overseas Insurance Co. v. Mentor* [1989] 1 Lloyd's Rep. 473 decision appears to be the first decision recognizing the *lex mercatoria* as law, see, KERR, Michael, *Equity Arbitration in England*, 2 *Amer. Rev. Int'l Arb.* 393.

Thirdly, both international legislation and the soft law codification movement of the mid-1990's confuted the argument according to which the rules of the new *lex mercatoria* were hard to define and ambiguous. Considerable progress has been achieved in unification of law at the level of international legislation in 1980's, in both substantive and procedural terms. The adoption of the Vienna Convention on International Sale of Goods³⁵ and the UNCITRAL Model Law on International Commercial Arbitration³⁶ are probably the most successful ones of these achievements.

As to the soft law codification movement of the new *lex mercatoria*, UNIDROIT Principles³⁷ and Principles of European Contract Law (known as Lando Principles)³⁸ have been published in 1994; Trans-Lex Principles have been first launched in 2001,³⁹ while International Bar Association (IBA) had already adopted its first rules on the taking of evidence in 1983.⁴⁰ All these rules are being reviewed regularly. All these texts proved how competent the new *lex mercatoria* was as a legal order and how much could be achieved in unification of law by simply excluding the states from the law making process. Although positivist lawyers used to be reluctant about the application of all these rules,⁴¹ the practice

³⁵ United Nations Convention on Contracts for the International Sale of Goods adopted on 11 April 1980, http://www.uncitral.org/uncitral/en/uncitral_texts/sale_goods/1980CISG.html

³⁶ UNCITRAL Model Law on International Commercial Arbitration (1985), with amendments as adopted in 2006, http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html

³⁷ UNIDROIT Principles of International Commercial Contracts, <http://www.unidroit.org/english/principles/contracts/main.htm>

³⁸ The Principles of European Contract Law, known as "Lando Principles", http://frontpage.cbs.dk/law/commission_on_european_contract_law/PECL%20engelsk/engelsk_partI_og_II.htm

³⁹ Trans-Lex Principles, <http://www.trans-lex.org/principles>

⁴⁰ "Supplementary Rules Governing the Presentation of Evidence in International Commercial Arbitration" adopted by IBA in 1983. The current name of this text is the "IBA Rules on the Taking of Evidence in International Arbitration" that has last been updated in 2010. http://www.ibanet.org/Publications/publications_IBA_guides_and_free_materials.aspx#takingevidence

⁴¹ KESSEDJIAN, Catherine, *Un exercice de rénovation des sources du droit des contrats du*

has shown that these rules are welcomed by international commercial arbitration community.⁴²

As mentioned above, none of the debates on the new *lex mercatoria* can be considered totally concluded. However, it is a fact that the objections to the existence of *lex mercatoria*, the skepticisms about the applicability of its rules as “rules of law” and enforceability of the awards based on these rules, the reluctance about applying soft law are getting more and more infrequent. On the one hand, the new *lex mercatoria* is becoming increasingly systematized and formulized.⁴³ On the other hand, most mercatorist authors agree that the incompleteness of the new *lex mercatoria* does not prevent it from being a genuine legal system.⁴⁴

commerce international: Les Principes proposés par l'Unidroit, in *Revue critique de droit international privé* 1995, at 641 et seq.; HILL, Richard, *A Businessman's View of the UNIDROIT Principles*, in 13 *Journal of International Arbitration* 1996, at 163 et seq.; PONTIROLI, Luciano, *La protezione del 'contraente debole' nei Principles of International Commercial Contracts di UNIDROIT: Much ado about nothing?*, *Giurisprudenza commerciale*, 1997, at 566 et seq.

⁴² BONELL, Michael Joachim, *The UNIDROIT Principles in Practice – The Experience of the First Two Years*, 1997 *Unif. L. R.* at 34 et seq., available at <http://www.cisg.law.pace.edu/cisg/biblio/pr-exper.html>; also Center for Transnational Law (ed.) *The CENTRAL Study on the Use of Transnational Law in International Contract Law and Arbitration*, Münster, 2000

⁴³ BERGER, Klaus-Peter, *General Principles of Law in International Commercial Arbitration, How to Find Them – How to Apply Them*, 5 *World Arbitration & Mediation Review* 2, 97-141, 2011, (BERGER, *General Principles of Law*) at 101.

⁴⁴ For this view, see, among others, LANDO, *The Lex Mercatoria*, *op. cit.* 7, at 752; “... [I]t is by no means evident that to be the object of a valid choice of governing law the rules chosen must necessarily be organized in a distinct legal order. Although the insistence by some advocates of *lex mercatoria* that it fulfills the criteria that traditionally define a legal order may have fueled the controversy on this point, it is the idea that the parties’ choice of applicable law is necessarily restricted to a complete legal order which is questionable.” FOUCHARD/GAILLARD/GOLDMAN *On International Commercial Arbitration*, *op. cit.* 4, at 809; “Au demeurant, qu’il soit incomplet et au moins dans certains domaines encore en voie de formation, n’empêche que l’ordre juridique de la *lex mercatoria* existe” GOLDMAN, *Nouvelles réflexions*, *op.cit.* 3, at 250.

Marrella, instead, makes a comparison between the new *lex mercatoria* and public international law in terms of their structures, sources and general features and concludes that the new *lex mercatoria*, as a legal system, is more similar to public international law than domestic legal systems. MARRELLA, *La Nuova Lex Mercatoria*, *op. cit.* 5, at 31 et seq.

In the 21st Century, the questions included to what extent the rules of the new *lex mercatoria* are being applied in practice, and how? What is the connection between different sources of the new *lex mercatoria*? Again, answers to these questions would depend on how one conceives the new *lex mercatoria* and its sources.

II. Sources of the New Lex Mercatoria in the 21st Century

In general

From the positivist point of view, both the scope of application and sources of *lex mercatoria* are limited. *Lex mercatoria*, considered as a secondary or supplementary source of law might be applied only when the parties did not determine the applicable law and the case is not closely connected with a particular domestic legal system. Therefore, according to the positivist conception, the content of the new *lex mercatoria* is limited to its function defined as a supplementary law. This conception equates the new *lex mercatoria* to general principles of law and trade usages and recognizes its application only when an explicit reference is made to *lex mercatoria*, “general principles of law”, “principles common to all trading nations” and like expressions.⁴⁵

Early mercatorist authors, instead, had established the theory of the new *lex mercatoria* by defining it as the law of the *societas mercatorum*. Nevertheless, two of the most important early mercatorist authors, Goldman and Schmitthoff have been quite prudent while defining the content of the new *lex mercatoria*. Probably due to the influence of excessive optimism of international law in the period after the World Wars, they have put too much emphasis on the role of international legislation. According to Schmitthoff, the sources of the new *lex mercatoria* consisted only of “international legislation” and “written custom”. According to the

⁴⁵ Paulsson, after rightly observing that the term of “*lex mercatoria*” is “surchargée de sens” (PAULSSON, *La Lex Mercatoria*, *op. cit.* 4, at 57) opts for the narrow definition of the *lex mercatoria*, according to which “*La lex mercatoria*, dans ce sens modeste, serait perçue comme un affinement de la notion d’usages, de façon à viser spécifiquement les contrats revêtant un caractère international.” PAULSSON, *La Lex Mercatoria*, *op. cit.* 4, at 71.

author, even usages did not make part of it as they were not in writing.⁴⁶ However, standard or model contracts as a part of the written custom were an important component.⁴⁷ As to Goldman, he was even more modest while defining the sources of the new *lex mercatoria*, and considered it as a secondary source of law,⁴⁸ emphasizing however, the role of international treaties. On the basis of the decisions of French *Cour de Cassation*, Goldman mentioned three sources of the new *lex mercatoria* as “principles, rules and usages”.⁴⁹

The third father of the theory of the new *lex mercatoria*, Goldstajn, instead, has not been reluctant at all while defining the new *lex mercatoria*'s sources. As the law of the society of merchants, the new *lex mercatoria* was composed of all the rules and regulations that governed international economic transactions; including “1. International trade usages; 2. International legislations; 3. Awards of international arbitration tribunals; and 4. Municipal law a) Through ordre public, and b) As regulations filling gaps in contracts.”⁵⁰

Goldstajn had listed these sources of the new *lex mercatoria* more than forty years ago. During the passed decades, the achievements towards the unification of law added more to the kinds of rules that govern international business transactions. Much has been written on the new sources of the new *lex mercatoria*; especially on soft-law codifications.⁵¹ For the purposes of this paper, I will propose a simplified and metaphorical classification of the sources of the new *lex mercatoria* according to their connection with positive law and their degree of formulation.

⁴⁶ SCHMITTHOFF, *International Business Law*, op. cit. 3, at 35 SCHMITTHOFF, *The Law of International Trade*, op. cit. 3 at 149

⁴⁷ SCHMITTHOFF, *The Law of International Trade*, op. cit. 3 at 165

⁴⁸ GOLDMAN, *The Applicable Law*, op. cit. 32 at 114

⁴⁹ GOLDMAN, *Nouvelles réflexions*, op.cit. 3, at 246-247

⁵⁰ GOLDSTAJN, *The New Law Merchant Reconsidered*, op. cit. 3, at 184

⁵¹ For a summary of the classifications of the new sources of international trade law, see MISTELIS, Loukas, *Is Harmonization a Necessary Evil?: The Future of Harmonization and New Sources of International Trade Law*, in FLETCHER, Ian / MISTELIS, Loukas / CREMONA, Marise (eds.), *Foundations and Perspectives of International Trade Law*, London, 2001, at 3 et seq. (MISTELIS, *Is Harmonization a Necessary Evil?*) Available at <http://www.cisg.law.pace.edu/cisg/biblio/mistelis2.html#iii>

1. I will call the rules of state or inter-state origin as “solid form” of the new *lex mercatoria*. “Solid form” includes international conventions and model laws, as well as domestic codifications that relate to international economic relations and international commercial arbitration. Like all the other forms, “solid” form is composed of rules of both substantive and procedural nature.
2. I will call the rules governing substantive or procedural aspects of international commercial relations which are formulated by international organizations, chambers of commerce, trade associations, bars and other NGO’s, but which are not adopted by states, as the “liquid form” of the new *lex mercatoria*.
3. I will call the unformulated rules and principles of either substantive or procedural nature, applied by international tribunals as the “gas form” of the new *lex mercatoria*.

Solid form

“Solid form” of the new *lex mercatoria* may originate either from a state as a domestic legislation, or from a community of states, in the form of international treaties, conventions or model laws.⁵² The history of the unification of law has shown that international legislation is the form of unification which is the hardest to achieve.⁵³ Therefore, “solid form” texts of inter-state origin of the new *lex mercatoria* are relatively few compared to other forms. As a typical example of substantive “solid” text of inter-state origin, the 1980 United Nations Convention on International Sale of Goods (CISG) can be mentioned. Other conventions by the UNCIT-

⁵² Indeed, model laws are possibly better to be called “plasma form” since their position is in between solid and liquid forms. They aim at becoming positive law, but they do not have a legally binding effect by themselves.

⁵³ GOLDSTAJN, *The New Law Merchant Reconsidered*, *op. cit.* 3, at 175-176; GALGANO, Francesco, *The New Lex Mercatoria*, 2 *Ann. Surv. Int’ & Comp. L.* 99, at 104; MISTELIS, *Is Harmonization a Necessary Evil?*, *op. cit.* 51, at 21 et seq. DAVID, René, *The Methods of Unification*, 16 *American Journal of Comparative Law* (1968) 13, at 18 et seq., available at <http://www.cisg.law.pace.edu/cisg/biblio/david.html>

RAL⁵⁴ and the UNIDROIT⁵⁵ governing international commercial relations or GATT⁵⁶ and other treaties by the WTO⁵⁷ can be considered as other examples of inter-state solid sources of the new *lex mercatoria*. Two of the most commonly used examples to inter-state “solid” procedural source are the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards⁵⁸ and the UNCITRAL Model Law on International Commercial Arbitration.⁵⁹ Naturally, other international conventions on international arbitration are also of this kind.

As for solid texts of state origin, the codes governing international commercial contracts by Eastern European countries are typical examples of such texts.⁶⁰ Even substantive rules of domestic origin applied by international arbitral tribunals may be considered within this category.⁶¹ These are “solid” texts of state origin of substantive nature. Domestic arbitration laws⁶² would probably be the best examples to procedural “solid” texts of state origin.

⁵⁴ For other conventions by the UNCITRAL, see http://www.uncitral.org/uncitral/en/uncitral_texts.html

⁵⁵ For other conventions by the UNIDROIT, see <http://www.unidroit.org/dynasite.cfm?dsid=84211>

⁵⁶ General Agreement on Tariffs and Trade adopted in 1947 and amended in 1994 http://www.wto.org/english/docs_e/legal_e/06-gatt_e.htm

⁵⁷ For other legal texts by the WTO, see http://www.wto.org/english/docs_e/legal_e/legal_e.htm

⁵⁸ New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards done in New York on 10 June 1958, https://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html

⁵⁹ *Supra* note 34

⁶⁰ KRONKE, Herbert, *Introduction*, in *UNIDROIT Principles: New Developments and Applications*, ICC International Court of Arbitration Bulletin, 2005, Special Supplement, at 7

⁶¹ LYNCH, *The Forces of Economic Globalization*, *op. cit.* 7, at 319; WAELDE, Thomas, *The Lex Mercatoria in the Global Economy*, 2 B.L.I. Issue 113 (2000), at 116-118

⁶² For a comprehensive list of domestic legislations on international commercial arbitration, see <http://www.arbitration-icca.org/related-links.html>

Liquid form

The written custom in the form of model contracts and clauses, such as those of GAFTA,⁶³ FOSFA,⁶⁴ FIDIC⁶⁵ or ICC,⁶⁶ the uniform rules such as the ICC's Uniform Rules for Demand Guarantees,⁶⁷ institutional arbitration rules,⁶⁸ procedural rules of soft law nature, such as the IBA Rules on the taking of evidence,⁶⁹ substantive soft law rules, such as the UNIDROIT Principles of International Commercial Contracts,⁷⁰ Principles of European Contract Law⁷¹ and Trans-Lex Principles⁷² can be considered as the examples for the "liquid" form. As also appears from the conference program, considerable progress in the unification of law has been achieved by means of these soft law texts, and therefore the texts of liquid form constitute a very crucial component of the new *lex mercatoria*.

"Liquid" sources are not only employed in dispute resolution, but they also serve as model contracts and formulated customary rules regulating specific fields.⁷³ Therefore, they have a larger field of application than other sources. For instance, ICC's Uniform Customs and Practices

⁶³ The Grain and Feed Trade Association, www.gafta.com

⁶⁴ The Federation of Oils, Seeds and Fats Associations, www.fosfa.org

⁶⁵ Fédération Internationale des Ingénieurs Conseils, fidic.org

⁶⁶ International Chamber of Commerce, www.iccwbo.org; see also BORTOLOTTI, Fabio, *The ICC model contracts: a new approach to the drafting of model forms for international trade*, I.B.L.J. 2001, 8, at 969 et seq.; ERDEM, Ercüment, *ICC Model Contracts in Milletlerarası Ticaret Hukuku ile İlgili Makaleler*, 2008, Istanbul, at 513 et seq.

⁶⁷ Uniform Rules for Demand Guarantees – URDG (758) that came into effect on 1 July 2010, replacing URDG (458) of 1992 <http://www.iccwbo.org/About-ICC/Policy-Commissions/Banking/Task-forces/Uniform-Rules-for-Demand-Guarantees-%28URDG%29/>

⁶⁸ For a comprehensive list of arbitral institutions, see <http://www.trans-lex.org/links> For the view that the rules of arbitral institutions make part of soft-law, see KAUFMANN-KOHLER, Gabrielle, *Soft Law in International Arbitration: Condification and Normativity*, *Journal of International Dispute Settlement*, 2010, at 1 et seq.

⁶⁹ *Supra* note 38

⁷⁰ *Supra* note 35

⁷¹ *Supra* note 36

⁷² *Supra* note 37

⁷³ GOLDMAN, *The Applicable Law*, *op. cit.* 32 at 125

for Documentary Credits (UCP)⁷⁴ are being used every day by banks in financial transactions in more than 175 countries. The spread use of ICC's Incoterms⁷⁵ may be mentioned as another example.

Gas form

For the purposes of this paper, I will call the uncodified sources of the new *lex mercatoria* as the “gas form”. These include uncodified usages⁷⁶ and general principles of law referred to with their uncodified forms.⁷⁷ Arbitral case-law provides us with numerous examples of usages and general principles of law to apply to the substance of the disputes.⁷⁸ These are substantive “gas form” sources. As for procedural “gas form”

⁷⁴ The latest version of the Uniform Customs and Practice is ICC's UCP 600 that came into effect on 01 July 2007.

⁷⁵ ICC's INCOTERMS have last been revised in 2010, <http://www.iccwbo.org/products-and-services/trade-facilitation/incoterms-2010/the-incoterms-rules/>

⁷⁶ On the difference between usages and general principles of law, see GAILLARD, Emmanuel, *La distinction des principes généraux du droit et des usages du commerce international*, in Etudes Bellet, Litec 1991, at 203 et seq.; On the role of the usages in international arbitration, see, ERDEM, Ercüment, *The Role of Trade Usages in ICC Arbitration*, in Liber Amicorum Serge LAZAREFF, Paris, 2011, at 247 et seq.; VEYTIA, Hernany, *Driving Forces Behind Trade Usages in International Trade*, in ŞİPKA, Şükran / YILDIRIM, Ahmet Cemil (eds.) *Sales Contracts under the New Turkish Code of Obligations and the CISG*, Istanbul, 2012, at 157 et seq.

⁷⁷ BERGER, *General Principles of Law*, *op. cit.* 43. GAILLARD makes a terminological remark on the two different meanings of the expression of “general principles of law”: “... from a terminology standpoint, one should recognize that the expression ‘general principles of law’ has two very distinct meanings. It can be used to denote a rule which is very general in nature (e.g., good faith, *pacta sunt servanda*, etc.), or to refer to a rule found generally in many legal systems of the world. The first meaning refers to the positioning of the rule in the legal system, at a given level of generality, the second one to the source of the rule... The expression ‘transnational rules’ has the advantage of avoiding any ambiguity...” GAILLARD, *Transnational Law*, *op. cit.* 7, at 61

⁷⁸ Some extracts from ICC awards first started to be published in the CLUNET journal of international law in 1974. International Council for Commercial Arbitration (I.C.C.A.) started to publish extracts from arbitral awards in The Yearbook Commercial Arbitration in 1976. In 1986, International Arbitration Report also started to publish extracts from arbitral awards. Most of the published awards can be found at <http://www.translex.org/principles> on article by article basis.

sources, these are not very numerous, but a clear example would be the use of “Redfern list” which is quite common in international arbitration.⁷⁹

	Substantive		Procedural	
Solid	Inter-state origin	State origin	Inter-state origin	State origin
	CISG	Domestic laws applied by international arbitral tribunals	New York Convention, UNCITRAL Model Law	Domestic arbitration laws
Liquid	UPICC, Trans-Lex Principles, PECL (Lando Principles), INCOTERMS, UCP 600, ICC’s and FIDIC’s model contracts, ICC’s URDG		IBA Rules on Taking of Evidence, ALI/UNIDROIT Rules on Transnational Litigation, institutional arbitration rules	
Gas	Unformulated usages, references to unformulated forms of general principles of law		Redfern list	

III. How the Sources of the New Lex Mercatoria Operate? An Illustration from Practice:

The broad conception of the new *lex mercatoria* would consider all the abovementioned sources as the components thereof. The narrow conception, instead, traditionally tends to see only the uncodified, “gas form” sources within the framework of the new *lex mercatoria*.⁸⁰ Is it possible to distinguish these sources according to their origin and allege that

⁷⁹ Redfern list is a document used by the parties to an arbitration to request production of evidence from the other parti(es).

⁸⁰ LOWENFELD, *Lex Mercatoria*, *op. cit.* 5, at 144; GOODE, Roy, *The Adaptation of English Law in International Commercial Arbitration*, 8 *Arb. Int’l.* 1 (1992)

only some of them are within *lex mercatoria*, while others are not? I think that the answer lies on how different sources operate in practice.

I will explain the division of labor among different sources of the new *lex mercatoria* by an illustration: In a recent arbitration experience of mine, I was the counsel for the Respondent in an ICC arbitration involving a first demand guarantee agreement. The parties were from two different countries and the sole arbitrator was from a third country.

By submitting the case to ICC arbitration, the parties accepted the application of the ICC rules of arbitration (a procedural “liquid” source).

In the Terms of Reference, the parties agreed to submit evidence according to IBA Rules on the taking of evidence (another procedural “liquid” source) and to make a Redfern List (a procedural “gas” source).

The first demand guarantee agreement was subject to ICC’s Uniform Rules on Demand Guarantees (a substantive “liquid” source).

These rules indicated the Respondent’s law as the applicable law to the contract, and the substantive rules of the Respondent’s country have been discussed by an international arbitral tribunal (a substantive “solid” source of state origin).

The arbitral tribunal based its decision also on the principle of good faith without referring to any particular domestic law (a substantive “gas” source).

The enforceability of the award under the New York Convention has been discussed (a procedural “solid” source of inter-state origin).

The award has been recognized and enforced under the arbitration law of a third country (a procedural “solid” source of state origin) which was adopted on the basis of UNCITRAL Model Law on International Commercial Arbitration (a procedural “solid” source of inter-state origin).

Conclusion

It is possible to observe applications of most of the types of the new *lex mercatoria*'s sources in this case, even though the case was not a complicated one. Therefore, I think that this example illustrates well the practice. I have two conclusions to draw from this illustration:

1. The new *lex mercatoria*, conceived as the law of the *societas mercatorum* is a functioning, competent and autonomous legal system. There is a division of labor among different sources of the new *lex mercatoria* and they operate as a whole in practice, serving a common purpose. Different forms of the new *lex mercatoria* are all the components of the same legal order and they are functional to the extent that they complement each other. A distinction among them according to their origin remains only theoretical and is inadequate to explain the functioning of international commercial law in the 21st Century.
2. The use of the different sources of the new *lex mercatoria* is so spread and well established that we do not even notice when we apply them. Therefore, the practice of the *lex mercatoria* is not limited to cases in which we expressly use the term.