The New, New *Lex Mercatoria*, or, Back To The Future*

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I. INTRODUCTION

> Commercial arbitration exists for one purpose only: to serve the commercial man. If it fails in this, it is unworthy of serious study.

I TAKE these wise and wonderfully insightful words of our friend and colleague, Lord Michael Mustill,[1] as the essential creed of the commercial arbitrator. The '... it's the economy, stupid' of the professional world which we – practitioners, students, administrators, *providers* of international commercial arbitration – inhabit. That such a practical, common-sense view of the world is expressed not by a businessman but by a former Law Lord is noteworthy. That it is expressed in a text devoted to an assessment of the *lex mercatoria* is perhaps even more so.

Lord Mustill understood, as I do, the risks inherent in a discussion of the *lex mercatoria*. To paraphrase:

> Few people are likely to welcome a discussion on the *lex mercatoria*. The common lawyer will not look kindly on an addition to the extensive literature on what he may be tempted to regard as a non-subject, having no contact with reality save through the medium of a handful of awards which could well have been rationalised more convincingly in terms of established legal principles. Conversely, a scholar nurtured in other disciplines may well anticipate yet another reactionary response to any doctrine lying outside the tradition of Anglo-Saxon jurisprudence.[2]

Yet as I hope to explain, the *lex mercatoria* is indeed a live subject: more so today than at almost any time over the last generation. This is so, precisely because it transcends the constraints of any given juridical tradition.

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* Presentation to AAA–ICC–ICSID 17th Joint Colloquium on International Arbitration, Washington, DC, 10 November 2000.

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1 M. Mustill, 'The New *Lex Mercatoria*: The First Twenty-five Years' (1986) 4 *Arbitration International*, 2, 86.

2 *ibid.*

ARBITRATION INTERNATIONAL, Vol. 17, No. 2

II. A QUESTION OF PRACTICALITY

By proposing to address the question of *lex mercatoria* in the context of a discussion devoted to 'governing law' in international arbitrations, I do not intend to dwell on the nature or origin of the *lex*. Nor will I expand at length on the admittedly fundamental question of whether or not such a beast as an 'anational system of general principles, customs and rules spontaneously referred to, elaborated and followed in the framework of international trade and commerce' exists or constitutes a true 'law'.

Inspired by Lord Mustill's injunction, my project is more simple in design, more practical in orientation. The question whether 'the general principles of law' – or, in this case, the *lex mercatoria* – conceived as a system, can serve as the proper law of a contract, depends less on any preconceived notion of what constitutes a legal system than on whether they can fulfil satisfactorily, in practice, the function of a proper law, and whether they are, in fact, used for that purpose.[3]

The typical critique of the *lex mercatoria*, from the perspective of the lawyer or business person for whom practicality is all-important, is expressed by Klaus Peter Berger, as follows:

> The problem is both in its 'provability', and in finding a comprehensive set of principles within the *lex mercatoria*. For problems with determining the existence of any purported principle of *lex mercatoria*, just look at its sources: practices followed since time immemorial, or at least since the Roman *ius gentium*; ancient cases in dusty tomes; writings of erudite scholars who passed away about the time the steam engine was revolutionizing industry . . . As a collection of commercial practices, the content of *lex mercatoria* has not been discoverable in any single place . . . Nor has *lex mercatoria* been 'definitive' in the sense of supplying a comprehensive set of decision-making rules which can be applied to resolve a dispute.[4]

These concerns are not merely of theoretical interest; they bespeak substantial scepticism regarding the practical viability not only of the *lex*, but of *any* self-styled system of transnational law. Indeed, the discussion between international practitioners, who tend to view the *lex* as meaningless (or at least, of little utility) in the absence of concrete and workable legal rules, and those scholars and advocates who focus on developing, first, the theoretical and doctrinal underpinnings necessary to a positivist system of legal norms, has been less a *dialectic* than a *dialogue of the deaf*, resulting not in synthesis but in stalemate.

The so-called *law merchant*, if it exists, by definition exists both *because of* and *for* ('to serve', in Lord Mustill's words) the commercial party; it is therefore worthy of study by commercial arbitrators who must confront the question: is it such that it can be applied in international commercial arbitrations?

In 1988, Lord Mustill answered a series of similar questions with a 'no'.[5] In truth, however, the questions he posed could be said to have begged such a response. Then as now, and likely for a long time to come, it is difficult to envisage

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[3] *See* Jenks, *The Proper Law of International Organisations* (1962).
[4] Klaus Peter Berger, *The Creeping Codification of the Lex Mercatoria* (1999), at 5.
[5] Mustill, *supra*, n. 1, at 102.

an affirmative response to a question such as: 'has the *lex mercatoria* stolen the international commercial scene, pushing national laws into the wings?'[6] Yet, Lord Mustill's 'no' was, in fairness, tempered by '... at least not yet.' Which brings us back to the present.

In their book, *Dealing in Virtue: International Commercial Arbitration and the Construction of a Transnational Legal Order*,[7] Dezalay and Garth argue that international commercial arbitration began to assume its present role, as the pre-eminent means of resolving transnational disputes, around 1970, for very particular historical reasons. The Cold War and North–South tensions in the post-World War II era gave rise to a need for legal norms, independent of national legal systems, that could be used to resolve major transnational commercial disputes and that could, as well, serve as a framework for new transnational agreements. This, in turn, led to a renewed interest in the *lex mercatoria* and to the development of what Lord Mustill and others have called 'the new *lex mercatoria*'.

Interestingly, it appears that these developments were also behind the growth at that time of the ICC as an international arbitral institution. In considering why it should have been the ICC that attained such a pre-eminent position, '... rather than arbitral institutions in London, of older vintage and much world-wide prestige,'[8] such as the LCIA, the authors posit that the answer lies in the fact that, at the time, it was primarily Continental European, and in particular French, law professors who possessed both the prestige and the academic freedom to develop credibly the concept of an anational, autonomous *lex mercatoria*. Moreover, French courts of the day maintained a 'rather disdainful lack of interest' in the activities of the ICC, as a private institution, and in the limited arbitration work undertaken by it at that time. Ironically, this benign neglect on the part of the courts may have done much to establish the ICC's credentials. By way of contrast, England then had a well-established and highly respected Commercial Court with a tradition of overseeing private arbitrations.[9]

However, as I have indicated, the so-called 'new' *lex mercatoria* proved short-lived. The argument runs as follows. Just as the new *lex* was developing a nascent legitimacy as an independent legal order, based largely on the work of academics,

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6 *Id.*

7 Y. Dezalay and B. Garth (Chicago, University of Chicago Press, 1996).

8 L. Nottage, 'The Vicissitudes of Transnational Commercial Arbitration and the *Lex Mercatoria*: A View From the Periphery' (2000) 16 *Arbitration International* 1, 53 at 59.

9 Fortunately, the advent of the new English Arbitration Act 1996 has resulted in somewhat less interference in private arbitrations by the no less respected English Commercial Court, though the Act has also been characterized as 'unduly statist in approach' by requiring (in section 46(1)) an arbitral tribunal to establish an applicable 'law' (generally considered to mean a national law), rather than the more flexible 'rules of law' (more easily encompassing custom, usage, general principles of law and the *lex mercatoria*). *See* 'Young Arbitration Practitioners and the 1996 Act: Let Age Learn from Youth' Editorial in (1997) 13 *Arbitration International* 4, at iii. While section 46(2) of the Act permits a tribunal to resolve disputes according to 'such other considerations as are agreed by [the parties] or determined by the tribunal,' the greatest comfort for those who advocate the practicality of informal 'rules of law' such as the *lex mercatoria* lies in the fact that s. 46 is not a mandatory provision of the Act, opening the door to application of, for example, Article 14.2 of the LCIA Rules or Article 17(1) of the ICC Rules, which refer explicitly to applicable 'rules of law'.

an entirely new challenge arose: the arrival on the European, in particular the Parisian, legal scene of some of the major US law firms, followed by their British cousins, bringing 'promises of efficacy and cost-effectiveness, keys to the world of business.'[10] It has been argued that one of the effects of this latter-day storming of French beaches by lawyers who '... had no compunction about pursuing a new business opportunity ... [who] treated arbitration like litigation, applying increasingly sophisticated document and case management techniques, and developing procedural tactics to assist their clients further ...'[11] was to '[force] the formalisation of pro-cedure in transnational commercial arbitration' and, along with it, 'the formalisation of the substantive norms of the *lex mercatoria*.'[12] For these lawyers, the *lex* constituted neither a true body of law nor, indeed, a practical one. Worse, *whatever* it was, the *lex* was seen to be the product of an earlier generation of 'grand old men' with little to teach the modern practitioner.[13] The result was a return to the sterile debate of the past.

III. GETTING TO THE ROOT OF THE PROBLEM – THE NEW TREND

More than any other factor, the difficulty in determining the content of transnational law has typically stood in the way of a serious discussion concerning the practical usefulness of the *lex mercatoria*. Practicability – or its lack – is the watchword.

Recent initiatives and new approaches evidence not only a resurgence of interest in the issue, but may in fact go a long way toward providing international practitioners with the workable tools they claim are lacking. At their core, these initiatives share certain defining traits: informality and pragmatism, rather than an insistence on overly formal and dogmatic methodology or result. They have also resulted in what has been called 'the *new*, new, *lex mercatoria*'.[14]

In 1994–1995, two separate yet similar projects revealed to scholars and practitioners that transnational commercial law is more than a mere abstract academic subject, '... that it is capable of being codified in norm-like principles and rules together with commentary-like explanations, thus providing international legal practitioners with a means to apply the *lex mercatoria* in every day legal practice.'[15]

In May 1994, the International Institute for the Unification of Private Law (UNIDROIT) published its Principles of International Commercial Contracts (the UNIDROIT Principles). The UNIDROIT Principles set forth what are referred

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[10] *Ibid.*, at 59–60.
[11] *Id.*
[12] *Id.*
[13] *Id.*
[14] *Id.*
[15] Berger, *supra*, n. 4, at 3.

to as 'general rules' for international commercial contracts. Almost one year after publication of the UNIDROIT Principles, the Commission on European Contract Law (eponymously referred to as the Lando Commission, in honour of its Chair, Professor Ole Lando) published its Principles of European Contract Law.

In addition to sharing the common objective of presenting a kind of modern *ius commune*, that is, a contemporary expression of the *lex mercatoria*, the UNIDROIT and Lando Principles also share, as mentioned, a common approach to the subject. Eschewing earlier unsuccessful attempts at formal 'codification' (for example, by means of statutory codes, multilateral conventions or model laws) these initiatives instead opt for a more informal product, along the lines of American-style 'restatements' of contract (or tort) law. Focusing on the question of *how* to give form and expression to the *lex mercatoria*, instead of being trapped in endless doctrinal discussions concerning its existence and nature, these initiatives have arguably freed the discussion from the sterility and stagnation into which it had fallen.[16] The result – a concrete, usable list of principles and rules – addresses head-on the traditional concern of practitioners that the *lex* is too abstract and impractical to be of any use in the real world.[17]

Surely, the most important attribute of these collections is that they *exist*. They can be filed with a judge or an arbitrator, can be referred to by page and article, and may be located and reviewed easily by all those who wish to understand and apply them.[18] As such, they possess the sort of 'definitive' and 'provable' qualities required of a system of law if it is to provide an understandable, workable framework to govern the dealings of parties to international commercial transactions. At the same time, however, these initiatives are criticized for lacking the sort of underlying flexibility which reflects '... the peculiar character of the *lex mercatoria* which, being an open legal system, requires a similar, open codification technique.'[19]

Such an 'open' technique has been proposed and elaborated by Berger, and is suggested in the title to his book, to which I have already referred. This is what he calls the '*creeping codification*' of transnational commercial law. Berger's idea – and, if it proves to be successful, his great innovation – is that it is possible to distinguish so-called 'creeping' codification from more formalized techniques for defining the *lex mercatoria*. As with the UNIDROIT and Lando Principles, creeping codification is manifested in the drafting of a list containing principles, standards and rules of transnational commercial law. However, unlike other

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[16] *Ibid.*, at 227 to 228. *See also* G. Baron, 'Do the UNIDROIT Principles of International Commercial Contracts Form a New *Lex Mercatoria*?' (1999) 15 *Arbitration International* 2, at 115.

[17] In an arbitration in which the author served as Chairman of the Tribunal, the UNIDROIT Principles, as well as a substantive domestic law, were applied in the process of determining a partial award. The Tribunal found that the same conclusion derived from the application of either legal system.

[18] Barton S. Selden, '*Lex Mercatoria* in European and US Trade Practices: Time to Take a Closer Look' 2 *Ann. Surv. Int'l & Comp. L.* 1995 at 111 *et seq.*

[19] *Ibid.*, at 233.

means to that end, it is intended to avoid the 'static element' characteristic of other approaches and to provide the openness and flexibility required in order to take account of the rapid development of international trade and commerce. True, restatements generally, and the Lando and UNIDROIT Principles specifically, account for this problem insofar as they contain provisions allowing for the development of new solutions in accordance with their underlying general principles. Yet, in Berger's view, these 'opening clauses' are of only limited usefulness:

> They may help in individual cases but they also reveal the essential weakness of the restatement technique [what he refers to as the 'codification dilemma'] in that they contain an implied acknowledgement of the fact that transnational commercial (contract) law cannot be put in statutory form.[20]

The need for openness and flexibility in a *transnational* legal system is of a quality altogether different than in domestic legal systems. I agree with Berger when he writes:

> The *lex mercatoria* as 'law in the making' requires a degree of codificatory flexibility and subtleness that goes far beyond that which a restatement may provide.[21]

This requirement, ironically, can only be satisfied by means of – for lack of a better expression – a sort of *enforced informality* in methodology, so as somehow to ensure that, after an initial drafting phase, a list of transnational commercial principles is capable of being rapidly and continuously revised and updated.

Berger cites the establishment of the Centre for Transnational Law at the University of Münster (known by the acronym CENTRAL) as creating the required institutional framework for the task of developing and updating the list. For myself, however, I cannot help but wonder whether Berger's proposal does not end up impaled on the horns of the very 'codification dilemma' that he himself invokes. One may legitimately ask whether *any* institutional framework is able to maintain the degree of openness and flexibility required to keep pace with the world of international commerce – particularly the world of e-commerce. Berger writes of the Centre for Transnational Law as a forum for discussion between all those who participate in the creation of transnational law: international arbitrators, practitioners and businessmen. He refers to it as a 'law-finding community', composed of renowned experts, both academic and practitioners, in the field of transnational commercial law, and the focal point for the exchange of ideas, concepts and information on the emerging and ever-evolving *lex mercatoria*. He may be correct. However, in my view, the importance of his ideas, and in particular, his own list of principles, rules and standards of the *lex mercatoria*, lies less in their correctness than, as with other recent initiatives, in the fact that they exist.

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[20] *Ibid.*, at 228.
[21] *Id.*

Berger's list of 70 norms of 'black-letter' transnational commercial law – drawn from international arbitral and contract practice, backed up by comprehensive comparative references – is a tremendous achievement. It attempts to unify all of the various sources of transnational law into a defined yet open-ended set of principles and rules: general principles of law, previous codification efforts by various institutions, the case law of international arbitral tribunals, the law-making or declaratory authority of model contract forms and general conditions of trade, and concise comparative legal analysis. It perfectly represents the trend associated with development of what has been identified as the new, new *lex mercatoria*. For its scholarship, detail and thoroughness, the list puts the lie to the claim that it is not possible to point to, and thus not possible to consider basing commercial relationships on, a discrete body of transnational commercial norms. Berger's 'creepy code' is undeniably a major contribution to the field of transnational law. On the other hand, I imagine that Berger himself might demur, and that for him the most significant contribution is not the list *per se*, but the *technique* that gave rise to it and is meant to ensure its open-endedness and continuing evolution: the technique of creeping codification.

So many treatises on the subject of the *lex mercatoria* conclude with some form of the cliché: '... only time will tell'. As in, for example: whether or not the *lex* becomes part of the grab-bag of tools and mechanisms regularly employed by parties and arbitrators in day-to-day international commercial practice ... only time will tell. For my part, only time will tell whether 'creeping codification' becomes a trend – or whether it means anything in practice. However, it is evident that the idea of 'the list', in its several manifestations (e.g. Lando; UNIDROIT; Berger) is as close as we've come, in recent generations, to tackling the *lex* and wrestling it into usable shape.

IV. CONCLUSION

It has been said that '... custom, not law, has been the fulcrum of commerce since the origins of exchange.'[22] No doubt this is true, as far as it goes. Business, especially international business, requires practical and commercially sensible solutions to the myriad practical and economically significant disputes that it spawns. Such solutions are likely more easily found within the realm of commercial practice rather than legislative pronouncement. The application of custom-based solutions, which are by their very nature 'transnational', serves to avoid much of the unpredictability of domestic substantive legal rules and complicated conflict of laws doctrine. Yet, as we all know, the *lex mercatoria* is not without its problems, especially in regard to the basic question of whether and how it can be used as a governing law in day-to-day practice.

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[22] L. Trakman, *The Law Merchant: The Evolution of Commercial Law* (1983) at 7.

The recent work of Klaus Peter Berger and others constitutes a new and very constructive trend in dealing with these problems. This trend consists, simply, in drawing up the *lex*, rather than engaging in drawn-out discussion of whether or not it is possible or worthwhile to do so. Focusing on *how* to codify the *lex* has made it possible to do so.

In 1622, Gerard Malynes published his treatise:

> Consuedo, vel, Lex Mercatoria: or, The Law Merchant: Divided into three parts, according to the Essential Parts of Trafficke Necessary for All Statesmen, Judges, Magistrates, Temporal and Civil Lawyers, Mint-Men, Merchants, Mariners and Others Negotiating in all Places of the World.

Malyne's rather … *comprehensive* … text contains one of the first legal commentaries on international commercial arbitration in England, and remains, in many respects, as relevant today as then. The treatise also contains the following description of the *lex mercatoria*:

> Every man knoweth, that for Manners and Prescriptions, there is great diversitie amongst all Nations: but for the Customes observed in the course of trafficke and commerce, there is that sympathy, concordance and agreement, which may be said to be of like condition to all people, diffused and spread by right reason, and instinct of nature consisting perpetually…
>
> And this Law of Merchants hitherto observed in all countries, ought in regard of commerce, to be esteemed and held in reputation as the Law of the Twelve Tables was amongst the Romans. For herein you shall find every thing built upon the foundations of Reason and Justice.

Think what one will about the currency, relevance and viability today of a loosely organized system of transnational legal principles, rules and standards derived from the usages, customs and practice of international commerce, some of which date back several centuries, the fact remains that the concept simply refuses to die. Indeed, it may well be that this old dog still has some tricks to teach us.

A friend remarked last week, as I was preparing for this Colloquium: if it's the 'ancient' law merchant, how can it be a new trend? My response was that sometimes one must look back to look forward. In the Tempest, Shakespeare observed: 'What's past is prologue.'[23] In the case of the *lex mercatoria*, it could be that what's past is also what's to come.

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[23] *The Tempest*, II, i, 261.