LEX MERCATORIA[1]

William W. Park♦

SUMMARY

KEY WORDS: lex mercatoria. International trade usage. Force majeure. Arbitral justice.

SUMÁRIO

PALAVRAS-CHAVE: lex mercatoria. Usos comerciais internacionais. Força maior. Justiça arbitral.

[1]Revised for Part III-B of PARK, William. "Arbitration of International Business Disputes" published by Oxford University Press in 2006. Originally adapted from an essay published in 2000 co-authored with W. Laurence Craig and Jan Paulsson in the Third Edition of "International Chamber of Commerce Arbitration" (ICC Arbitration) published by Oceana Publications in 2000, starting at page 623. [NB., Arbitration Treatise (2006) misspells W. Laurence Craig's name as LaWrence Craig]

♦Professor of Law, Boston University. General Editor, Arbitration International. President, London Court of International Arbitration; Member, International Council for Commercial Arbitration.

A. Three Concepts of Lex Mercatoria

Lex Mercatoria seems to mean different things to different people. The present authors [W. Laurence Craig, William W. Park and Jan Paulsson] suggest that the various notions may usefully be distinguished and grouped under three headings. First, the most ambitious concept of Lex Mercatoria is that of an autonomous legal order, created spontaneously by parties involved in international economic relations and existing independently of national legal orders. Second, Lex Mercatoria has been viewed as a body of rules sufficient to decide a dispute, operating as an alternative to an otherwise applicable national law. Third, it may be considered as a complement to otherwise applicable law, viewed as nothing more than the gradual consolidation of usage and settled expectations in international trade.

These concepts are sufficiently complex, and are so often encountered in commentary on International Chamber of Commerce (ICC) arbitration, that a description of their theoretical bases seems appropriate. In 1974, the ICC began to publish excerpts of awards, edited to preserve the anonymity of the parties, in the Journal du droit international. In the presentation of the initial small collection of awards, two ICC Court officials (Messrs Thompson and Derains) expressed a caveat. ICC arbitrators were not aware of awards rendered by other ICC arbitrators; since the ICC itself had neither the authority nor the wish to harmonize decisions of independent ICC arbitral tribunals, each award was rendered without regard to other awards. "One may thus hardly speak of an arbitral case law.[2]"

That was a quarter of a century ago. Since then, similar selections of ICC awards have been published in French each year in the last issue of the Journal du droit international; in English, the ICCA Yearbook of Commercial Arbitration has followed suit (beginning in 1976). Numerous other publications and books have helped create a substantial body of published ICC awards. The issues faced by ICC arbitrators also arise in non-ICC proceedings, and indeed the proliferation of published awards has extended to those rendered in such proceedings.

Concomitant with this development, ICC arbitrators have increasingly come to rely on previous awards to support their decisions. By 1981, in his introduction to the Journal du droit international digest of ICC awards, the then Secretary General of the ICC Court of Arbitration wrote that awards with increasing frequency referred to previous published awards[3]. Such references may be found not only in cases where arbitrators have been given the authority to act as amiables compositeurs and thus without founding their decision in law[4], nor only in cases where the parties have stipulated by various formulations that general principles of law (rather than a specified national law) should apply[5], but indeed in cases where a specific national law is acknowledged in principle as being applicable[6]. Given the fact that issues as to conflict of laws and the scope of arbitral jurisdiction often must be considered prior to the choice of the national law that may otherwise govern the contract, it is not surprising that ICC arbitrators' reference to prior awards is especially frequent in dealing with such preliminary issues[7].

It has become commonplace for advocates to invoke arbitral precedents in memorials and oral argument. Whether one is a believer ("lex mercatoria is being continually reinforced"[8]) or not ("the myth of arbitral precedents as a source of international commercial law"[9]) , the trend cannot be ignored.

---

[2]1974 Journal du droit international (JDI) 878.

[3]Yves Derains, Comment, 1981 JDI 914. The same author repeated this observation more recently, in Les Tendances de la jurisprudence arbitrale internationale, 1993 JDI 829.

[4]See e.g. International Chamber of Commerce (ICC) Cases 3267/1979, I ICC Awards 76, 376; II ICC Awards 43; 5103/1988, II ICC Awards 361.

[5]See e.g. ICC Case 3380/1980, I ICC Awards 96, 413.

[6]See e.g. ICC Cases 3493/1983, I ICC Awards 124; 5073/1986, II ICC Awards 85; 2404/1975, I ICC Awards 280.

[7]See e.g. ICC Cases 2930/1982, I ICC Awards 118; 4131/1982, I ICC Awards 146, 465; 4381/1986, II ICC Awards 264; 4237/1984, I ICC Awards 167; 4695/1984, II ICC Awards 33. See also Iran–U.S. Claims Tribunal Cases 74 et al., XIII Yearbook 288, at 292 (1988).

[8]Yves Derains, Comment, 1981 JDI 914. See also Thomas Carbonneau, Rendering Awards with Reasons: The Elaboration of a Common Law of International Transactions, 23 Colum. J. Transnat'l L. 579 (1985).

Reviewing the first edition of this book (ICC Arbitration was first published in 1984), the late eminent Swedish arbitration specialist Gillis Wetter suggested that we are witnessing the birth of something that should be called the international law of arbitration comprising both procedural and substantive elements and destined to grow in a manner similar to the common law in the United States, where "cases decided in a large number of jurisdictions, each of whose legal systems is sovereign, have come to create a common source of law which unites the various jurisdictions without disturbing their autonomy.[10]" He wrote that the term lex mercatoria was inappropriate: at once too limited and overused.

While tempted to opt for a new expression and thus be free to define concepts afresh, upon reflection the present authors have not done so. Too much has been written about lex mercatoria in the context of ICC arbitration to skirt the subject. Yet Dr. Wetter was quite right in saying that the expression is overburdened with meaning; the first task must be to understand the difference between the fundamentally disparate concepts behind the catchphrase lex mercatoria. The discussion can be meaningful only if the terms are defined.

For all of its intellectual fascination, the debate over Lex Mercatoria to date[11] does not appear to have had more than a marginal impact on the practice of international arbitration[12], and this is even more true of the attitudes and conduct of parties to international contracts. It may, however, be argued that participants in the process apply and create lex mercatoria without knowing it. The proponents of lex mercatoria certainly have important and legitimate objectives: to discern rules for international commerce that conform to parties' expectations, and to avoid the trap created when the otherwise applicable national law appears uncertain, peculiar, dramatically amended since the date of the contract, or otherwise unpredictable and unjust in its application to foreigners. One problem is that the debate so far has involved only the members of a small group of specialists. Another is that when these specialists argue about lex mercatoria, they often are not talking about the same thing.

Proponents of lex mercatoria have the disconcerting habit of announcing the existence of an entire planet on little more evidence than blips on the radar screen, while detractors have adopted what one might call a posture of aggressive ignorance. The non-specialist, recoiling instantly from something which he recognizes as complicated and far removed from his everyday concerns, perhaps notes the catch-words for possible future reference, and goes on his way.

The discussion was revitalized in 1987 with the publication of a thoughtful and clear-eyed essay by Lord Mustill, "The new lex mercatoria.[13]" It is a rare and fortunate contribution to the field: an effort of extensive research and analysis, examining the postulates and the evidence with a fresh mind. Moreover, it was undertaken by a jurist of the category most suitable to the task, but generally least likely to be in a position to carry it out: an experienced practitioner and magistrate at the height of professional life.

A principal merit of Mustill's essay is its demonstration of the disparate concepts that have been blurred in much of the previous literature. While acknowledging their intellectual debt to this learned jud-

---

[9]Antoine Kassis, Théorie générale des usages du commerce, at 501 (1984).

[10]J. Gillis Wetter, Book Review, 1984 Svensk Juristtidning 156, at 161.

[11]The name most frequently associated with the doctrine of lex mercatoria is that of Professor Berthold Goldman, and his two leading essays, published with an interval of 15 years, are Frontières du droit et lex mercatoria, in Archives de philosophie du droit at 177 (1964), and La Lex mercatoria dans les contrats et L'arbitrage internationaux: réalites et perspectives, 1979 JDI 475. For a thorough review of the literature, see Le Droit des relations economiques internationales (1982), a collection of liber amicorum essays in honor of Professor Goldman, which demonstrates that French legal scholars are not unanimously convinced that there has been a new dawning of lex mercatoria; see e.g. Paul Lagarde, Approche critique de la lex mercatoria, at 125. See generally Lex mercatoria and arbitration (T. Carbonneau, ed., 2nd edn, 1998); Emmanuel Gaillard, Thirty Years of Lex Mercatoria: Toward the Selective Application of Transnational Rules, 10 ICSID Review 208 (1995).

[12]In 1986, the then General Counsel of the ICC Court of Arbitration noted that lex mercatoria "rarely appears" in ICC awards; Sigvard Jarvin, Comment, 1986 JDI 1138.

[13]In Maarten Bos & Ian Brownlie (eds.), Liber Amicorum for Lord Wilberforce 149 (1987); reprinted in 4 Arb. Int. 86 (1988).

ge, the present authors seek to spread neither conviction nor doubt. They aim simply to shed light on what may be relevant to current practice. They suggest that lex mercatoria is invoked to cover three different concepts, two of which are ideals rather than current realities. As for the third, which in the authors' view represents a useful evolution with a significant impact in practice, its contours are so modest that its very description may turn the tables: the theoreticians of lex mercatoria may deplore the banalization of their lofty constructs, while the scoffers might reflect that if this is all there is to it, they have been mercatorists all along.

An autonomous legal order

The average international practitioner may have great difficulty finding his way through the arcane abstractions found in the literature. The present authors believe that the significant practical distinction is the one to be perceived between the law of the arbitration, that is to say the law (or laws) which determines the binding effect of the actions of the parties or the arbitrator (in agreeing to arbitrate, in choosing rules of procedure or the applicable substantive law, in determining jurisdiction, or arbitrability, in issuing an award) and the law under which the merits of the dispute are decided. The latter is foremost in the minds of the parties when addressing the arbitral tribunal, because it establishes the nature and extent of their obligations; the former comes into play when facing national judges, because it determines what effect is to be given to an agreement to arbitrate, or to an arbitral award. (There are also occasions when arbitrators consider the effect of national laws other than the one they deem applicable to the contract; for example in determining the capacity of a party or the effect of mandatory rules of the country where the contract is to be performed. If one takes the U.S. legal system as an example, there has been an unmistakable extension of the extra-contractual law arbitrators are expected to apply, from the validity of patents to the effect of antitrust laws.)

Given the fact that international business transactions by definition have connecting factors with more than one legal system, the distinction is at once natural and concrete[14].

It is likely that every week an award is rendered in some Swiss city that applies a non-Swiss law, whether English, Brazilian, Iranian – or indeed lex mercatoria. But if that award is challenged before the Swiss judge, he will test it not under English, Brazilian, or Iranian law, nor under lex mercatoria, but according to the criteria of Swiss law. Thus, with respect to an ICC award which by its terms purports to decide the dispute by applying lex mercatoria, the question might arise whether the courts of the place of arbitration consider the award to be unlawful. Such a case has not arisen in England; some commentators there have expressed doubts as to the validity of such an award[15], but those doubts were put to rest by Article 46(1)(b) of the Arbitration Act 1996, subject to the requirement that the parties so agree. The Supreme Court of Austria has faced this situation and upheld the award[16]. As of 1985, the courts of Belgium would not even have jurisdiction to hear such a challenge if no litigants were Belgian[17]. The point is that the relevant legal system of that country which determines the effects of the award[18].

[14]In a rigorous review of the theoretical literature, Professor Pierre Mayer has peeled off vast layers of cumbersome abstractions to reach the conclusion that "the ultimate legal source of an international relationship is to be found simultaneously in all the States whose courts may be called upon to hand down a decision with regard to it, either directly or on the occasion of granting leave to enforce an arbitral award. No legal order is fundamental for the relationship; the Grundlegung does not exist." Le Mythe de l'ordre juridique de base (ou Grundlegung), in Le Droit des relations économiques international, 199, at 216 (Liber Amicorum for Prof. Goldman, 1982).

[15]See e.g. Michael J. Mustill, 4 Arb. Int. 86, at 108–9 (1988); Michael J. Mustill & Stewart C. Boyd, Commercial Arbitration 68–71 (2nd edn, 1989); Martin Hunter, Publication of Awards and Lex Mercatoria, 57 Arbitration 55, at 57–58 and 67 (1988).

[16]Norsolor S.A. v. Pabalk Ticaret, decision of 18 March 1982, in 1983 Recht der Internationalen Wurtschaft 29, at 868; excerpts in English in IX Yearbook 159 (1984).

[17]See Jan Paulsson, Arbitration Unbound in Belgium, 2 Arb. Int. 68 (1986).

[18]See generally Horacio Grigera Naon, Enforceability of Awards Based on Transnational Rules under the New York, Panama, Geneva and Washington Conventions, in Transnational Rules in International Commercial Arbitration 89,

If an international treaty such as the New York Convention applies, it does so because it has been made part of the national law of the enforcement forum. (The English courts have in fact held that an ICC award rendered in Switzerland and applying no national law as such, but "internationally accepted principles of law governing contractual relations," may be enforced.[19])

By contrast, the first concept covered by the expression lex mercatoria is that of an autonomous legal order which creates rules independent of any national legal order, and which govern the relationships of parties involved in international trade. As Lord Justice Mustill demonstrates after asking the simple question, "From where does its normative power arise?" the theoretical and practical difficulties of this concept are daunting. There exists no obligatory World Court of International Commerce. Disputants under an international contract may be confronted with one or more national judges or arbitrators; depending on the terms of the contract and on relevant rules of jurisdiction. At what point is one to suppose that a contractual relationship has fled the dominion of a national system to fall under an anational or transnational one? A cabinet-maker in Lyon who has never set foot outside France may one day unthinkingly enter the realm of international commerce by accepting an order to send a table to London. Is it seriously meant that he therefore must suddenly be concerned not only with the French legal system (because he might be sued in
Lyon if he fails to perform), and possibly the English legal system (because he may have to sue in London if he is not paid), but some independent legal order whose rules can be understood only if one is attuned to dominant principles of a host of national legal systems, conventions, form contracts devised by various organizations, and the like? Does the autonomous legal order come into play only when there is an arbitration clause? Or only if the contractual relationship is complex or of long duration – and if so where is the borderline? Is this legal order a matter of choice, available to parties who agree to refer to it, or is it obligatory whenever the relationship somehow has fallen within its ambit? When operating within this legal order, does an arbitrator apply existing law, or does he create it by rendering an award having precedential value? Mustill puts his finger on the dilemma by using the illustration of an international arbitrator faced with a previous award which decided precisely the question of law at issue:

> *If the arbitrator's function is simply that of an exponent, then the second arbitrator need do no more than pay appropriate respect to the reasons of his colleague, without being obliged to arrive at the same decision. If he thinks fit, he is at liberty to hold that his predecessor misunderstood the Lex Mercatoria. Again, at the other extreme, if the first arbitrator has exercised a creative function as a social engineer, his successor can fairly regard him as no more than a part of the self-regulating mechanism of the contract under which he acted, and can thus feel free to exercise the same function, in a different sense, under his own contract. But if the intermediate theory is correct, an award which enunciates a new rule thereby adds to the corpus; and since the lex is conceived to be a binding law, the subsequent arbitrator must apply it, whether he agrees with the conclusion or not*[20].

Perhaps the strongest objection to viewing lex mercatoria as a legal order is the fact that at present

---

ICC Publication No. 480/4 (1993). At the 65th International Law Association Conference in Cairo in 1992, a Resolution was adopted which recommended the following: The fact that an international arbitrator has based an award on transnational rules (general principles of law, principles common to several jurisdictions, international law, usages of trade, etc.) rather than on one law of a particular State should not in itself affect the validity or enforceability of the award; (1) where the parties have agreed that the arbitrator may apply transnational rules; or (2) where the parties have remained silent concerning the applicable law.

[19] In Deutsche Schachtbau- and Tiefbohrgesellschaft mbH v. Ras Al Khaimah National Oil Co. and Shell International Petroleum Co. Ltd. [1987] 2 Lloyd's L. Rep. 246, [1987] 2 All ER 769; extracts in XIII Yearbook 522 (1988); reversed on other grounds by the House of Lords [1988] 2 Lloyd's L. Rep. 293, [1988] 2 All ER 833. The French courts have also enforced ICC awards applying lex mercatoria rendered in Austria and Switzerland.

[20] 4 Arb. Int. 86, at 98 (1988).

it is simply not sufficient to deal with all aspects of an international commercial dispute. For example, how is one to determine the bona fides of an act undertaken on behalf of a corporation? Lex mercatoria, understood as principles derived from shared expectations in the international community, may hold that the capacity of an entity is determined by the law under which it is constituted, but the fact is that there are no corporations created under Lex Mercatoria. In the same vein, Mustill writes:

> *[I]t must be noted that the Lex Mercatoria has not yet laid claim to the whole territory of potential disputes arising from international commerce. Thus: (i) there appears to be no instance in which the lex has been invoked in a case of pure delict (ii) the lex has rarely been applied where*
> *the issues are those of consent, fraud in the making of a contract, and so on (iii) the lex has not, as far as the present author is aware, ever been credited in the literature with a power to create rights in rem, valid as against third parties—for example, by way of a transfer of title of corporeal assets, or pledge, or the creation of a monopoly such as patent or copyright . . . once it is accepted that the lex may on occasion have to be applied to some aspects of a dispute, whereas national law is applied to others, the practical attractions seem less apparent*[21].

A comprehensive body of substantive rules

Hundreds of international arbitral awards have now been published, in whole or in part, either containing the whole record of the case or sanitized to protect the anonymity of the parties. As already noted, it is an everyday phenomenon in ICC arbitration that written memorials and pleaders refer to awards as precedents. The text of this book [ICC Arbitration] itself is replete with descriptions and citations of arbitral awards. Does this confirm lex mercatoria's existence as a body of laws sufficient to serve as the governing law of an international contract?

The present authors believe in the importance of arbitral precedents, but as shall be seen, in a more limited sense (the third concept). As matters stand today, it is difficult to maintain that lex mercatoria can govern a contract. As Mustill writes:

> *The proponents of the Lex Mercatoria claim it to be the law of the international business community: which must mean the law unanimously adopted by all countries engaged upon international commerce. Such a claim would have been sustainable two centuries ago. But the international business community is now immeasurably enlarged. What principles of trade law, apart from those which are so general as to be useless, are common to the legal systems of the members of such a community? How could the arbitrators or the advocates who appear before them amass the necessary materials on the laws of, say, Brazil, China, Russia, Australia, Nigeria, and Iraq? How could any tribunal, however cosmopolitan and polyglot, hope to understand the nuances of the multifarious legal systems? In published awards the arbitrators occasionally make large claims about the universality of principles, but these are rarely if ever substantiated by citation of sources. Equally if not more important is the question: How could any adviser hope to predict what a tribunal not yet constituted might make of such a task in the future?*[22]

[21]Ibid. at 102. The best-known proponent of lex mercatoria, Berthold Goldman, has admitted that a number of lacunae of lex mercatoria (in particular the validity of consent, whether as a matter of capacity, authority, or undue influence) are structural and not temporary, in La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalites et perspectives, 1979 JDI 475, at 479–80. Commenting on this admission, Paul Lagarde infers that Goldman considers that such questions "naturally pertain to national legal orders," in Approche critique de la lex mercatoria, supra, at 141.

[22]4 Arb. Int. 89, at 92–3 (1988). The present authors wholly agree with the following observation by Lord Mustill: "In the literature, the use of legal encyclopaedias is sometimes advocated. I suggest that these are usually worse than useless for this particular purpose, unless the reader is guided by someone with direct knowledge: a little learning is indeed a dangerous thing. Anyone with practical experience of international disputes must acknowledge the diffi-

Nor is Mustill satisfied with trade practice as a source of rules outside national law:

> *The simple repetition of contracts on the same terms is as consistent with the exercise of freedom of contract as with subordination to a system of binding norms; indeed, far more so, since if the parties to a commodity transaction do not wish to bind themselves to, say, the GAFTA Contract Form No. 100, there is no legal or other institution which can compel them to do so. Moreover, the repetition of transactions in the same form could at most create a group of norms peculiar to the individual trade, thereby creating a network of para-legal systems. This is quite inconsistent with the theoretical premises of the Lex Mercatoria, which is that it springs spontaneously from the structure of international commerce—which is quite plainly regarded as an indivisible whole.*[23]

Whatever one's views de lege ferenda, it would appear impossible to deny that Mustill's objections are well taken as a matter of current reality[24]. The present authors would add only these observations:

> *• At the time of the preparation of the United Nations Commission International Trade Law's (UNCITRAL) Model Law on International Commercial Arbitration*[25]*, there was much debate about what was to become Article 28(2), defining the law to be applied by the arbitrators when the parties have not stipulated applicable law. Proponents of lex mercatoria (second concept) wished the wording (following the example of recent arbitration laws in France and the Netherlands) to refer to "rules of law" rather than "the law" determined by applicable conflict rules. The purpose was to allow awards to be decided on the basis of lex mercatoria. This proposal was defeated*[26]*.*
> *• Awards handed down on the foundation of lex mercatoria can doubtless be things of beauty, if rendered by profoundly knowledgeable scholars of comparative law. But if correct application of lex mercatoria requires arbitrators of such caliber, there simply will be a shortage of*

---

culty of making an accurate assessment of the law of only one unfamiliar legal system, absent the kind of prolonged and expensive expert guidance which would be quite out of the question if dozens of different laws had to be assimilated." Ibid. at 92, n. 24. These types of considerations doubtless underlie the reluctance of many arbitrators to embrace lex mercatoria (second concept). Thus, in a case where the evidence seemed clear that the parties when contracting had not considered the matter of governing law, an ICC tribunal presided by one of the leading Swiss arbitrators (Dr. Briner, who in 1997 became Chairman of the ICC Court) declared its unwillingness to assume that lex mercatoria should apply: "the choice of such a law would require an agreement between the parties which in the present case was not reached," ICC Case 4650/1985, II ICC Awards 67, at 68.

[23]Arb. Int. 86, at 95–6 (1988).

[24]The French Supreme Court's decision in Compania Valenciana de Cementos Portland v. Primary Coal Inc., 22 October 1991, 1992 Rev. Arb. 457 (upholding an ICC award rendered in Paris and applying general principles of "international trade") was heralded in some quarters as recognizing the legal status of lex mercatoria, but in the opinion of the authors the judgment signifies only that the Court of Cassation refused to overrule the substantive determination of the arbitrators when the contract contained no choice-of-law clause [NB., typo in original]. If this latter view is correct, the debate over the "normative force" of lex mercatoria may as a practical matter be viewed as a tempest in a tea cup.

[25]*See Gerold Hermann, The UNCITRAL Model Law: Its Background, Salient Features and Purposes, 1 Arb. Int. 6 (1985); same author, UNCITRAL Adopts Model Law on International Commercial Arbitration, 2 Arb. Int. 2 (1986); Jan Paulsson, Report on the UNCITRAL Model Law as Adopted in Vienna on 21 June 1985, 52 Arbitration 98 (1986).*

[26]*On the other hand, Article 28(1) dealing with choice of law by the parties refers to "rules of law," which Professor Clive Schmitthoff has concluded authorizes arbitrations to apply lex mercatoria if the parties have so stipulated, International Trade Usages 48 (ICC Publication No. 440/4, 1987). In commenting on the ILA Resolution quoted supra, a leading international arbitrator, Prof. Karl-Heinz Bockstiegel, stated that: "the message of this resolution is not to tell parties to just use this and nothing else, but just to deal with a situation which does occur in practice." Discussion of the ILA Resolution on Transnational Rules, 23 October 1992, in Transnational Rules in International Commercial Arbitration 49 (ICC Publication No. 480/4, 1993).*

> *qualified arbitrators. In addition, is it not a fair assumption that the best awards from the viewpoint of the parties are rendered by persons experienced with the problem raised by the particular context and substance of the dispute (construction contracts, long-term supply agreements, charter parties, or insurance policies); and would it not be unfortunate if they would be disqualified or reluctant to accept appointment because they do not belong to the lex mercatoria cognoscenti?*
> *• To those who would answer the last point by observing that one need not realistically fear a dearth of persons eager to act as international arbitrators, it must be responded that this fuels rather than allays one's apprehensions. In the hands of the untutored, authority to apply lex mercatoria may be a recipe for amateurism and arbitrariness. In some cases it may serve as a fig leaf for the arbitrator's private preferences, substituted for the parties' shared contractual expectations. Nothing is easier than to proclaim common principles on the basis of limited and superficial personal knowledge*[27]*. If enough awards are rendered by amateur mercatorists, there may well be pressure to reverse the international trend toward non-reviewability of arbitrators' findings of law.*

In 1994, UNIDROIT came to the rescue of lex mercatoria by publishing Principles of International Commercial Contracts which seek to provide uniform substantive rules, dealing not only with general matters but also highly technical ones[28].

If parties, arbitrators, and courts come to refer to these Principles, however, it will not mean that they are embracing lex mercatoria as the accretion of a common law of international transactions, but by way of relying on what is in effect a fixed codification which itself contains lacunae and may – once accepted in various places – have some difficulty in evolving. The UNIDROIT Principles may thus turn out to be a competitor of lex mercatoria, not its savior. Or perhaps it will come to be accepted, at least partially, as a snapshot of lex mercatoria as of 1994[29].

International trade usage

[27]Mustill, 4 Arb. Int. 86, at 113, n. 195, describes ICC Case 2291/1975, 1976 JDI 989, as follows: "[A]n instructive example of the dangers of making unsupported generalizations. In the award and commentary we find that Anglo-Saxon law is 'plus accessible à la révision des contrats en cas de déséquilibre même pour la cause économique (clause de hardship)' ('more open to the revision of contracts in the event of disruption of the contractural equilibrium even for economic causes') as well as reference to 'la présence presque automatique de clauses de ce type dans les contrats internationaux' ('the nearly automatic presence of such clauses in international contracts'). The former is not a correct statement of the common law; and the inclusion of hardship and similar clauses in the routine type of transportation contract with which the arbitrators were concerned is almost, if not entirely, unknown."

[28]Michael Bonell, The UNIDROIT Principles in Practice: The Experience of the First Two Years, 1 Uniform Law Review 30 (1997), cites the award in ICC Case 8128/1995, 123 JDI 812 (1996), where a sole arbitrator filled a gap in the otherwise applicable law with respect to the issue of interest by referring to Article 7.4.9(2) of the UNIDROIT Principles as a relevant "general principle" and therefore, in the circumstances, applied LIBOR plus two per cent. See also Klaus Peter Berger, The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts, 28 Law & Policy in International Business 943 (1997). For a more doubting view, see Hans van Houtte, The UNIDROIT Principles of International Commercial Contracts, II Arb. Int. 373 (1995), esp. 381–2 See also, The UNIDROIT Principles For International Commercial Contracts: A New Lex Mercatoria? (ICC Institute of International Business Law & Practice, 1995); Philippe Kahn, Vers l'institutionnalisation de la Lex mercatoria: à propos des principes UNIDROIT (Commission Droit et Vie des Affaires, 1998); Klaus Peter Berger, International Arbitral Practice and the UNIDROIT Principles of International Commercial Contracts, 46 Am. J. Comp. L. 129 (1998); Detlev Vagts, Arbitration and the UNIDROIT Principles, Contractación Internacional (Mexico, 1998).

[29]A similar venture has been undertaken by the Lando Commission which in May 1995 proposed Principles of European Contract Law, a text which some hope may be precursor of a European Civil Code; see Ole Lando, Principles of European Contract Law: An Alternative to or a Precursor of European Legislation? 40 Am. J. Comp. L. 573 (1992).

Finally, the expression lex mercatoria may cover the notion of international trade usages sufficiently established to warrant that parties to international contracts – whether generally or by category of contracts – be considered bound by them. This is the concept that the present authors deem to be practically significant today[30]. 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, apparently, 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:

> *Nobody could deny that usage in this sense can be an important element in the assessment by a tribunal of the rights and duties created by the contract, either because in a codified or inexplicit form it is tacitly incorporated into the contract, or because it has been received into the relevant national law. But there is nothing special about international trade in this respect, nor anything special about arbitration*[31].

Mustill points out that Article 7(1) of the Geneva Convention of 1961, Article 33(3) of the UNCITRAL Arbitration Rules, and Article 13(5) of the ICC Rules (Article 17(2) in the 1998 revision) require trade usages to be taken into account, and then says: "But the position would surely be just the same without them."[32] The justification for this assertion is, of course, to be found in national laws. The reader reflecting on his own national law will doubtless find support for the applicability of usages[33]. Indeed, the UNCITRAL Model Law on International Commercial Arbitration, which, it should be recalled, is a recommendation for harmonization of national laws (and whose drafters, as seen, specifically declined to en-

---

[30]Professor Clive Schmitthoff, who carried out an ICC research project begun in 1980 and terminated in 1987 with the publication of a report, International Trade Usages (ICC Publication No. 440/4) in reaching his conclusion that lex mercatoria is "a system of law" and not the reflection of authority to decide in equity, refers to lex mercatoria as "a universal trade usage," at 48. In fact it may be useful even if it is not a coherent "system," and even if it is not an impressively monolithic super-usage, but merely an incomplete concatenation of various usages. See Jan Paulsson, La Lex Mercatoria dans l'arbitrage CCI, 1990 Rev. Arb. 55.

[31]4 Arb. Int. 86, at 94 (1988).

[32]Ibid., at n. 33. Here Mustill may be underestimating the emphatic effect of what is now Article 17(2) of the ICC Rules providing that "[i]n all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages." For an instance where arbitrators relied on its precursor to establish a commission rate to replace a method for calculating remuneration which as a result of changed circumstances had become "excessive," see ICC Case 4145/1986, XII Yearbook 97, at 110 (1987).

[33]Article 1135 of the French Civil Code states: "Contracts give rise not only to the obligations expressed therein, but also to all consequences which equity, usages or the law attach to that obligation in accordance with its nature." The position of French law finds numerous echoes not only in legal systems that have codified the law of obligations, but also in those of the common law. In England, usages fall under the category of "implied terms," and their claim to application was felicitously expressed one and a half centuries ago in Hutton v. Warren (1836), 1 Meeson & Welsby's Exchequer Reports 466:

> *It has long been settled that in commercial transactions extrinsic evidence of custom and usage is admissible to annex incidents to written contracts in matters with respect to which they are silent. The same rule has also been applied to contracts in other transactions in life and this has been done upon the principle of presumption that, in such transactions, the parties did not mean to express in writing the whole of the contract by which they intended to be bound, but to contract with reference to those known usages.*

Contemporary statutory law in the United Kingdom is quite to the point. Section 55(1) of the Sale of Goods Act 1979 provides:

> *[A]ny right, duty, or liability arising under a contract of sale by implication of law may be negatived or varied by usage if such as to bind both parties to the contract.*

dorse the applicability, in the absence of agreement by the parties to that effect, of "rules of law" other than "the law"), firmly sets down, in Article 28(4):

> *In all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take into account the usages of the trade applicable to the transaction.*

Lex mercatoria in this modest sense may thus be seen essentially as an expansion of the notion of usages to encompass particular contracts whose specificity is that they are international. According to this view, the interpretation of international contracts requires recognition of the transnational context of the underlying transactions. The practical justification is not difficult to grasp. If international trade is to be facilitated, the regime of international contracts should not be a minefield of hidden provisions of national law. It is easy to say that no one should enter into a contract governed by, say, Finnish or Korean law without getting reliable and comprehensive legal advice, but if one adopts a position of absolute rigidity in this respect one is furthering the cause of lawyers rather than that of commerce. To do so would result in a situation where parties would view any foray into the international field as high adventure, particularly where the governing law is not specified in the contract. And as for parties who are active in a great number of countries, such as the licensor of widely desired technology, is it not healthy to start with the postulate that detailed standard contracts, developed over years of experience in various jurisdictions, should if at all possible be interpreted in a uniform manner, even though the judges of countries X, Y, and Z might have viewed the contracts differently if they had been concluded as a matter of purely domestic commercial relations between fellow nationals?

It would appear particularly appropriate to avoid unexpected peculiarities of a national law in the case where parties have not chosen the applicable law. In such a situation, one may often reasonably conclude that the parties have made a "negative choice." Each party proposed its own law, but each proposal was rejected; and finally neither law was stipulated. An arbitrator who then gives one of those laws primacy is in a sense doing just what the parties resolved should not be done. Another situation where the dominance of any national law seems doubtful is that of a contract to be performed in several countries[34].

An example might be helpful. In ICC Case 2090[35], a Pakistani party brought ICC arbitration against a French supplier under a cost-and-freight sales contract. An award was rendered by the three French arbitrators, sitting in Paris, in favor of the Pakistani buyer and against the French seller. It is clear that the tribunal took account of the practical difficulties a Third World party might face with respect to an arbitration to be conducted far away and under unfamiliar rules, as the following aspect of the case makes clear.

The French party had argued that under the contractually applicable French law, the buyer had failed to serve a "summons" as required by Article 1139 of the French Civil Code. Noting that Article 1139 refers to "a summons or any equivalent document," the arbitrators dismissed the technical argument. They felt it was appropriate to take into account the reasonable degree of familiarity by the Pakistani party of a foreign law it had accepted to govern the contract:

> *WHEREAS by law the judges are empowered to decide to what extent "another document" is "equivalent" to a summons;*
> *WHEREAS it is necessary to take into account the fact that the plaintiff, while it accepted to submit the dispute for solution under French law, is nonetheless a Pakistani company with its office in Karachi, and as such had little familiarities with technical precisions of French legal*

International contracts containing reference to the terms C.I.F. and F.O.B. have been cited as examples of usages that may, in light of §55(1), neutralize the application of the Sale of Goods Act even to contracts explicitly subject to English law. For a fuller review of incorporation of usages into various national laws, based on an ICC research project, see Schmitthoff, supra.

[34]See ICC Case 1859/1973, 1973 Rev. Arb. 133, where the arbitrator stated: "The contract was to be performed in three different countries . . . it was clear that the parties intended to refer to the general principles and practices of international trade."

[35]Award in ICC Case 2090/1976, I ICC Awards 56.

> *civil procedure;*
> *WHEREAS the claimant could have believed that it acted in good faith by contacting the French Commercial Counselor in Karachi on October 21, 1970, in order that he intercede with Defendant so that the latter would perform the sales contract, and thus accomplishing an act or document which could be considered as a summons;*
> *WHEREAS in any case, it is necessary to consider as a document equivalent to a summons the letter from Claimant dated May 19, 1971, in which he informed the Defendant of his intention to seize the Arbitration Court with the "dispute arising from the nonperformance of the contract by the Defendant*[36]*"*

The arbitrators thus took account of the international character of the contract in making allowances for the fact that the understanding of a Pakistani party, used to particular customs in managing its contractual relationships, might be quite different from that of a French party. The fact that the Pakistani party knows that a particular contract is governed by French (or Japanese or Brazilian) law will not necessarily change the instinctive reactions of its personnel to given situations during the life of the contract. The international arbitrator should not necessarily draw the same inferences from the acts or omissions of such a party as a French judge would when assessing the conduct of a French party. This can hardly be controversial; a French judge might well make the same allowances when dealing with an international contract governed by French law but performed by foreigners. The ICC arbitrator, however, is more often called upon to reflect in this transnational mode – and would be more suited to it if he has experience in international practice. To insist that the international arbitrator should try to ascertain how a judge of the country whose law he is applying would react, and then to do exactly that, may finally lead to more controversy. To avoid violence to his own sense of justice, the arbitrator would be tempted to reach for another applicable law. Although in most cases his "error" in determining the applicable law would not be subject to review, this type of artifice appears less appealing than the frank recognition that an international contract governed by French law may be viewed in a different light than a purely internal one[37].

Viewed as usages specific to international contracts, lex mercatoria would have both negative and positive effects. The negative effect has just been illustrated with respect to ICC Case 2090: the avoidance of peculiarities demonstrably contrary to the reasonable expectations of the parties. The positive effect is to recognize that some rules applicable to international commercial relations are so pervasive that no particular references to sources in national laws are needed to justify application of the rules[38].

This approach is particularly useful in cases where the governing law is unknown to the tribunal and the amount in dispute is so modest that it would be uneconomical for the parties to engage in research and offer detailed proof. It is even more useful when the governing law is that of a country whose sources of law are rudimentary. (In such a situation, the approach also has the salutary effects of making it easier for the arbitrator to accept the principle that the law of that country is applicable – thereby enhancing the

[36]Award in ICC Case 2090/1976, I ICC Awards 56 at 132.

[37]Since 1981, Article 1496 of the French Code of Civil Procedure gives the following directive to international arbitrators: "The arbitrator shall decide the dispute according to the rules of law chosen by the parties; in the absence of such a choice, he shall decide according to those he deems appropriate. "In all cases he shall take into account trade usages." (Emphasis added.)

[38]See e.g. ICC Case 4338/1984, I ICC Awards 555. A French court once made the following statement in rejecting an argument to the effect that the ICC Uniform Rules and Practice for Documentary Credit were "mere recommendations:" "[T]hey cannot have the same binding character as the law, but they reflect usages which are recognized, particularly in commercial matters, as constituting a source of law, applying in the absence of any express reference by the parties, at least insofar as they have not excluded their application with respect to a given point." Tribunal of Commerce of Paris, Judgment of 8 March 1976, 1977 Revue de la Jurisprudence Commerciale 72. Since in the premises the parties had in fact made contractual reference to the Uniform Rules, this statement must be considered as obiter dictum. See generally Jean Stoufflet, L'Oeuvre normative internationale dans le domaine bancaire, in Le Droit des relations économiques internationales 361 (Liber Amicorum for Prof. Goldman, 1982).

legitimacy of the international arbitral process in the eyes of parties from that country – and, frequently, to avoid controversial references to the laws of former colonial powers as "ultimate" sources of the laws of developing countries.)

It is here, in the evolution of standards to which reference can be made directly, without invoking more specific sources of national law, that arbitral precedents come in. The observation that this third concept of lex mercatoria is banal should not obscure the fact that application of the usages of international contracts is a challenging one. The weight to be given to lex mercatoria applied in this sense would not be the same in every case, nor should it, in light of its ultimate justification as a matter of the parties' reasonable and legitimate expectations. Thus, a foreign company which has long been established in France may appropriately be held to specifically French norms rather than international usages. And it may often be the case that with respect to certain categories of trade, the relevant usages are specific to that field of activity – different from general international usages and perhaps occasionally at variance with them.

One problem with the expression "usages" is that its primary meaning is that of conduct in the ordinary course of business, whereas the international arbitrator is looking for rules to be applied in a pathological situation: a dispute. There is no difficulty in applying usages in its ordinary sense to illuminate the meaning of contractual language (thus, for example, relevant usages may indicate whether "payment" was "made" at a particular date). But it is difficult to point to a dispositive "usage" when one party invokes a legal characterization of a situation (such as the neutralization of contractual duties due to an event of force majeure) which is challenged by the other. It is here that international arbitral awards may be seen to generate rules; the "usage" with respect to international contracts is that engendered by the existence of a body of arbitral precedents which may fairly be considered to fall within the scope of the settled and reasonable expectations of parties to international contracts. In this sense, "usages" may evolve into a type of customary law of international contracts, and it may be seen as creating useful and legitimate norms in the absence of contrary indications of otherwise applicable national law. The present authors would, however, express grave reservations with respect to any suggestions that "usages" created by arbitral precedents may overrule the explicit provisions of applicable national law. They are also mindful of the possible danger of arbitrators' inappropriately concerning themselves with implications of their decision beyond the parties before them.

One final reflection. National laws often give the judge (and by extension the arbitrator who may be applying them) wide powers to interpret contractual provisions and to apply them to the fact pattern at hand. When an international arbitrator exercises that authority, for example to establish the effect of an amendment on a prior contract or to determine whether an alleged event of force majeure was truly unavoidable, he does so (in conformity with whatever national law may be relevant) in light of all the circumstances. When those circumstances pertain to an international transaction, involving foreign states, foreign laws, foreign languages, and foreign currencies – not to mention foreigners – a type of jurisprudence is generated, by repeated decisions dealing with similar transnational fact patterns, which by definition cannot be derived from a purely national context. This, in the present authors' opinion, is a convincing rationale for the reference in ICC awards to arbitral precedents. As the unanimous ICC tribunal presided by Professor Pieter Sanders of the Netherlands put it in Case 4131/1982, after citing two prior ICC awards (relating to the possibility of inferring acceptance of arbitral jurisdiction from the conduct of parties in carrying out international contracts):

> *The decisions of [ICC] tribunals progressively create caselaw which should be taken into account, because it draws conclusions from economic reality and conforms to the needs of international commerce, to which rules specific to international arbitration, themselves successively elaborated, should respond*[39].

B. ICC Awards as Precedents

[39] I ICC Awards 146, 465.

The development of a mature body of authoritative rules requires that both businessmen and arbitrators view arbitral decisions as a confirmation of international commercial custom. By publishing awards rendered under its auspices, selecting especially those decisions that appear particularly independent of national law[40], the ICC has contributed toward the development

It was at this point of his reading of the first edition of this book [ICC Arbitration] that Gillis Wetter, who was otherwise convinced of the potential significance of what he would prefer to call an "international law of arbitration," wrote that the authors' attempt to identify specific principles unintentionally caused the bubble to burst. The attempted demonstration, he concluded, revealed an unfortunately shriveled and meaningless remnant of what had appeared to be high-flying and beautifully shimmering juridico-technical structures, which scientific analysis reduces to a dozen or so obvious or exceedingly fuzzy juridical axioms of limited value[41].

In light of this and many similar comments, the authors wish to emphasize the limited scope of their claims for these arguable norms of lex mercatoria. Certainly the "shimmering structures" of lex mercatoria (first concept) are not materialized here. And those who criticize lex mercatoria (second concept) on the grounds that it is far from able to deal with the full range of issues that arise in international business disputes may say with some force that as a system of jurisprudence, this is a "shriveled and meaningless" one. That leaves the "obvious" and the "fuzzy." In the view of the present authors, the significance of obvious or fuzzy norms should not be underestimated for the purposes of lex mercatoria (third concept). The question is whether a lex mercatoria of international usage has become so "obvious" with respect to a given principle that it may be applied without necessary reference to the otherwise applicable national law. If that has been the case, it is no mean achievement. Considering the cultural heterogeneity of the many significant actors in contemporary international trade, it would be unreasonable to expect that more than a handful of principles would reach this level of consensus. As for norms which appear "fuzzy," they obviously cannot be applied as long as the adjective fits. However, the frequency of attempts to apply them independently of national law suggests that it is an important matter in current practice; one should be attentive to their possible evolution into clearer norms[42].

The following principles have been applied in ICC arbitration without reference to national law.

> *(1) Institutional freedom to regulate the conduct of arbitrators. Articles 11 and 12 of the ICC Rules establishes in very general terms standards for the conduct of arbitrators; an ICC arbitrator may be challenged if he is not "independent" of the parties, if he is "prevented de jure or de facto from fulfilling his functions," or if he is "not fulfilling his functions in accordance with the Rules or within the prescribed time-limits." The point for present purposes is that rulings by the ICC on challenges of arbitrators are in most cases final[43] and may fairly be characterized as applying a set of uniform rules proper to ICC arbitration, rather than applying*

[40]The then Secretary General of the ICC Court of Arbitration wrote as follows in his introduction to the first award published in the digest of ICC awards appearing annually in the JDI: "Only those awards in which arbitrators have felt least constrained to apply national law have been published." 1974 JDI at 878. The introduction to the 1983 digest confirmed this guiding principle, 1983 JDI at 889.

[41]See Wetter, Book Review, 1984 Svensk Juristtidning, supra, at 160.

[42]An Indian author has expressed strong support for the development of lex mercatoria as a desideratum in terms of achieving greater acceptance of international arbitration by countries outside the industrialized world: In international commerce and business, trade usages and customs familiar to the parties and accepted by them must retain the primacy of place and consideration . . . The harmonization of laws in international trade and practices in international arbitration will be the greatest factor, which will help the movement of arbitration and its adoption by trade in every country and region of the world. What is required in international trade is not laws tied to national or different systems of laws, but a legal system based on international trade laws and usages, customs and practices conducive to the development of a lex mercatoria for worldwide acceptance and practice. N. Krishnamurthi, Some Thoughts on a New Convention on International Arbitration, in The Art of Arbitration 207, at 210 (Liber Amicorum for Pieter Sanders, 1982).

[43]See Jean-Yves Art, Challenge of Arbitrators: Is an Institutional Decision Final? 2 Arb. Int. 261 (1986).

> *different national rules depending on the case. Thus, the standards for conduct of arbitrators may be deemed to constitute norms germane to international arbitration.*
> *(2) Freedom to establish rules of procedure. Article 15(1) of the ICC Rules gives arbitrators the freedom (in the silence of the ICC Rules themselves and the absence of party agreement) to apply any rules of procedure they consider appropriate, "whether or not reference is thereby made to the Rules of procedure of a national law to be applied to the arbitration." Thus most of the established practice in ICC arbitration, particularly with respect to hearings and proofs, constitutes evidence of commonly accepted principles, independent of national laws.*

These principles guide the manner in which an international commercial arbitration should be conducted, and may thus be taken as part of the lex mercatoria governing the arbitral process. One of these principles, of course, is that arbitrators should first and foremost seek the parties' agreement when making procedural orders. The basic point is that the prudent arbitrator may find a basis on which to make procedural rulings without looking to national law.

> *(3) Freedom to establish applicable law. When the parties have not chosen applicable law, Article 17(1) of the ICC Rules provides that the "Arbitral Tribunal shall apply the rules of law which it determines to be appropriate." How arbitrators apply this rule is one of the most discussed aspects of ICC arbitration. It certainly is the point on which there is the greatest body of arbitral precedents, the greatest instances of ICC arbitrators citing previous published awards, and the most developed category of principles elaborated independently of national law*[44].
> *(4) Arbitrators' authority to rule on their own jurisdiction. This principle, consecrated in ICC arbitration, is a widely recognized rule. Article 6(4) of the ICC Rules call on arbitrators to decide questions relating to their own jurisdiction, and countless ICC arbitrators have done just that*[45]*. In so doing, they have generally been upheld by national courts*[46].
> *(5) A state may not invoke its internal law to repudiate its agreement to arbitrate. As Judge Keba Mbaye (former Vice-President of the International Court of Justice and former First President of the Supreme Court of Senegal) put it: "A state must not be allowed to cite the provisions of its law in order to escape from an arbitration that it has already accepted.*[47]*" This principle of good faith has been applied by ICC arbitrators as an imperative norm perceived without reference to any specific national law*[48]*. It may be noted that by virtue of the new Swiss Federal Act on Private International Law, this principle has been incorporated into the national law of one of the leading venues for international arbitration. This is a singular example – but perhaps a sign of things to come – of a national legal principle being derived from lex mercatoria rather than the other way round.*
> *(6) Pacta sunt servanda ("contracts are to be enforced"). None of the first five principles discussed above relates to substantive matters, but rather to issues of procedure, applicable law, and jurisdiction. This is the first substantive principle. The classical basic postulate, it is*

---

[44]See e.g. ICC Case 4237/1984, I ICC Awards 167.

[45]See e.g. ICC Cases 3987/1983, I ICC Awards 521; 4367/1984, II ICC Awards 18; 4695/1984, II ICC Awards 33; 5065/1986, II ICC Awards 330; 5103/1988, II ICC Awards 361; 6268/1990, III ICC Awards 68; 6719/1991, II ICC Awards 567.

[46]The references are too numerous to be cited. See generally the various National Reports published in the Yearbook. For a recent and thorough discussion at the highest level of a national court system, see the decision of the Supreme Court of India of 16 August 1984 in Renusugar Power Co. v. General Electric and International Chamber of Commerce, unpublished; extracts in X Yearbook 431 (1985).

[47]In International Arbitration: 60 Years On 293, at 296 (ICC Publication No. 412, 1984).

[48]See generally Jan Paulsson, May a State Invoke Its Internal Law to Repudiate Consent to International Commercial Arbitration? 2 Arb. Int. 90 (1986). Michael Mustill, 4 Arb. Int. 86, at 112, n. 91 (1988), writes: "Perhaps it should be classed as a principle of international ordre public rather than lex mercatoria." One might observe that to the extent that an international commercial arbitrator finds that he is authorized to apply international ordre public,

> *given particular resonance by the ICC Rules themselves, which in Article 17(2) require arbitrators in all cases to take into account the provisions of the contract*[49].

For example, arbitrators presume that international businessmen negotiate contracts in awareness of the potential impact of price fluctuations and foreign exchange regulations. Unless the parties explicitly reallocate these risks, arbitrators hesitate to imply terms that alleviate a party's obligation to perform. Fluctuations of the currency in which a contract price is denominated changes the real value of contractual obligations. Parties may avoid this risk by using a currency stabilization clause, for example by indexing the currency to its gold value at the time of contracting[50]. ICC arbitrators have consistently enforced express currency stabilization clauses. In one case, for example, an Iranian purchaser was awarded damages for breach by the Yugoslavian seller in accordance with the contract's currency stabilization clause, without reference to the content of the contract's governing law[51].

A party to an international contract generally must render payment in the designated currency even though its value has changed. In one ICC award[52], the parties were required by contract to negotiate a new sales price should currency fluctuations cause an imbalance in the parties' obligations. When a devaluation of the U.S. dollar precipitated fruitless negotiations, the seller claimed that he had fulfilled his obligations. The arbitrator found that the clause required only that the parties undertake good faith negotiations, the failure of which meant that the contract was binding according to its original prices. Because the parties failed to provide an index to stabilize the price, the seller could arbitrate only the issue of the buyer's good faith[53]. The parties may have considered currency fluctuations, but they failed to create a currency stabilization clause. Instead they had drafted a type of hardship clause, ill-suited to currency stabilization.

The principle of pacta sunt servanda does not permit parties to be totally indifferent to the problems of their co-contractants when significant circumstances have rendered performance difficult. ICC arbitrators are not anxious to give the proverbial "pound of flesh." They find the pacta sunt servanda principle to be tempered by another rule; that of good faith.

> *(7) Performance and renegotiation in good faith. Most national legal systems contain explicit legal texts to the effect, as the Egyptian Civil Code puts it in Article 148, that: A contract must be performed in accordance with its contents and in compliance with the requirements of good faith.*
> *A contract binds the contracting party not only as regards its expressed conditions but also as*

---

he may be giving substance to lex mercatoria (first concept).

[49]As a U.S. court stated in upholding an agreement to arbitrate in the Netherlands against the complaint of a U.S. defendant that it would not have agreed to such an "onerous" condition as the obligation to arbitrate in a foreign country had it known that such an obligation was part of the "Conditions" referred to in an "Offer" it had accepted: "Parties, especially commercial parties, are generally held to their contracts whether they have read them or not. Were this not the law, there would be no certainty in contracts," JMA Investments et al. v. C. Rijkaart B.V. et al., unpublished decision of 18 June 1985, U.S.D.C, E.D. Wash.; extracts in XI Yearbook 578, at 580 (1986).

[50]Awards upholding "gold clauses" include, according to Mustill's enumeration, 4 Arb. Int. 86, at 112, n. 94 (1988): ICC Cases 1512/1971, I ICC Awards 207; 1990/1972, I ICC Awards 20; 199; 2291/1975, I ICC Awards 274. Such a clause is only one of several mechanisms for adapting the contract to future circumstances. The more complex "hardship clause" calls for contractual adaption in the face of a wide variety of changed circumstances that may have made the contract onerous for one of the parties. The adaptation mechanism generally requires negotiation followed by arbitration, suitable for long-term development contracts rather than for sales contracts. See Bruno Oppetit, L'Adaptation des contrats internationaux aux changements de circonstances: la clause de "Hardship", 1974 JDI 794.

[51]ICC Case 1717/1972, I ICC Awards 191. Iranian law had been found to govern the contract.

[52]ICC Case 2478/1974, I ICC Awards 25, 233.

[53]Cf. Werner Melis, Force majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration, 1 J. Int. Arb. 214 (1984).

> *regards everything which, according to law, usage, and equity, is deemed, in view of the nature of the obligation, to be a necessary sequel to the contract*[54].

To say that this principle has also evolved into a norm of lex mercatoria applicable "independently" of national laws may appear somewhat fatuous, since most national legal systems have long since erected it as a cornerstone of their law of obligations[55]. But beyond that, arbitral precedents provide illustrations of the "necessary sequels" that the requirement of good faith attach to international contracts[56]. Thus, the principle of good faith has been applied to hold an existing corporate entity bound by documents it signed on behalf of a company to be created[57], to hold that the obligation by the supplier to install telecommunications equipment to be used in West Africa implied that the equipment "would be built with all specifications necessary for complying with the conditions prevailing at the site," and that in the circumstances of a case involving an international distribution agreement between U.S. and Argentine parties having had an initial two-year duration and having been extended for several shorter periods, a two-month notice of termination was wrongful and constituted a material breach[58]. In many cases, the issue of good faith may also be viewed in terms of estoppel (see paragraph 17 below) as in the case of the corporate entity having signed on behalf of a yet-to-be created company; having caused the other party to perform under the contract, it was estopped from seeking to avoid liability simply by failing to finalize the establishment of the company in whose name the contract had formally been signed.

While a party may ultimately insist on its contractual rights, it would be ill-advised to refuse even to discuss matters with a co-contractant harmed by substantially changed circumstances. Refusal to negotiate in good faith has been sanctioned by ICC arbitrators[59].

> *(8) Rules of force majeure. The defense of force majeure is often litigated in ICC arbitration. It breaks down into a number of sub-issues relating to the components of a valid defense, such as the meaning and scope of the requirements "insurmountability," "unforseeability," and "extraneousness." It can therefore not be encapsulated in a neat phrase. For this reason, and also because they provide a particularly rich field to observe arbitral jurisprudence in the making, the rules of force majeure are specially analyzed below.*
> *(9) Conduct may be deemed tacit acceptance of modifications of contract. The former Secretary General of the ICC Court of Arbitration has referred to: a consistent view by international commercial arbitrators that any act, or failure to act, that constitutes a divergence from the strict terms of contractual stipulations calls for an immediate reaction by the other contracting party, in the absence of which the latter is presumed to have waived any objection*[60].

The notion that the failure to act promptly may result in a waiver is frequently invoked as a defense against parties who allege failure of contractual performance but who had not, at the relevant time, promptly and clearly expressed their intention to consider the contract rescinded for breach. Their silence in effect created an ambiguous situation calculated to let them have it both ways. Under such circumstances, ICC tribunals have reduced damages[61]. In other situations, the claimant's failure to react in timely

[54]Translation by Perrott, Fanner, and Sims Marshall.
[55]Some common lawyers seem to think that the good-faith obligation has no place in their law. The fact is that it does, but perhaps in so obvious a fashion that they do not recognize it when it appears, typically under the guise of implied terms. See Stephen Burton and Eric Andersen, Contractual Good Faith (1995).
[57]But see, for a sceptical view of the possibility of discerning useful transnational norms, Piero Bernardini, Is the Duty to Cooperate in Long-term Contracts a Substantive Transnational Rule in International Commercial Arbitration? in Transnational Rules in International Commercial Arbitration 137 (ICC Publication No. 480/4, 1993).
[58]ICC Case 5065/1986, II ICC Awards 330.
[58]ICC Case 5073/1986, II ICC Awards 85.
[59]See ICC Case 3131/1979, extracts in I ICC Awards 122 but relevant passages only in 1983 Rev. Arb. 525, at 531. See also Goldman, supra, 1979 JDI at 492; ICC Cases 2291/1975, I ICC Awards 274; 2478/1974, I ICC Awards 25, 233; 2508/1976, I ICC Awards 292; 5477/1988, II ICC Awards 358; and discussion infra.
[60]Yves Derains, Comment, I ICC Awards 447 (commenting ICC Case 3344/1981, Ibid. at 440).

fashion (for example in inspecting goods) deprived the defendant of the possibility of early rectification of its deficient performance. To reduce the amount of awards on account of such failures appears consistent with the well-established duty to mitigate damages. There are, however, difficulties in extending these concepts as far as the just-quoted passage might suggest. For if they are sought to be elevated to a general legal principle that "silence means acquiescence," it must be recognized as problematical[62]. These notions are better suited to the realm of arbitrators' discretion in evaluating facts, where they become matters of degree, than as coalescing into a legal principle which can hardly be articulated in general terms without generating controversy.

> *(10) Ut res magis valeat quam pereat ("so that the thing be held valid rather than perish"). According to this principle, one should, when faced with contractual provisions which may have more than one interpretation, or which contradict one another, favor the interpretation which preserves meaning for each provision. In other words, interpretations which have the effect of canceling contractual terms, or of making them redundant, are to be eschewed. In French, this is called the principle of the effet utile. ICC arbitrators have recognized it as being a "universally acknowledged principle of interpretation.[63]"*
> *(11) The burden of proof of facts alleged to support a claim. The principle actori incumbit probation has been applied by ICC arbitrators as a fundamental concept of the international legal community[64].*
> *(12) Disregard of legal nomenclature misused by the parties. ICC arbitrators have refused to be bound by what the parties have seen fit to call their acts[65] or their contracts[66] if such expressions purport to create legal classifications that are wrong.*
> *(13) Use of goods implies acceptance. It often happens that a buyer, while refusing to take delivery under contractual procedures, nonetheless utilizes equipment or goods and later claims to have reserved the right to challenge its quality. Absent other factors justifying the refusal of formal acceptance, ICC arbitrators have deemed use to be tantamount to acceptance[67].*
> *(14) Mitigation of damages. This principle, reaffirmed in 1987 in an award which, pursuant to the parties' agreement, expressly applied lex mercatoria[68], has become a consistently applied norm in ICC awards[69].*
> *(15) Damages for contractual breach are limited to foreseeable consequences. In evaluating damages, ICC tribunals have considered what was foreseeable in the ordinary course of events[70]. One commentator, noting that ICC arbitrators deem this principle to have an "international scope," concluded that the reasoning of the arbitrators was consonant with both the famous nineteenth-century English case of Hadley v. Baxendale and Article 1150 of the French Civil Code[71].*
> *(16) The availability of set-off or compensation. The right of a party to raise as a defense what*

[61]ICC Cases 2291/1975, I ICC Awards 274; 2520/1975, I ICC Awards 278; 3243/1981, I ICC Awards 429.
[62]Lord Mustill writes flatly that it "is not consistent with the common law," 4 Arb. Int. 86, at 114, n. 106 (1988).
[63]ICC Case 1434/1975, I ICC Awards 263, at 267. See also ICC Cases 3460/1980, I ICC Awards 425; 5910/1988, II ICC Awards 371.
[64]See e.g. ICC Cases 1434/1975, I ICC Awards 263; 3344/1981, I ICC Awards 440; 6653/1993, III ICC Awards 513.
[65]ICC Case 3540/1980, I ICC Awards 105, 399.
[66]ICC Case 3243/1981, I ICC Awards 429.
[67]Ibid.
[68]ICC Case 4761/1987, II ICC Awards 298, 302, 519.
[69]See references given by Goldman, supra, 1979 JDI at 495; by Yves Derains, Comment, 1982 JDI 983, at 986; and in ICC Case 4761/1987, I ICC Awards 298, 302, 519. See also ICC Cases 4462/1987, III ICC Awards 17; 5910/1988, II ICC Awards 371; 5885/1989, III ICC Awards 40; 6069/1989, XV Yearbook 83 (1990); and Bernard Hanotiau, La Détermination du dommage réparable: principes généraux et principes en émergence, in Transnational Rules in International Commercial Arbitration 216–217 (ICC Publication No. 480/4, 1993).
[70]ICC Cases 1526/1975, I ICC Awards 218, 290; 2404/1975, I ICC Awards 280; 5946/1990, III ICC Awards 46; and Hanotiau, supra, at 214–15.
[71]Yves Derains, Comment, 1976 JDI 995, at 996.

> *common lawyers call set-off, and civil lawyers call compensation, is often an issue of surpassing practical importance in arbitration. Must the purchaser of goods pay immediately for certain shipments of goods notwithstanding his counter-claim on account of other defective deliveries under the same contract, or may his payment be suspended while the substance of his counter-claim is considered by the arbitral tribunal? May a nationalized concessionaire withhold taxes or royalties for minerals extracted because it has an unliquidated claim for compensation? The answer to these questions may be of no theoretical significance as to the merits of the dispute, but as a practical matter it may mean everything: if compensation is not available, the counter-claimant may be destroyed economically, or face such expenses, delays, or other difficulties of collection that he must accept a settlement for a fraction of that to which he is in principle entitled.*

There is support for the proposition that a right to set-off of claims arising under the same contract is an established principle of international contractual usage irrespective of applicable national law; at least as long as the competing claims are to be heard by the same tribunal[72]. The usefulness of a rule in this connection is particularly great in view of the fact that the competing claims may otherwise be governed by different national laws containing different criteria for compensation. (The conclusion that the availability of set-off should be judged according to the law governing the claim sought to be extinguished has intuitive appeal but is not conclusive. If "the law of the counter-claim," as opposed to "the law of the claim," defines different criteria for claims that may be used to extinguish debts, there will inevitably be an argument.)

Hand in hand with the issue of set-off goes the doctrine of the exceptio non adempleti contractus. Contractual non-performance is excusable as a reaction to failure of performance by the other contracting party. It is quite clear that this doctrine has particular legitimacy with respect to competing claims that may ultimately be used to offset each other and produce a single "net" debt. There is evidence for the proposition that the exceptio is an autonomous rule of international arbitration[73]. It would not seem misplaced to reflect that the exceptio was enshrined in Article 60 of the Vienna Convention on the Law of Treaties precisely because it was thought that in international conflicts, it would be unfair for the aggrieved party to have to continue to comply with a treaty which the other party is violating, and this for the duration of possibly lengthy proceedings[74].

> *(17) Estoppel. The doctrine of estoppel is a creation of Anglo-American law. Moreover, it has not traditionally been listed among the perceived principles of lex mercatoria. Explicitly recognizing these two facts, Emmanuel Gaillard has nevertheless concluded that a rule to the effect that no party may rely upon its own inconsistency to the detriment of another may now be deemed elevated to the level of a "general principle applicable in international commercial*

[72]ICC Case 3540/1980, I ICC Awards 105, 399. Mustill comments on this award as follows, 4 Arb. Int. 86, at 114, n. 104: "the conditions . . . resemble those for set-off 'in law' under English law, but are more restrictive than those of the set-off 'in equity'." Cf. ICC Case 5946/1990, III ICC Awards 46. Accord, award in Case 60/1980 of the Court of Arbitration at the Bulgarian Chamber of Commerce and Industry, XII Yearbook 84 (1987). For a case where set-off was denied because the claim in set-off was subject to another arbitral jurisdiction, see the award of 13 March 1984 of the Netherlands Royal Association of the Committee of Grain Traders, 1984 Tijdschrift voor Arbitrage 112; extracts in English in X Yearbook 79 (1985). It appears that deductions from freight or hire by way of set-off are considered contrary to U.S. maritime law and custom absent agreement to the contrary; see Jerry Scrowcroft, Note, X Yearbook 101 (1985).

[73]ICC Cases 2583/1976, I ICC Awards 304; 3540/1980, I ICC Awards 105, 399; see also P. O'Neill and N. Salam, Is the Exceptio Non Adimpleti Contractus Part of the New Lex mercatoria? in Transnational Rules in International Commercial Arbitration 147 (ICC Publication No. 480/4, 1993).

[74]Eduardo Jimenez de Arechaga, International Law in the Past Third of a Century, I Recueil Des Cours 1, at 81 (1978). It should be noted that suspension of performance under this doctrine is at one's own risk; if it is ultimately decided that there was no material breach; on the other side, the suspension itself may be a breach; ibid. The same reasoning would appear apposite to international contractual relations not per se governed by public international law.

> *arbitration.[75]" Although Gaillard's main reference points are arbitral awards involving states[76], he expresses the firm view that nothing in the sources or the scope of this "new principle" limits it to cases of State contracts[77].*
> *(18) Contracts are unenforceable if their purpose is contrary to international morality. International arbitrators may consider a contract to be contrary to an imperative norm of international morality: contra bonos mores. In this connection, it should be noted that the Council of the ICC has adopted Rules of Conduct to Combat Extortion and Bribery, Article 1 of which provides simply "No one may demand or accept a bribe.[78]"*

In his important study, Lord Justice Mustill listed twenty rules "representing a tolerably complete account of the rules which are said to constitute the lex mercatoria in its present form.[79]" Most of them have been discussed above. The rules falling in the following categories, although listed by Mustill, appear to be much more problematic, whether because they are "fuzzy" (to use Wetter's word) or because they are quite likely to be neutralized by conflicting norms – and therefore seem unlikely to escape analysis and ultimate disposition under applicable national laws.

Exceptions to pacta sunt servanda

The notion that contractual obligations may be attenuated or neutralized by a change of circumstances, or by a finding that the claimant has committed an abuse of right, or that the terms of the contract are unfair, is difficult enough to apply when they appear as part of a body of national law. Any attempt to introduce such a notion as a general principle applicable by an ICC arbitrator would seem to open the door to subjectivism and unpredictability, and must be viewed with great reservations[80].

---

[75]L'Interdiction dé se contredire au détriment d'autrui comme principe général du droit du commerce international, 1985 Rev. Arb. 241, at 258. See also Paul Bowden, L'Interdiction de se contredire au détriment d'autrui (estoppel) as a Substantive Transnational Rule in International Commercial Arbitration, in Transnational Rules in International Commercial Arbitration 125 (ICC Publication No. 480/4, 1993).

[76]Amco Asia Corp. et al. v. Republic of Indonesia, ICSID Award on jurisdiction dated 25 September 1983, 23 I.L.M. 351 (1984); Woodward-Clyde Consultants v. Islamic Republic of Iran and the Atomic Energy Organization of Iran, Iran–U.S. Claims Tribunal, Award of 2 September 1983, 3 Iran–U.S. Claims Tribunal Reports 239 (1983-II).

[77]1985 Rev. Arb. 245. Gaillard particularly analyzes the similarity in comparative law of the doctrine of estoppel with those of apparence and non concedit venire contra factum proprium. In ICC Case 4667/1984, cited in Yves Derains, Comment, 1987 JDI 1043, at 1047-8, the arbitral tribunal stated that under the "usages" referred to in Article 13(5) (now Article 17(2) under the 1998 Rules) of the ICC Rules, when a chief executive is assisted in negotiations by another representative of a company, the other party is entitled to believe that when the former leaves the table after having seen all documents ready for signature, the latter has authority to sign. For an award holding an Austrian company bound by the signature of an unauthorized person who nonetheless had the appearance of authorization, see the award of 5 March 1980 of the Arbitration Court of the Chamber of Commerce and Industry of Czechoslavakia, unpublished, excerpts in XI Yearbook 112 (1986). See also the award in Case No. 255 of 26 April 1985 of the *Iran–U.S. Claims Tribunal, XI Yearbook 332, at 336–337; Commentary, XI Yearbook 399, at 439 (1986).*

[78]*ICC Publication, 1977. See generally Ahmed El Kosheri and Philippe Leboulanger, L'Arbitre face à la corruption et aux trafics d'influence, 1984 Rev. Arb. 3. See also United Nations Declaration against Corruption and Bribery in International Commercial Transactions, adopted 16 December 1996, 36 I.L.M. 1044 (1997).*

[79]*4 Arb. Int. 86, at 110 (1988).*

[80]*"ICC arbitrators have only exceptionally admitted the application of the principle rebus sic stantibus," Werner Melis, Force Majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration, 1 J. Int. Arb. 214, at 221 (1984). See also Hans van Houtte, Changed Circumstances and Pacta Sunt Servanda, in Transnational Rules in International Commercial Arbitration 105 (ICC Publication No. 480/4, 1993). For an illustration of the rejection by an ICC tribunal of an argument seeking to avoid contractual obligations under the notion of rebus sic stantibus, see ICC Case 2404/1975, I ICC Awards 280. Accord, ICC Cases*

Culpa in contrahendo (wrongful acts while entering into a contractual relationship)

While Mustill cites one commentator to the effect that culpa in contrahendo was recognized in ICC Case 2540/1976, he also notes that that particular case appears to have been decided in accordance with national law[81]. In addition, the notion of good faith in the negotiating process gives rise to remedies whose conditions are intricate and rather different as they appear under various national laws. One need only consider the vast learning in all developed legal systems on this topic, whether it appears under the headings of firm offers, mistake, misrepresentation (dol), negligence, estoppel, and implied contract[82]. Such tools require delicate handling in the best of cases, and do not readily lead to conclusions that there are transnational norms for pre-contractual behavior. In the case of arbitration, given its necessary foundation in contract, the difficulty is exacerbated[83].

C. An Emerging Transnational Norm: The Example of Force Majeure

ICC awards dealing with force majeure illustrate the way that the repeated use of certain analytical criteria in arbitral awards may create a recognized standard of international business behavior that is conducive to establishing authoritative customary rules of lex mercatoria[84].

When considering the discussion that follows, the reader should be aware of the fact that many if not most cases deal with contracts that contain force majeure clauses, and thus do not necessarily support

---

1512/1971, I ICC Awards 3, 33, 37, 207; 2216/1974, I ICC Awards 224; 5617/1989, III ICC Awards 537; award of 6 July 1983 in an ad hoc arbitration between Hungarian and Yugoslav parties (applying Swiss substantive law), unpublished; extracts in IX Yearbook 69, at 70 (1984); award No. 2049 of 21 December 1984 of the Society of Maritime Arbitrators, New York, Lygnos Brothers Shipping Inc. v. Gold Kist Inc., XI Yearbook 200 (1986). To the contrary, relief from contractual terms was granted under the facts of ICC Cases 4145/1986, I ICC Awards 559, II ICC Awards 53; 4761/1987, II ICC Awards 298, 302, 519; and the award of 25 September 1985 in Case No. 59, Iran–U.S. Claims Tribunal, XI Yearbook 283 (1986).

[82]4 Arb. Int. 86, at 111, n. 87 (1988).

[82]A recent collection of essays by scholars and practitioners on this complex subject appeared in Formation of Contracts and Precontractual Liability (ICC Publication No. 440/9, 1990).

[83]The situation is quite different – although no less complex – with respect to an admittedly valid contract which contains an undertaking to conduct further negotiations. The obligations, as a matter of international law, of pacta de negotiando or pacta de contrahendo were discussed in detail by the Arbitral Tribunal for the Agreement on German External Debt in the case of Greece v. Federal Republic of Germany, award of 26 January 1972, 47 Int. L. Rep. 418 (holding past efforts by the parties to have been unsatisfactory and declaring the parties to be obliged to enter into "meaningful" negotiations, and not merely a "formal process . . . Meaningful negotiations cannot be conducted if either party insists upon its own position without contemplating any modification of it;" ibid. at 462). See also the following statement of the tribunal seized with a dispute under a nationalized oil concession in the ad hoc case of AMINOIL v. Kuwait, award of 24 March 1982, 21 I.L.M. 976, at 1004 (1982):

> *An obligation to negotiate is not an obligation to agree. Yet the obligation to negotiate is not devoid of content, and when it exists within a well-defined juridical framework it can well involve precise requirements. In some cases the failure of the negotiations can be attributed to the conduct of one of the parties, and if so, the matter becomes transposed onto the plane of responsibility, and should find its solution there.*

As Yves Derains, the then Secretary General of the ICC Court of Arbitration wrote in commenting on ICC Case 2508/1976, in I ICC Awards at 296, "the obligation to negotiate in good faith implies, among other things, that of 'refraining from making any manifestly unacceptable proposals that would necessarily lead to the failure of the discussions,' " citing Les Lettres d'intention dans la négociation des contrats internationaux, 3 Droit et Pratique Du Commerce International 73 (1977).

[84]See Werner Melis, Force majeure and Hardship Clauses in International Commercial Contracts in View of the Practice of the ICC Court of Arbitration, 1 J. Int. Arb. 214 (1984); David Rivkin, Lex mercatoria and force majeure, in Transnational Rules in International Commercial Arbitration 161 (ICC Publication No. 480/4, 1993).

the proposition that there exists a general principle of force majeure independent of contractual stipulation. Rather, these cases suggest rules for interpreting force majeure clauses, which often follow standard forms and cannot be applied mechanically to the concrete situations that arise.

To raise a defense of force majeure the non-performing party must prove: (1) the impossibility or futility of performance (2) the unforeseeability, at the time of signing the contract, of the circumstances that made performance impossible; and (3) prompt notification to the disappointed party of the inability to perform. Each of these elements reflects the needs and common practices of the international business community and will be discussed separately below[85].

Impossibility or futility

Arbitrators have distinguished impossibility from mere impracticality or onerousness. A party's inability to perform will not constitute impossibility if, in an objective sense, someone else could perform.

For example, in an ICC case[86] Jewish employees could not obtain the visas needed to perform services in an Arab country as required by their employer's contract with a Yugoslav firm. The arbitrator found that the employer, a German company, would have had to provide the services by employing non-Jewish workers if necessary. The Jewish employees' inability to perform did not support a finding of impossibility on behalf of their employer. The arbitrator held that if the German company itself could not perform, it was bound to engage another firm to fulfill its obligations. A standard of feasibility was derived from the business community as a whole rather than from the particular situation of the party obliged to perform.

In three related cases decided in 1974, a government, having nationalized a foreign corporation's source of raw materials, subsequently contracted to sell a quantity of the same material to another corporation[87]. The company suffering the nationalization threatened seizure of all such material sold by that government on the open market. The prospective buyer argued that the threats constituted force majeure and excused its non-compliance with the purchase agreement. Noting that others had purchased from the government, the arbitrators declined to make a finding of impossibility.

The award rendered against Parsons & Whittemore in favor of an Egyptian State entity similarly illustrates the difficulty of proving impossibility[88]. There the U.S. contractor in a turnkey project (paper mill) claimed that the Six Day War of 1967 excused non-performance because it made operations excessively dangerous. Although it found that a suspension of performance had been inevitable, the arbitral tribunal refused to find ultimate execution of the contract impossible[89].

A written request from the Under-Secretary of a Ministry of the Indian government to give domestic requirements priority over exports, invoked by an Indian seller as an excuse for failure to make delivery

[85]On force majeure in international transactions, see generally Harold Berman, Excuse for Nonperformance in the Light of Contract Practices in International Trade, Columbia Law Review 1413 (1963); Georges Delaume, Excuse for Nonperformance and Force Majeure in Economic Development Agreements, 10 Columbia Journal of Transnational Law Review 242 (1971); Marcel Fontaine, Les Clauses de force majeure dans les contrats internationaux, 5 Droit Et Pratique Du Commerce International 469 (1979).

[86]ICC Case 1782/1973, I ICC Awards 230. The present interpretation does not necessarily follow from the published parts of the arbitrator's decision, but rather is expressed by Mr. Derains in his commentary; ibid. It is not clear whether Mr. Derains based his statements on unpublished parts of the award or whether he extrapolated from the award's reasoning.

[87]ICC Cases 2139/1974, I ICC Awards 23, 237; 2142/1974, I ICC Awards 7, 194.

[88]ICC Case 1703/1971, I ICC Awards 6, 195; I Yearbook 130 (1976). See also 508 F. 2d 969 (1974) (award enforced in the U.S.).

[89]Accord, ICC Case 2546, unpublished; described and quoted in Melis, supra, at 217–218. See also Georges Delaume, The Proper Law of State Contracts and the lex mercatoria: A Reappraisal, 3 ICSID Review – Foreign Investment Law Journal 79 (1988): "In the case of long-term State contracts, the normal consequence of force majeure events is suspension rather than termination of the agreement," ibid. at 93. For another award involving frustration of a contract due to the risks created by armed conflict, see ICC Case 5195/1986, II ICC Awards 101.

under a commodity sales agreement, was not accepted as being an event of force majeure by another ICC tribunal[90].

Back-to-back contracts are especially common in commodity contracts. The party in the middle – i.e., the buyer/reseller – is exposed to the risk that his supplier fails to perform. Unless the failure of delivery of a third-party upstream supplier is expressly stipulated as an event that discharges the obligation to deliver onward, the party in the middle will have a difficult defense. If the goods sold are fungible and available on the market, the defendant is not faced with an event of force majeure. In one ICC case, the defendant was held bound to perform irrespective of the fact that alternative suppliers would have demanded a premium of one-third above the market cost[91].

A corollary to the impossibility requirement is that the alleged discharging event must be extraneous to the party invoking it. A party would be in bad faith if it first created the impossibility and then sought to rely on it as a defense. This concept is particularly relevant in the context of disputes involving public entities, where claimants often dispute the proposition that governmental intervention is entitled to recognition as a supervening event uncontrollable by the parties. The issue goes to the heart of the difficult matter of how to characterize the relationship between foreign public bodies and the government that created and controls them. Although it is a national court decision and not an arbitral award, the English House of Lords decision in Czarnikow v. Rolimpex[92] is well known to international practitioners. There, a Polish foreign trade enterprise invoked as an event of force majeure a government ban, following a poor harvest, on all sugar exports. The English court held that although Rolimpex was bound to follow governmental directives, it was entitled to recognition as a separate legal entity. The court was satisfied that Rolimpex had sought to perform its contract but that its protests against the ban had been to no avail, and therefore upheld an award in favor of Rolimpex rendered by the Refined Sugar Association. In an often-quoted passage, however, Lord Wilberforce stated: "I am not saying that there may not be cases when it is so clear that a foreign government is taking action purely in order to extricate a state enterprise from contractual liability, that it may be possible to deny to such action the character of government intervention . . .[93]" One limitation of the Rolimpex decision would thus be the factor of collusion. Another limitation was recognized by an ad hoc tribunal hearing a dispute between a West German supplier of industrial goods and a Polish buyer, whose contract for the construction of a fuel gas plant, signed in 1980, contained a force majeure clause giving the following illustrations: "natural disasters, fines, floods, earthquakes, strikes, war, mobilization, military actions of the enemy, requisitions, riot embargo, governmental order." In December 1981, the Polish Council of Ministers, "by virtue of the ordered state of war," banned the import of goods for twenty-one large industrial projects. The Polish buyer, which was a state-owned export trading company, contended that this was an event of force majeure. The two Swiss arbitrators, who rende-

[90]Case 3740, unpublished; described and quoted in Melis, supra, at 220. See also ICC Case 4237/1984, I ICC Awards 167 at 172: ". . . if every governmental reshuffle and accompanying public excitement constitutes force majeure, world trade would in modern times be bogged down by uncertainty."

[91]Case 3952/1982, unpublished; described in Melis, supra, at 221. See also ICC Case 5195/1986, II ICC Awards 101 at 107: "Where events beyond the control of either party supervene which merely render performance financially more onerous for a contracting party he will not, under most systems of law, be excused from further performance or (in the absence of some special contractual or statutory provision – nowadays not infrequently to be found) entitled to insist upon extra compensation."

[92][1978] 2 All ER at 1043. See Joseph Becker, The Rolimpex Exit from International Contract Responsibility, 10 New York Univ. J. Int. Arb. 214 (1978).

[93][1978] 2 All ER at 1047–48. An instance such as the one imagined by Lord Wilberforce was apparently faced by a tribunal comprised of Messrs Brunner (Netherlands), McCrindle (U.K.), and Vischer (Switzerland) in Case No. 723 of the Netherlands Arbitration Institute, Setenave v. Settebello. As reported in the Financial Times on 27 February 1986, the otherwise unpublished award unanimously refused to recognize a Portuguese decree designed to procure contractual benefits to a Portuguese state-owned shipyard in detriment to the rights of a foreign purchaser of a supertanker, holding that to do so would be contrary to "concepts of public policy and morality common to all trading nations," and this despite the fact that the contract was in principle governed by Portuguese law.

red the award over the dissent of a Polish arbitrator, considered that the contractual reference to governmental orders as events of force majeure was "merely intended as an example"; the parties were using a standard clause and the tribunal found it "obvious that, by accepting this wording, claimant did not want to waive the defense of abuse of rights or a particular relationship of defendant to the ordering State.[94]" Assessing this "defense" (a more appropriate term might have been "claim" or "contention") under the applicable Swiss law, and after many references to comparative law with respect to the issue of piercing the corporate veil of state enterprises, including the Rolimpex case, the tribunal reasoned as follows in rejecting the defense of force majeure:

> *Where a State authority has the power to impose plan instructions on an enterprise, and this authority then imposes another instruction contradicting previous planning acts or does not permit execution of contracts entered into, it does not merely act by virtue of its function as a State organ, but also as an organ of the State enterprise having decision making and directive powers . . .*
> *Unilateral and specific interference of the State with contracts already entered into, by which the contracting parties are discharged of their contractual obligations is unacceptable under the principle of good faith according to Art. 2 Swiss Civil Code.*
> *When an enterprise is integrated in the State economic planning and enters into contracts within the objectives of the State economic planning, then modifications of the plan interfering with contracts entered into cannot be invoked as force majeure by the enterprise.*
> *Where, on the other hand, a Socialist State for other reasons issues a general order, which would affect a privately organized company in the same way as a State enterprise, and where the consequences of this order are not related to the specific nature of the State enterprise as a dependant enterprise, nothing would preclude reliance on force majeure*[95].

Unforeseeability

There is a presumed standard of foresight attributable to international businessmen. Thus the occurrence of a foreseeable event ignored by the contract does not relieve a party of its obligations.
International contracts are known to be particularly susceptible to price fluctuations and government regulations of foreign trade. Arbitrators accordingly hold international businessmen to a high level of sophistication in these matters[96]: "A party is not liable for a failure to perform any of his obligations if he proves that the failure was due to an impediment beyond his control and that he could not reasonably be expected to have taken the impediment into account at the time of the conclusion of the contract or to have avoided or overcome it or its consequences."

Price and currency fluctuations are inherent elements of international commerce. Thus, even a drastic price change will not generally constitute an unforeseeable event[97]. In a 1976 award, the arbitrator found that the increased market value of a product did not relieve the Belgian seller of its obligation to deliver it to a Japanese firm[98]. Referring to the price fluctuation, the arbitrator stated:

---

[94]Interim award of 9 September 1983, XII Yearbook 63, at 67 (1987).
[95]Ibid. at 74–75.
[96]The wording of Article 70 of the 1980 Vienna Convention on Contracts for the International Sale of Goods is consistent with this observation.
[97]It will be remarked that even if it were accepted that a spectacular price variation was of an unprecedented and reasonably unforeseeable magnitude, the obligor would also have to demonstrate that it rendered his performance possible. After all, a fixed price may be viewed as a reciprocal allocation of risk of price fluctuations – and the higher the variation, the greater the need for a reliable allocation. Legal systems which seek to alleviate the possibly harsh results of commercial bargains do so at great risk to contractual stability and predictability. In the U.S., for example, the doctrine of impracticability (as reflected in Restatement (Second) of Contracts § 261 and Section 2-615 of the Uniform Commercial Code) creates excuses on account of "the occurrence of an event the non-occurrence of which was a basic assumption on which the contract was made." As one might expect, what is or is not a "basic assump-

Especially in the field of international commerce, circumstantial changes constitute one of the most important incentives for contracting, each party expecting to profit from changes in the market and at the same time implicitly accepting the risk that the change may be unfavorable.

Arbitrators may find government regulation of trade to be foreseeable and therefore not to constitute a valid defense. The fact that general legislation is potentially applicable to a party obliges that party to anticipate its actual application. In one case, a purchaser claimed force majeure as a defense because he could not obtain the foreign exchange needed to pay the seller[99] .Under regulations that antedated the contract, the central bank of the purchaser's country had the power to withhold foreign currency in times of foreign exchange shortages. The arbitral tribunal found the purchaser's inability to obtain foreign exchange foreseeable in light of the economic conditions existing at the time of contracting, and so rejected the defense.

Currency freezes may be foreseeable even in the absence of such general empowering legislation. In the Dalmia Dairy Industries award (Pierre Lalive, sole arbitrator)[100] the National Bank of Pakistan had guaranteed certain payments to an Indian company. Shortly thereafter war erupted between the two countries and Pakistan enacted emergency legislation that prevented the bank from complying with the guarantee. On the basis of "general principles of law," the arbitrator found that the bank had failed to prove the unforeseeability element of force majeure; since the war was predictable, the Pakistani bank should have foreseen the passage of emergency legislation.

In another case, however, the arbitrators found that subsequent government regulation could constitute force majeure[101]. The Rumanian government had cancelled the seller's export license. By failing to notify promptly his buyer of this development, the seller had, according to the buyer's argument, forfeited his force majeure defense. The arbitrators, however, declared the situation to constitute force majeure according to general principles of law without giving any further reasons for their finding.

A number of factors may distinguish the Rumanian exporter from the Pakistani bank. For example, the arbitrator may have decided that once the Rumanian government granted an export license, subsequent cancellation was less foreseeable than legislation passed in response to an imminent war. Unfortunately, the particular facts leading to the force majeure finding were not published in the case of the Rumanian exporter.

An illustration of a typical situation may be found in a 1984 award of the New York Society of Maritime Arbitrators. A charterer nominated a particular berth in the U.S. for the loading of coal. At the time of this nomination, the berth was being modified to be able to load. The construction was delayed by the Department of Environmental Conservation, which intervened, following the expression of public concern, to evaluate the hazards of coal operations. The vessel had to wait for one month. As a result, the owner of the vessel claimed demurrage for delay. The charterer referred to a contractual clause excluding demurrage with respect to delays due to "any cause whatsoever beyond the control of the Charterer." This defense was rejected by the arbitrators, who stated that "the diligent exercise of [environmental conservation] procedures are foreseeable in the ordinary course by all prudent businessmen.[102]"

Any reasonable standard of force majeure will involve scrutiny of the particular transaction in the context of the custom within a specific trade. For example, a short-term sales contract for fungible goods might justify a greater presumption of speculative intent, thus requiring a stricter standard of force majeure, than a contract involving long-term commitments to provide goods and services for which there may not be adequate substitutes.

---

tion" is in the eye of the beholder, making it difficult to make meaningful distinctions between valid and invalid defenses. Thus, one court excused a contractor for having failed to remove all of an agreed quantity of gravel from the plaintiffs land because it could only have done so by the costly removal of gravel located under water, while ano ther court enforced a contract to build two schools although the housing project that the schools had been intended to serve was cancelled; discussed in Rivkin, supra at 166–8.

[98]ICC Case 2708/1976, I ICC Awards 297.

[99]ICC Case 3093/1979, I ICC Awards 365.

ICC arbitrators necessarily use objective criteria to support presumptions of sophistication to discern the intent of the parties. In a 1974 award[103], a Norwegian purchaser of oil claimed it had not contemplated a serious drop in prices when he entered into the contract. The arbitrator considered evidence as to what was actually within the purchaser's contemplation, and rejected the force majeure defense because the purchaser had in fact kept abreast of OPEC price meetings up to the time it signed the contract.

Prompt notification

A duty to mitigate damages is consistently recognized in ICC awards. This stems from considerations of fairness, good faith, and a responsibility to carry out contractual obligations in a cooperative manner. The arbitrator in the previously mentioned Rumanian export dispute stated the concept as follows: "by virtue of general principles of law . . . it is the duty of the injured party to take all steps necessary to avoid an increase in damages."[104] In this dispute, the arbitrator referred to "general principles of law," but based his finding of a duty of prompt notification on a specific contractual provision[105]. Prompt notification of the impossibility of performance permits the other party to mitigate its damages by finding a suitable substitute at the earliest possible date.

D. Toward a Concept of Arbitral Justice

Party autonomy, or freedom of contract, plays an important role in the creation of these norms. When private parties regulate their own legal relationships, the state has in essence delegated to individuals the power to establish law, within certain limits party autonomy allows the international business community to create its own regulatory environment through contractual interaction, minimizing the impact of national law. Moreover, by means of contract, the business community can establish adjudicatory bodies both to interpret and apply a supplementary law based on non-national commercial custom.

Standardized contracts, seeking to crystallize customs and practices existing within a particular trade or commercial sector, have an important role to play in elevating these norms to a higher level of authority. When used frequently within a given commercial sector, these "self-regulatory" standardized contracts may provide stability that transcends a particular transaction and create a type of customary law[106].

ICC arbitration seems particularly well suited to application of the new lex mercatoria. Drawn from a variety of countries, arbitrators are less preoccupied with national concerns than judges, and may be expected to possess a less parochial perspective, emphasizing good faith, general principles of law, and the particular equities of the situation.

What can one say, finally, about the qualitative difference of the justice rendered by international arbitrators as compared with that of national judges? It is certainly true that arbitrators are less constrained

[100]ICC Case 1512/1971, I ICC Awards 3, 33, 206.
[101]ICC Case 2478/1974, I ICC Awards 25, 233.
[102]Award No. 2014, 13 September 1984, XI Yearbook 202 (1986).
[103]ICC Case 2216/1974, I ICC Awards 224.
[104]ICC Case 2478/1974, I ICC Awards 25, 233.
[105]See also ICC Case 4237/1984, I ICC Awards 167; ad hoc award of 9 December 1983, supra.
[106]An international construction law specialist has proposed the notion of a lex constructionis as guidance in interpreting international contracts "as a reference, an aid, in deciding disputes when the applicable law is thin or non-existent." Charles Molineaux, The FIDIC Conditions: Basis for a Construction Lex Mercatoria, A Lex Constructionis? paper given at an LCIA/AAA Conference in Boston, 26–28 September 1996, p. 2. The author suggests ten common principles, such as "directed changes (or 'variations') do not amount to contract breach" and "the methods and sequences of construction shall be at the selection of the contractor unless there is a structural or other impact which is evident from a site investigation or noted in the tender document." Ibid. at 11. Molineaux's paper was developed in an article entitled Moving Toward a Construction Lex mercatoria, 14 J. Int. Arb. 55 (1997). Similar suggestions

legal technicalities; in ICC cases, as in most international arbitrations, they do not live in fear of a court of appeal. Furthermore, the fact that both parties have often named an arbitrator may seem to have the practical effect that the psychological dynamics of arbitral tribunals militate in favor of "balanced" awards.

But that does not mean that arbitrators are to be confused with mediators. Their decision is to be justified as a matter of principle rather than accommodation or compromise.

On the question of liability, there is usually a clear winner. Arbitrators often find that one party has entirely succeeded as a matter of law and contract interpretation. The ruling on damages is frequently less categorical. It is thus perhaps with respect to quantum of damages that parties who have opted for arbitration are most likely to be dissatisfied, feeling that if they were clearly right, they should have been awarded the full measure of damages requested. Failing that, they perceive arbitrators as too conciliatory, "splitting the difference" in the hopes of rendering an award acceptable to both parties rather than drawing the full consequences of their decision on the merits.

It may be true that at least with respect to lost profits, international arbitrators tend to be conservative. This attitude, however, may often be a consequence not so much of their being arbitrators as of the fact that their perspective is international. It is certainly true as a general proposition that international contracts are fraught with greater uncertainties than domestic ones. If arbitrators thus tend to discount theoretically impeccable demonstrations of lucrum cessans, are they not simply reflecting realistic expectations? The question cannot be answered in an absolute manner, since the parameters of what may reasonably be expected vary with the context of each case. Conversely, arbitrators may be persuaded to award some measure of damages, if they believe that in the normal course of events it was reasonable to anticipate some profits, even if those damages may not be proved to a mathematical certainty or by complete documentary proof.

The test of the international arbitrator finally remains the same: whether his decision reflects what the parties can fairly be held to have understood to be the consequences of their contractual undertaking. And if one is to recognize that an emerging arbitral justice as applied to international contracts is distinct from the justice of national courts, in the sense that three arbitrators of different nationalities sitting in London or Baghdad are unlikely to follow the same procedure, and to come out with exactly the same decision, as would English or Iraqi commercial judges applying the full panoply of local laws and technicalities, is that really contrary to what the parties expect?

---

have been made in other domains by Aboubacar Fall, Defence and Illustration of Lex Mercatoria in Maritime Arbitration, 15 J. Int. Arb. 83 (1998), and Doak Bishop, International Arbitration of Petroleum Disputes: The Development of a Lex Petrolea, XXIII Yearbook1131 (1998).