

**UNIVERSITY OF CAPE TOWN**  
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**The New Lex Mercatoria: Applicability of Lex Mercatoria as  
Substantive Law in International Commercial Arbitration.**

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Research Dissertation presented for the approval of the Senate in fulfilment of part of the requirements for the Masters of Laws in approved courses and a minor dissertation. The other part of the requirements for this qualification was the completion of a programme of courses.

I do hereby declare that I have read and understood the regulations governing submission of a masters of law dissertation, including those relating to length and plagiarism, as contained in the rules of this university, and that this dissertation conforms to those regulations.

**DECLARATION**

I Maitho Edwin Mwangi, do hereby declare that this minor dissertation submitted for the degree of Masters in Laws at the University of Cape Town has not previously been submitted by me at this or any other University, that it is my own work and that all referenced material in it have been duly acknowledged.

.....  
Maitho E M

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## **ABSTRACT**

The study addresses the controversy surrounding the existence and validity of the *lex mercatoria* as an autonomous legal system. The overall objective of the study is to evaluate whether the *lex mercatoria* has attained the status of an autonomous system of law. Traces of the law merchant derive from the early ages, a time when merchants began to traverse the world in search for new markets. This created a need to govern their businesses and conduct to avoid the interference of their affairs by sovereign authorities. The rules formulated by the merchants were codified into the laws of states giving rise to the oblivion of the law merchant. There has arisen over time a debate on the existence of a new *lex mercatoria*.

The study evaluates the existence and viability of the new *lex mercatoria* by answering the following pertinent research questions: what are the sources of the new *lex mercatoria*; are the criticisms levelled against the *lex mercatoria* viable; has the *lex mercatoria* attained the status of an autonomous legal system and if not, what are the reasons behind its rejection? This study is limited to international commercial arbitration since it is through arbitration that the applicability of *lex mercatoria* as substantive law has been made possible. Recognition of state-less awards, the modernization of arbitration laws by African states, recognition by the European Union of the possibility of application of general principles of law reflect trends towards the acceptance of the autonomous nature of *lex mercatoria*.

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**LIST OF ABBREVIATIONS**

CENTRAL	Centre for Transnational Law
CISG	United Nations Convention on the International Sale of Goods
CRCICA	Cairo Regional Centre for International Commercial Arbitration
EU	European Union
FIDIC	International Federation of Consulting Engineers
ICC	International Chamber of Commerce
ICSID	International Centre for the Settlement of Investment Disputes
LCIA	London Chamber of Commerce
PECL	Principles of European Contract Law
TLDB	Transnational Law Data Base
UCP	Uniform Customs of Practice of Documentary Credits
UNICTRAL	United Nations Commission on International Trade Law
UNIDROIT	International Institute for the Unification of private law

## CHAPTER ONE

### 1 INTRODUCTION

#### 1.1 Introduction

The existence of a non-national law commonly known as ‘lex mercatoria’ has created much controversy since the Roman times. Questions on its existence stem from its historical background in the Roman times, the codification of the customs and principles of the law merchant into traditional legal regimes, terminological difference, questions of the feasibility of the law merchant to govern contracts as concise law that meets the tenets of sources of law, preference of state law over lex mercatoria and the fact that there is little that is known by legal practitioners of this law.

Criticism of lex mercatoria is attributed to the unwillingness of legal practitioners to embrace a law that they are not familiar with. In addition those who are familiar with the general principles of international law or the lex mercatoria have been trained based on specific schools of thought. Given the benefits these practitioners have gained from the application of these laws, it is difficult for them to allow a non-national law to control their affairs.<sup>1</sup> A number of scholars and institutions have collated principles that are of a lex mercatoria nature<sup>2</sup>. These emerging principles have been accepted, applied by arbitrators and recognised by courts through enforcement of arbitral awards thereby strengthening the contention that lex mercatoria is now regarded as a viable source of law.

#### 1.2 Background of the Study

The tale of the merchants is best told by Sir Richard Atkin in his foreword to Wyndham Bewes’ book *The Romance of the Law Merchant*;

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<sup>1</sup> Howarth Richard J ‘Lex Mercatoria: Can General Principles of Law Govern International Commercial Contracts?’ (2004) Vol. 10 *Canterbury L Rev* 36 at 46 (hereinafter referred to as Howarth Richard J).

<sup>2</sup> UNIDROIT Principles of International Commercial Contracts 2004, List of principles collated by the Center for Transnational Law at [www.tldb.net](http://www.tldb.net), Lord Mustill’s list of principles in M, Mustill ‘The New Lex Mercatoria: The First Twenty-Five Years’ (1988) Vol. 4 No. 2 *Arbitration International*, 86.



“They whose lawful occasions bring them into the commercial courts of this country are not usually associated with romance; whereby they are doubtless spared much publicity. But the practitioners in such courts are accustomed to tales of adventure and hairbreadth escapes that might provide the material for bales of stories should any visitor from the world of literature stray thereto. There are tales told in the admiralty court almost daily of perils by sea, endurance, sacrifice, courage, resource of mariners...

It is, perhaps fortunate that the law-makers of former days took little interest in rules of commerce, provided that the results were such that as to ensure that the sovereign lord has sufficient whereof to take toll. As a result, traders made their own rules and administered them summarily at their own courts, with the tacit or express approval of the sovereign. Such rules have in course of ages crystallized into law; in many cases recorded in statutory code...”<sup>3</sup>

The existence of *lex mercatoria* can be traced back to the late thirteenth century in England in the law book *Fleta* which book “explains the writ of debt and describes in detail the rigid distribution of the burden of proof between the plaintiff and the defendant”.<sup>4</sup> The book outlines that exceptions were made in favour of merchants by royal grace to allow them to bring proof in accordance with the law of merchants’.<sup>5</sup> Baron Gesa in his article<sup>6</sup> notes that it evolved in the eleventh and the twelfth century and grew from the Italian cities to France, Spain, England and the rest of Europe. In the middle ages merchants had devised business practices and regulated their own conduct.<sup>7</sup> They began transacting across national boundaries and carried with them their customs.<sup>8</sup> It is noteworthy that the merchants referred to were from Europe. The customs of the merchants were codified and localized in various towns around the world. The codes were used as a way of promoting trade by freeing merchants from the strict legal rules by

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<sup>3</sup> Goode, Roy *Commercial Law in the Next Millennium: The Hamlyn Lectures Forty-Ninth Series* (1998) The Hamlyn Trust, Sweet & Maxwell, London at 1.

<sup>4</sup> Albrecht Cordes ‘The Search for a Medieval *Lex Mercatoria*’ 2003 *Oxford University Comparative Law Forum* text after note 17 (hereinafter referred to as A. Cordes).

<sup>5</sup> *ibid.*

<sup>6</sup> Baron, Gesa, ‘Do the UNIDROIT Principles of International Commercial Contracts Form a New *Lex Mercatoria*?’ (1999) Vol. 15 No. 2 *Arbitration International* 115 at 116. Available also at [www.cisg.law.pace.edu/cisg/biblio/baron.html](http://www.cisg.law.pace.edu/cisg/biblio/baron.html) (Accessed on 7th May 2007) (hereinafter referred to as Baron, Gesa).

<sup>7</sup> Trakman Leon, E *The Law Merchant: Evolution of Commercial Law*, (1983) Fred B. Rothman & Co. Colorado 80127, United States of America at 8 (hereinafter referred to as Trakman, *The Law Merchant*).

<sup>8</sup> *Ibid.*

requiring a ‘just price and good faith’.<sup>9</sup> The customs influenced the laws of the day, statutes were modelled along the transactions of the merchants, and judges serving in the merchant courts were selected from persons in the trade of the merchants.<sup>10</sup>

Resolution of disputes was characterized by speedy trials, no strict compliance with the procedure and amiable compromises. Where however there was doubt as to what should determine the intentions of the parties for instance or penalties to be paid the merchants referred to the law of the land<sup>11</sup>. The customs of different fairs could not logically govern the transactions of the merchants across national boundaries.<sup>12</sup> Different merchant courts used differing principles of merchant law.<sup>13</sup> The lack of consistency of the use of these customs created a rift which caused the merchant law to be challenged. Albrecht Cordes concludes that *lex mercatoria* was linked to a royal privilege. He further notes that *lex mercatoria* in the thirteenth century was based on a set of rules which only dealt with the procedure of resolving disputes between merchants.

These are some of the reasons that have led to the criticism of origin of *lex mercatoria* as an autonomous set of rules to govern contracts. In support of the *lex mercatoria* Trakman in his book<sup>14</sup> notes that the principle of good faith was applied in the Roman times by merchants in their transactions, a principle that has been embodied at present in international trade law. Bills of exchange, promissory notes and letters of credit were an invention of the merchants. These documents are distinct features of the law merchant that are today legally binding documents that govern the transactions of traders. This rebuts the idea that the law merchant was basically a set of rules used to decide disputes between merchants.

The medieval law merchant was however diluted in the various laws for instance the Bills of exchange were made part of English law. This made the law merchant

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<sup>9</sup> Ibid.

<sup>10</sup> Ibid. at 18.

<sup>11</sup> Ibid

<sup>12</sup> Ibid at 17.

<sup>13</sup> Ibid at 20.

<sup>14</sup> Trakman, *The Law Merchant* (note 7) at 7.

obsolete. In the 17<sup>th</sup> century Gerard Malynes published a book by the name *Lex Mercatoria or the Ancient Law-Merchant*.<sup>15</sup> The book revolved around the issue whether disputes between merchants fall in the ambit of the English common law courts. Albrecht Cordes in his article notes Malynes was of the view that the merchants were happy with the admiralty courts, however these courts were seen to be too close to the king. As a consequence of a 'struggle for power between the Stuarts and Parliament' the jurisdiction of the admiralty courts was reduced and the competence of the Common law courts was extended.<sup>16</sup>

Merchants were faced with the problem of having to convince the Common law judges that *lex mercatoria* was a substantive law that was part of English law and not Common law, which law governed the obligations of traders and it should be applied when deciding disputes between merchants.<sup>17</sup> Albrecht Cordes notes further that according to Malynes this was not to be accepted by the Common law judges. Despite the fact that the king Henry VIII as we are informed<sup>18</sup> favoured the admiralty courts, it is still evident that there was an acceptance that the customs of the merchants formed part of the law and were it not for the power struggle that diluted the importance of these customs, *lex mercatoria* was indeed a law that coordinated international trade effectively. It is evident that the same power struggle is what is diluting the importance of the modern day *lex mercatoria*, states do not want to be governed by an autonomous law that has not been formulated through the system of government and additionally legal practitioners are not willing to embrace a rule of law that they are not used to and know little about.

The existence of a modern *lex mercatoria* has gained renaissance through the work of several scholars who have been 'inspired' to write various articles and also attempted to codify the law merchant.<sup>19</sup> Berger K P<sup>20</sup> has noted the following writers as the

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<sup>15</sup> A. Cordes (note 4) text after note 23.

<sup>16</sup> Ibid.

<sup>17</sup> ibid

<sup>18</sup> ibid

<sup>19</sup> Kurkela Matti S & Hannes Snellman, *Due process in International Commercial Arbitration* (2005) Oceana Publications, INC, Dobbs Ferry, New York at 4.

<sup>20</sup> Berger Klaus Peter, *The Creeping Codification of the Lex Mercatoria* (1999) Kluwer Law International, The Hague/London/Boston at 1-2 (hereinafter referred to as Berger K P *Creeping Codification*).

initiators of the notion ‘the modern *lex mercatoria*’; Fragistas, Goldstajn, Schmitthoff, Goldman, Kahn and Fouchard. Additionally he has through the Centre for Transnational Law, University of Cologne, Germany which carried out a study on the recognition and the use of *lex mercatoria* by legal practitioners and businessmen in international trade written several articles on transnational commercial law.<sup>21</sup> The Centre has a database that has a collection of various principles that form part of transnational commercial law that is updated regularly. Berger K P has published several books on transnational commercial law one of which is the Book *The Creeping Codification of the Lex Mercatoria* which is a study that tries to provide an open-ended list of principles and rules that constitute the *lex mercatoria*.<sup>22</sup>

The international community has not been left behind, the International Institute for the Unification of Private Law has drafted the UNIDROIT principles whose purpose as per its preamble is that they are a set of rules for international commercial contracts, which can be used as a model law in those countries whose laws are unsophisticated, used to supplement domestic law where there is a gap in the national law. These principles have been applied as a choice of law by arbitrators where they have been expressly chosen by the parties to a contract by reference to principles embodied in them or where the intentions of the parties to be govern by these principles can be inferred. courts have enforced awards made when the said principles have been applied.<sup>23</sup>

The International Convention on the Sale of Goods commonly known as CISG is similarly referred as constituting sources of *lex mercatoria*. It is a harmonization of numerous principles that are applicable in international trade. It has been ratified by countries carrying out 70% of the world trade. It provides a favourable foundation from which *lex mercatoria* can be worked on.<sup>24</sup>

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<sup>21</sup> See the Centre for Transnational Law Website [www.central-koeln.de](http://www.central-koeln.de) and also the Transnational Law Digest <http://www.tldb.de> (Accessed on 5<sup>th</sup> July 2007).

<sup>22</sup> Berger K P *Creeping Codification* (note 20) see the preface of the book.

<sup>23</sup> Rivkin, D W ‘Enforceability of Arbitral Awards Based on *Lex Mercatoria*’ (1993) Vol. 9 No. 1 *Arbitration International* 67 at 74 (hereinafter referred to as Rivkin, D W)

<sup>24</sup> Frischkorn, Michael ‘Definitions of the *Lex Mercatoria* and the Effects of the Codifications of the *Lex Mercatoria*’s Flexibility’ (2005) 7 *Eur. J. L. Reform* 331 at 335 (hereinafter referred to as Frischkorn, Michael).

The introduction of the study sums up the evolution of the *lex mercatoria* in the medieval ages. This history has to some extent shaped the evolution of what has come to be known as the new *lex mercatoria*. Albrecht Cordes notes however that the modern *lex mercatoria* is quite different to the middle ages law merchant that was termed as a law that grants advantages and privileges to merchants<sup>25</sup> as opposed to the modern *lex mercatoria* that is seen as a system of substantive trade law. This was the position of the law merchant as per the English law, that is, the granting of privileges to merchants.

There is however a recollection of other practices in different parts of Europe that were not dogged by the criticism that the law merchant benefited a few privileged merchants. However as noted aforementioned author it would be difficult to carry out an investigation on the various practices as they are scattered customs that evolved from practices of various fields of law, such as shipping law, transfer of payments and many more.<sup>26</sup> He argues that the history of *lex mercatoria* should not adversely affect the existence of a new *lex mercatoria* as it has far reaching benefits to international trade law and commerce.

### **1.3 Statement of the problem**

There is still controversy as to the nature of the modern *lex mercatoria*, it is seen as a codification of principles of international law that do not have a binding effect and therefore cannot govern the obligations of a contract. It is evident that international traders have increasingly applied the principles of the law merchant to govern their contracts and where disputes have arisen they have settled them through commercial arbitration where their choice of law, that is, *lex mercatoria* has been upheld. It is noteworthy that commercial arbitration has evolved as the most favourable form of dispute resolution. Most international contracts have as one of their clauses a dispute resolution clause requiring parties to submit their disputes to arbitration for final determination of the disputes.

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<sup>25</sup> A. Cordes (note 4) text after note 26.

<sup>26</sup> A. Cordes (note 4) text after note 39.

Thanks to the New York Convention<sup>27</sup> which provides for the enforcement of foreign awards, local courts have enforced awards delivered by arbitral tribunals. Additionally the UNICTRAL has adopted a model arbitration law<sup>28</sup> intended to ensure minimal or no court intervention in arbitration. Many states in the world have adopted the said law; this has ensured that the intention of the parties who determine various aspects of the arbitration are upheld thus making arbitration a favourable solution to businessmen. Moreover arbitration is favoured over the local courts in international trade due to its neutral effect since most international traders do not wish to be subjected to the other party's law. It has been common practice that parties to arbitration have chosen that when deciding the dispute that the contract be governed by international principles, these being principles of *lex mercatoria*. In most cases parties have either expressly referred to certain principles that fall in the reign of *lex mercatoria*, or referred to international principles which give the same result or the intentions of the parties have been inferred to indicate that they wish their contract to be governed by *lex mercatoria*.

The focus of the study is on the applicability of *lex mercatoria* as a substantive law in commercial arbitration. Coupled with the successes of arbitration and the increasing use of arbitration as the preferred dispute resolution tool, the study notes that *lex mercatoria* has been applied to contracts which require the settlement of disputes arising out of those contracts to be through arbitration. Therefore it should be recognized as an autonomous law and as a source of law in international trade law to govern the obligations of parties to a contract. Several codes and principles have been collated that provide a concise set of rules that form part of *lex mercatoria*, for instance, the UNDRIT principles, the CISG, the Principles of European Contract Law.

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<sup>27</sup> Convention on the Recognition and Enforcement of Foreign Arbitral Awards, Done at New York, on 10<sup>th</sup> June 1958 see at [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/NYConvention.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/NYConvention.html) (Accessed on 10th June 2007).

<sup>28</sup> UNICTRAL Model Law on International Commercial Arbitration, 1985 Available at [www.uncitral.org/uncitral/en/uncitral\\_texts/arbitration/1985Model\\_arbitration.html](http://www.uncitral.org/uncitral/en/uncitral_texts/arbitration/1985Model_arbitration.html) (Accessed on 7th July 2007).

The study endeavours to demonstrate the recognition of *lex mercatoria* from the extensive use of the same through international commercial arbitration. It is noteworthy that there are very few instances when parties have actually expressly provided for the application of the *lex mercatoria* as substantive law to govern a contract where a dispute is brought to arbitration.<sup>29</sup> Due to these facts many arbitrators when faced with the question of choice of law in the absence of an express choice have been reluctant to apply *lex mercatoria* and instead through the traditional choice of law procedures and determined that national law should be applied.<sup>30</sup> An example is the Rome Convention which provides under article 4(1) that where the law applicable to a contract has not been chosen by the parties, the contract shall be governed by the law of the country with which it is most closely connected.<sup>31</sup>

As will be noted later the English courts have interpreted this to mean that the convention does not contemplate any other choice of law other than that of a country. The study tries to explore whether parties to contract providing for the resolution of disputes through arbitration can have the confidence that awards formulated by the application of *lex mercatoria* by arbitrators taking into account other considerations under the conflict of law rules will be enforced. In addition it explores the possibility of the application of *lex mercatoria* as substantive law in Africa given the modernization of arbitration laws in some African states. The focus is mainly on three countries namely South Africa, Kenya and Egypt.

#### **1.4 Significance of the Study**

The growth of international commercial arbitration as the most favoured form of dispute resolution in international trade has rendered the application of *lex mercatoria* as law governing contracts crucial for the development of commercial arbitration thus the significance of this study. The study evaluates the feasibility and existence of *lex*

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<sup>29</sup> Davidson, Matthew T. 'The *Lex Mercatoria* in Transnational Arbitration: An Analytical Survey of the 2001 Kluwer International Arbitration Database' June 19<sup>th</sup> 2003 *Pace Law School Institute of International Commercial Law*, text after note 16. Available at [www.cisg.law.pace.edu/cisg/biblio/davidson.html](http://www.cisg.law.pace.edu/cisg/biblio/davidson.html) (Accessed on 7<sup>th</sup> July 2007).

<sup>30</sup> *Ibid* at 8.

<sup>31</sup> EC Convention on the Law Applicable to Contractual Obligations (Rome 1980) Available at [www.rome-convention.org](http://www.rome-convention.org) (Accessed on 7<sup>th</sup> July 2007) (hereinafter referred to as the Rome Convention).

mercatoria as a set of rules that have the force of the law to govern contractual obligations. An analysis of the historical background is undertaken and together with the evolution to new lex mercatoria. It is identified that there principles that have evolved to form content of the lex mercatoria. The study rebuts the idea that lex mercatoria is not law since it does not satisfy the normal tenets of sources of law by identifying that the growing application of lex mercatoria to govern the obligations in international contracts and that it should not be judged using the traditional classification of law but should be seen as a different entity.

Additionally it rebuts the scepticism that lex mercatoria is only applicable as a form of procedure for dispute resolution, by identifying that its principles can be used to govern contracts and spell out obligations of the parties to a contract. The study notes that the reasons behind the reluctance to use lex mercatoria as the proper law is the lack of knowledge of the existence of such principles, content of lex mercatoria and the reluctance of legal practitioners to change their normal habit of applying national law for fear of the unknown [lex mercatoria]. Similarly the attitudes of the courts play a big role in the evolution of the lex mercatoria. States in Africa for instance have influenced the evolution of trade for decades now. Until recently private parties did not play a part in transactions without the authorization of state agencies. The rigidity of the African states for fear of abuse of their sovereignty explains the absence of modern principles of international law such as the lex mercatoria, as they require the application of a system of law that has been implemented through the agencies of the states. The significance of the study of Africa is in cognizance of the fact that Africa has been left out for some time of the development of international commercial arbitration and the principles that enhance its efficiency. There is need to identify whether there is room for the development of these principles with the inclusion of African states in forums where the development of the principles are discussed and the implementation of the principles in commercial transactions.



### **1.5 Methodology of the Study**

The study was undertaken by way of research of information from books, journals and articles that have been written by various scholars and international institutions on *lex mercatoria*, commercial arbitration and other related fields. The study summarises various international principles that form part of *lex mercatoria* that have been formulated by various international institutions such as the UNIDROIT. Similarly information was collected from sources such as academic writings and the internet. All materials collected from these sources are acknowledged and referenced by identifying the source of the information.

The study commences by with a background study of the law merchant by researching on the existence of customs that were termed as forming part of the law in the Roman times, through to the middle ages. It briefly examines the modern *lex mercatoria* and identifies its autonomous nature and applicability as a source of law. Additionally *lex mercatoria* is seen as a substantive law applied to contracts as the proper law under commercial arbitration. The acceptance of *lex mercatoria* as a law governing the contract by arbitrators and the enforcement of arbitral awards by national courts is viewed as an indicator that *lex mercatoria* is recognized as a source of law, that is autonomous, legal and binding among parties. The study evaluates the formula used in choosing the applicable substantive law in commercial arbitration and the consequences of choosing *lex mercatoria* as the law governing the contract.

The study evaluates the position in England on the applicability of *lex mercatoria* as substantive law in international commercial arbitration. In addition the study looks at the French experience on enforcement of arbitral awards where *lex mercatoria* has been applied by arbitrators as the law governing the contract. It also evaluates the prospects of application of *lex mercatoria* as governing law in African states taking into consideration the current trend of the modernization of arbitration laws as a result of the adoption or implementation of new laws through the guidance of the UNCITRAL model law. A conclusion was made based on the findings of the research from books, journals and articles authored on the status of *lex mercatoria* is a legal order that is distinct in nature

and useable in international commercial arbitration to govern contracts. The words transnational commercial law, the law merchant, general principles of law and the *lex mercatoria* have been used interchangeably. The words refer to one and the same thing.

## 1.6 Literature Review

Several authors have written on the existence of *lex mercatoria* and its feasibility as applicable law in contracts and on the choice of *lex mercatoria* as the law governing the contract in commercial arbitration. Most authors have tried to prove the existence of the *lex mercatoria* in the medieval ages by tracing the earliest writings. They have given examples of customs that were codified and recognized as forming part of the law merchant. The trace goes on into the Middle Ages where more authors wrote on the topic. Additionally several authors have reinstated the law merchant in the 20<sup>th</sup> century by identifying the existence of the new *lex mercatoria*. International institutions have additionally formulated codes that contain principles of international law that form part of the new *lex mercatoria*. There have been several debates on the feasibility of the *lex mercatoria* where some writers have termed it as nothing more than guiding principles.

L. Trakman in his book *The Law Merchant: The Evolution of Commercial Law* notes that merchants had in the medieval times formulated their own ‘business practices and controlled their conduct’.<sup>32</sup> He gives an example of the maritime trade which he notes was based upon merchant tradition.<sup>33</sup> He notes further that merchants began codifying local practices into regulatory codes which they applied when they traded across national boundaries. He mentions the customs of Barcelona; ‘the *Consulato del Mare*’ which he notes became part of the mercantile customs. He notes that the Europe was the ideal place for the merchant tradition to grow as the merchants could navigate the whole of Europe with ease and spread the merchant customs. He states that due to the benefit that the merchants brought to the cities and towns, rulers, kings and princes supported its growth making the merchant customs to be preferred over law to regulate trade. For example the principle of good faith became a requisite custom in mercantile

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<sup>32</sup> Trakman, *The Law Merchant* (note 7) at 8.

<sup>33</sup> Trakman, *The Law Merchant* (note 7) at 8.

agreements.<sup>34</sup> Disputes were resolved through merchant courts where there were speedy trials, oral evidence and fewer complications. Judges were appointed from experienced merchants. However there was still need for law, merchants were from different countries and had different cultures, where there was a conflict between customs the law was brought in to bring about uniformity. Trakman notes that as nation states grew local rulers began to shun the law merchant over their regulatory regimes<sup>35</sup>; they dictated the practice of the commercial tribunals. This he notes led to the question of the law merchant as a single 'system of law'.

He concludes the chapter by noting that the benefits of the law merchant should not be ignored. He notes that nation states depend on international trade for the growth of their economies and rely on international trade. He posits that there is therefore need for a uniform law for traders around the world to govern their transactions.

Berger K. P is one of the proponents of the 'new lex mercatoria'. In his book *The Creeping Codification of the Lex Mercatoria* he quotes Gerard Malynes book the *Consuetudo Vel Lex Mercatoria, Or the Ancient Law-Merchant* which was published in 1622 as defining lex mercatoria as the 'customary law of merchants that was based on the foundation of Reason and Justice'.<sup>36</sup> He notes that in the 19<sup>th</sup> century as a result of what he calls the codification period the law merchant and customs became void. In the 20<sup>th</sup> century he notes that the work of some scholars namely Fragistas, Goldstajn, Schmitthoff, Goldman, Kahn and Fouchard advocated the existence of a new lex mercatoria. He states that the work of these scholars has been supported by other scholars such as Horn, Lando and Langen. Through his book he tries to advocate the codification of the lex mercatoria, by preparing a list of principles and rules that comprise the lex mercatoria. He points out that the list of principles and rules are updated regularly by the Centre for Transnational Law established at the Munster University in Germany.

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<sup>34</sup> Trakman, *The Law Merchant* (note 7) at 10.

<sup>35</sup> Trakman, *The Law Merchant* (note 7) at 21.

<sup>36</sup> Berger K P *Creeping Codification* (note 20) at 1.

Through the Centre for Transnational Law Berger Klaus Peter, Holger Dubberstein, Sacha Lehmann and Viktoria Petzold conducted an enquiry on the use of transnational commercial law in international contract law and arbitration. In their report<sup>37</sup> they note that the ‘existence and viability of the new *lex mercatoria*’ has suffered greatly due to the lack of sufficient evidence of the use of the principles of transnational commercial law. From the findings of the survey carried out they conclude that transnational commercial law is used in ‘international legal practice’ especially by the civil law system as opposed to the common law system. In addition they note also that ‘information on transnational commercial law was not able to keep in pace with the globalization of legal practice’, they challenge scholars involved in the field of transnational commercial law to disseminate information of its existence and viability as international trade law.

There is a lot of literature on international commercial arbitration; international trade has favoured the use of commercial arbitration for the resolution of disputes as opposed to the local courts. One of the topics that are discussed by several writers is the issue of choice of substantive law. Commercial arbitration recognizes the party’s rights to choose the substantive law to govern their contract. If there is no express choice by the parties an implied choice can be inferred from the intention of the parties. Where the choice cannot be inferred the arbitrator makes a decision based on the conflict of law rules.

The authors of the book; *Fouchard Gaillard Goldman on International Commercial Arbitration*<sup>38</sup> note that the choice of transnational commercial law as a substantive law has been subject to a lot of controversy. They try to bring light to the issue by discussing the content of transnational commercial law and the method of choosing it as substantive law. They note that parties to an arbitration contract sometimes

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<sup>37</sup> Berger Klaus Peter, Holger Dubberstein, Sacha Lehmann and Viktoria Petzold ‘The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration’ *Center for Transnational Law, University of Cologne, Germany*. Available at [www.tldb.de](http://www.tldb.de), (Accessed on 5<sup>th</sup> May 2007).

<sup>38</sup> E. Gaillard, Savage Gaillard and J. Savage (eds) *Fouchard Gaillard Goldman on International Commercial Arbitration* (1999) Kluwer law International, The Hague at 801 (hereinafter referred to as E. Gaillard, Savage Gaillard).

prefer that their contract be governed by a non-national law. In addition through international arbitration the choice of *lex mercatoria* as the law governing has been given acclamation. The authors give an example of the 1981 French Decree on International Arbitration where the words ‘rules of law’ were used and have been interpreted by commentators to include *lex mercatoria*. They note that several other international institutions and countries have given the same meaning to the words, that is, the words refer to transnational commercial law. Further that in England where there is much scepticism on the choice of transnational commercial law the courts and the Arbitration Act of 1996 have acknowledged its applicability.

The authors point out that the words used to signify the choice of transnational commercial law as the law governing a contract have been vague. The criticism that has been raised on transnational commercial law has been based primarily on the rules, emphasis being made to the sources that the general principles of international commercial law are drawn from and also where an analysis is made through comparative law.<sup>39</sup> Some of the criticisms the authors point out that have been levelled are that, the *lex mercatoria* is not a legal order when compared to national law or international law, that ideologically it only benefits the stronger party in a contract and finally that there is no exact content of *lex mercatoria*. They try to invalidate these criticisms by noting that international commercial arbitration has specialized the *lex mercatoria* and its use as law has increased over time making it generally accepted, that the choice of *lex mercatoria* as substantive law is consensual therefore it does not only benefit the stronger party. Finally they identify a list of principles that form a distinct content of *lex mercatoria*.

There are several authors who have heavily criticized the existence of *lex mercatoria* and its viability as a source of law. It is argued that there is no distinct list of principles that can be termed as constituting *lex mercatoria* and if there are such principles they are so vague that one cannot decide which principle is part of the law merchant and which is not. Keith Highet is one such author who asks the question whether *lex mercatoria* has replaced national laws in the interpretation of international

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<sup>39</sup> Ibid at 808.

contracts.<sup>40</sup> He notes that a system of law serves several roles when applied to a contract. These he states includes,

As a source of general obligations, as system of law that determines the rights and obligations of the parties to a contract, as a system of law that assists in the interpretation of the contract and as a body of law which provides for the effective enforcement of the contract.

He notes that *lex mercatoria* does not satisfy some of these roles and therefore cannot be termed as system of law. His argument revolves around the assertion that there cannot be a state-less contract. He notes that the only time such a contract can be recognized is when the agreement is voluntary between two parties. When such a contract affects the interests of other parties or public policy the state has to come in to regulate it. Additionally he states that contracts governed by *lex mercatoria* cannot be enforced, for instance, you cannot summon a person to an arbitration tribunal. He notes that *lex mercatoria* is not law but simply a set of principles which in any event are so vague that one cannot take an inventory of the principles that form part of the *lex mercatoria*. He notes further that *lex mercatoria* is a creation of multinational companies who did not want to be subjected to the laws of state that is a party to a contract as the same would benefit the state. He states that the only way that *lex mercatoria* can ‘satisfy the test of relative predictability, authoritativeness and consistency’ is when arbitral awards have been increasingly recognized as precedent for the interpretation of disputes.<sup>41</sup> He concludes by noting that *lex mercatoria* is an ‘enigma’ that is to be used as principles to guide the interpretation of contracts, dispute resolution and not as a governing law.

The study collates information on the existence of the new *lex mercatoria* by looking at the work of these authors and others who have written on the topic. It examines several codes that have been drafted which constitute part of the *lex mercatoria*. In addition I look at the experiences of two countries in Europe and three in Africa to

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<sup>40</sup> Hight, Keith ‘The Enigma of the *Lex Mercatoria*’ (1989) *Tulane Law Review* 613 (hereinafter known as Hight, Keith).

<sup>41</sup> *Ibid* at 625.

identify the attitudes of these countries towards the *lex mercatoria* as an autonomous system of law and international commercial arbitration. It is the conclusion of several jurists that the *lex mercatoria* has attained the status of an autonomous legal system that can be applied to govern the duties and obligations of parties to a contract.

### **1.7 Structure of the Study**

Chapter one commences with the historical background of the law merchant tracing its existence from the thirteenth century. It is noted that the law merchant was dissolved in the laws of states and as a result of which its existence was questionable until the revival of the topic in the seventeenth century by Gerard Malynes. The study evaluates the present day debate which revolves around the existence of a new *lex mercatoria*.

Chapter two identifies the sources of the *lex mercatoria*. These sources are derived from scholarly writing identifying what constitutes sources of *lex mercatoria*. It is the conclusion of the study that there exists a list of sources of the *lex mercatoria* that can be referred to by parties to a contract who wish to apply *lex mercatoria* as governing law, arbitrators, legal practitioners and academicians.

Chapter three looks at the factors to consider when making a decision on the choice of law by the parties, and in the absence of such choice by the arbitrators. The study examines the choice of *lex mercatoria* as a substantive law in international commercial arbitration and the consequences of such choice.

Chapter four evaluates the attitudes of different countries towards the *lex mercatoria* as substantive law. The case study that is undertaken on this chapter focuses on international commercial arbitration and the application of the *lex mercatoria* as substantive law in two countries in the European region, England and France and three countries in Africa, South Africa, Kenya and Egypt. The application of *lex mercatoria* has only been witnessed under international commercial arbitration in England and France where awards applying *lex mercatoria* as substantive law have been enforced. In Africa however this is not the case as there is only mention of *lex mercatoria* by scholars,

however it is noted that the modernisation of the arbitration laws in Africa creates the possibility of its application in arbitration.

Chapter five concludes the study by noting that the work of private actors, international institutions as law making bodies should be recognized taking into consideration the rethinking of the theories of law that posit that the law stems from the state. The *lex mercatoria* can be said to have attained the status of an autonomous legal system applicable under international commercial arbitration. What is left now is its recognition by the national courts.



## CHAPTER TWO

### 2. SOURCES OF LEX MERCATORIA

#### 2.1 Introduction

The obligations and duties of parties to an agreement require that some form of rules be applied to provide guidance to the parties on how to conduct themselves. Parties to a contract have an array of laws to choose from, for instance, the national law of the country where the dispute is being heard, the law of the state of one of the parties to the contract, a neutral law and the *lex mercatoria*. The study focuses on the last choice, that is, the *lex mercatoria*. As earlier noted in the first chapter of the study there has over time developed a set of rules through practice which have evolved within the international business communities that have come to be referred as the 'law merchant' *lex mercatoria*. It has been described as an autonomous source of law which is ideal for commercial agreements and relations between citizens and foreigners.

The applicability of the law merchant has been questioned by various authors, national courts. There has been some reluctance on its application as substantive law. As opposed to national law that is seen as a complete legal system the *lex mercatoria* is termed by its critics a mere set of general principles of isolated legal rules.<sup>42</sup> Critics have noted that it is hard to identify the content of *lex mercatoria* and that one should be careful not to choose a law that is ambiguous. Several authors, the international community have tried to remedy this by providing scholarly writings, international conventions and codes that form part of the *lex mercatoria* and which outline its content. It is important therefore to identify whether the argument against the *lex mercatoria* as a source of law is viable under this chapter.

#### 2.2 Sources of the Lex Mercatoria

The question that has been leveled against the application of *lex mercatoria* as a source of law is what category it falls in. Some authors note that *lex mercatoria* are general principles that are used to assist in the interpretation of complex international contracts

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<sup>42</sup> Wethmar-Lemmer, Marlene 'The Debate on the Existence of the Lex Mercatoria' (2006) Vol 47 No 1 ISSN 0010-020X © *Codicillus Unisa Press* 23 at 30-31.

and cannot be termed as law.<sup>43</sup> Others are of the opinion that transnational commercial law has evolved from the union of laws from several states, ‘a collection of rules that are non-national which have gained recognition through international usage and performance by the merchant community’.<sup>44</sup> Emanuel Gaillard argues that a genuine legal order must satisfy four preconditions; Completeness, structured character, ability to evolve and predictability.<sup>45</sup> He notes that *lex mercatoria* as a source of law is able to answer all questions that arise from a dispute or contractual agreements, it is structured just as a genuine legal order in the sense that its rules are interrelated and provide a composite set of rules, it has the ability to evolve with the changes that occur in international trade. Finally that it is predictable given the various codes and international conventions that have outlined its content and far more predictable than the ordinary system of law.

One of the most severe criticisms of the *lex mercatoria* is that it does not derive from a sovereign order and therefore does not have the binding effect the laws of a state have and therefore it is toothless without the reference to the laws of a nation. These views have been levelled against the notion that *lex mercatoria* is an autonomous law distinct from national laws. There are various theories on the foundations of law which differ as to what are the components of a proper legal order.

The positivist’s theory which reflects some of the criticism levelled on the *lex mercatoria* argues that there has to be a force that commands the obedience of a legal norm; it is a sin to try to alter the law.<sup>46</sup> *Lex mercatoria* is said not to satisfy this precondition as there is no body to overlook the observance of the law. As noted rightly by Silvia Fazio in his book the creation of the law can no longer be done by the state only.<sup>47</sup> The structure of transnational commercial law according to him arises from “non-

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<sup>43</sup> Hight, Keith (note 40) at 617.

<sup>44</sup> Goode, Roy 'Usage and Its Reception in Transnational Commercial Law' (1997) Vol. 46 *INT'L & COMP. L. Q.* 1 at 2-3.

<sup>45</sup> Emanuel Gaillard 'Transnational Law: A Legal System or a Method of Decision Making?' (2001) Vol. 17 No. 1 *Arbitration International* 59 at 65.

<sup>46</sup> See quotation of a passage by De Re Publica Cicero in Enrico Pattaro *A Treatise of Legal Philosophy and General Jurisprudence The Law and the Right, A Reappraisal of the Reality that Ought to Be*, VOL 1 Springer 2005 at 60.

<sup>47</sup> Fazio, Silvia *The Harmonization of International Commercial Law* 2007 Kluwer Law International, The Netherlands at 13 (hereinafter referred to as Fazio, Silvia).

traditional elements of public and private international law such as soft forms of codified usages and customary practices of several norms”. The activities of individuals and collective actors such as multinational corporations, international institutions have led to the ‘appropriation’ of a set of rules from the national legal order to form a distinctive legal order of general principles that have been observed by the interested parties.<sup>48</sup>

Peer Zumbansen in his review of A. Claire Cutler book<sup>49</sup>, notes that the proponents of *lex mercatoria* should not try and make it equal to the national legal order through the traditionalist legal theory. As noted earlier one part of the traditional thinking is that a genuine legal norm has to have a legal order that ensures its observance. In the modern times different ways have been devised to ensure the observance of the law. Additionally the fact that these rules have been formulated by the actors who practise it satisfies the theory that the law has to be accepted and that the society has agreed to be governed by the said principles by giving up specific rights. There are ways of ensuring the observance of contractual obligations for instance where a contract is governed by the *lex mercatoria*. Penalties are levied to persons who breach contracts, through the modern arbitration laws, suits are stayed in favour of arbitration and where awards are passed courts have gone further to recognize and enforce these awards. We should move away from the traditionalist thinking that is grounded on the fact that rights and obligations have to be enforced by official means rather than through consent and practice of customs.<sup>50</sup> The flexibility of *lex mercatoria* principles renders it more favourable to international trade, the fact that it is neutral and that parties have the right to choose whether their contracts will be governed by *lex mercatoria* or not makes it more favourable and in line with the modern trends of globalization.

Transnational commercial law or *lex mercatoria* has evolved from customary practices of merchants to international customary law and finally now to a distinct legal autonomous norm. The evolution of international law has faced the similar criticism as

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<sup>48</sup> Zumbansen, Peer ‘Sustaining Paradox Boundaries; Perspective of Internal affairs in domestic and International law’ (2004) *EJIL* 15 197 at 200 (hereinafter referred to as Zumbansen, Peer).

<sup>49</sup> A. Claire Cutler *Private power and Global Authority: Transnational Merchant law in the Global Political Economy* 2003 Cambridge University press, Cambridge.

<sup>50</sup> Zumbansen, Peer (note 48) at 200.

that staged against *lex mercatoria*. International law was termed as mere set of rules that had not evolved into a system of law because they lack ‘centralized legislature, network of recognized courts with compulsory jurisdictions and organized means of enforcement’.<sup>51</sup> Shaw criticizes this theory by noting that it overlooks the distinct characteristics of international law and its ‘vivacity’ as a system of law. In the chapter on the development of International law he talks about the evolution of the law merchant in England where codes were established to govern foreign trade and later ‘declared to be of universal application’.<sup>52</sup> Through this he notes the European society changed and began to recognize ‘scientific humanistic and individualistic thought’. In the modern era he gives an example of the United States where the nature of the law is determined by the values of the community and policy decisions. He points out that the role of the Judge is not just to interpret the law but also in shaping the public policy.<sup>53</sup> Shaw refers to Professor Franck on the question why states obey international law despite its condition as an undeveloped legal system.<sup>54</sup> He notes that the answer to the question is the legitimacy of international law. He quotes the definition of legitimacy as; ‘a property of a rule or rule-making institution which itself exerts a pull towards a compliance on those addressed normatively because those addressed believe that the rule or institution has come into being and operates in accordance with generally accepted principles of right process’.<sup>55</sup>

The legitimacy of *lex mercatoria* is evident from the continued observance and use of the said principles to govern international contracts. Through international commercial arbitration these rules have been specialized and used as applicable law in international contracts. *Lex mercatoria* is an autonomous source of law in the sense that it is distinct in nature though it evolved from the “appropriation” of national rules as Peer

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<sup>51</sup> Quotation of Professor Hart’s theory in his book “*The Concept of Law*” cited in Malcolm Shaw *International Law* 4ed (1997) Cambridge University Press, Cambridge at 42.

<sup>52</sup> Malcolm N, Shaw *International Law* 4ed (1997) Cambridge University Press at 17. (hereinafter referred to as Malcolm N, Shaw)

<sup>53</sup> *Ibid* at 46.

<sup>54</sup> See Franck T. M. *The Power of Legitimacy among Nations* 1990 Oxford cited in Malcolm N. Shaw (note 51) at 51-52.

<sup>55</sup> Malcolm N, Shaw (note 52) at 52.

Zumbansen points out. It has been accustomed to fit the needs of international trade. It is a harmonization of various customs to form one legal entity.

It is not possible to exhaustively outline all the sources of *lex mercatoria* as has been noted by Ole Lando in his article<sup>56</sup>. An outline of some of the sources of *lex mercatoria* that can be referred to will be done below, it is not an exhaustive one but it gives a basis upon which other sources can be identified. The outline of the said sources is done with reference to that of both Lord Mustill's list<sup>57</sup> and Ole Lando<sup>58</sup> with some alterations and inclusions.

### 2.2.1 UNIDROIT Principles of International Commercial Contracts

The drafting of the UNIDROIT principles proved that the harmonization of uniform laws is possible. The first draft of the UNIDROIT principles was published by the International Institute for the Unification of Private law in 1994. The recognition of the principles as a source of *lex mercatoria* has raised controversy. Baron Gesa in his article<sup>59</sup> notes that the UNIDROIT principles are part of the law merchant as they satisfy the components of the law merchant. They are transnational in nature as they do not reflect the laws of any specific legal order; they are common in origin, they are open to customs and are adapted to incorporate the evolving trends of international commercial law.

The preamble of the UNIDROIT principles provides the various functions that they serve. They are a set of rules for international commercial contracts.<sup>60</sup> The aforementioned author refers in their article to Berger K. P who states that the principles do not clarify their legal status. He notes that the status should be 'deduced from their structure, methodology and context'.<sup>61</sup> Additionally he raises the argument that the principles have been criticized for not having a legislative authority and therefore is not

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<sup>56</sup> Lando, Ole 'The *Lex Mercatoria* in International Commercial Arbitration' (1985) VOL 34, No. 4 *ICLQ* 747 at 749 (hereinafter referred to as Lando, Ole).

<sup>57</sup> M, Mustill 'The New *Lex mercatoria*: The First Twenty-Five Years' (1988) Vol. 4 No. 2 *Arbitration International*, 86 at 109-114 (hereinafter referred to as M, Mustill).

<sup>58</sup> Lando, Ole (note 56) at 749-751

<sup>59</sup> Baron, Gesa (note 6) at 127.

<sup>60</sup> Available at [www.unilex.info](http://www.unilex.info) (Accessed on 2<sup>nd</sup> August 2007).

<sup>61</sup> Baron, Gesa (note 6) at 128.

legitimate. He does not refute this argument but points out however that the methodology used to draft the principles involved a comparative study of different national legal orders which resulted in a true distinctive legal system. He notes further that the principles are a reasoned system of law which provide a “code-like” formation that conforms to the general structure of legislation. These codes are open-ended and provide a flexible set of rules to cover any situation and yet they are systematic in nature.

The principles are updated to conform to the trends of the International community. The new version of the UNIDROIT principles drafted in 2004 is in line with the continued work of the international community to update the principles to reflect the current position in international trade as a source of the modern *lex mercatoria*. In conclusion Baron Gesa notes that the UNIDROIT principles may be the foundation of the modern *lex mercatoria*; however this all depends on the interpretation of the principles and also their uniform application. Through enforcement of arbitral awards based on the *lex mercatoria* the UNIDROIT principles have gained recognition and the continued success of arbitration is seen by the author as a positive trend towards the recognition of *lex mercatoria* as law even in the national courts.

### **2.2.2 The Convention on the International Sale of Goods [CISG]**

The Convention on the International Sale of Goods entered into force on the 1<sup>st</sup> of January 1988. As per the Pace University Website<sup>62</sup> as of 2<sup>nd</sup> December 2006 70 states have ratified the Convention. The CISG has been termed as the ‘greatest harmonization of commercial laws yet put in practice’.<sup>63</sup> The CISG is said to form part of the modern *lex mercatoria* as a result of the unification of various principles into one Convention. These principles reflect the position of various states on international sale of goods and the Convention is a compromise of all these positions. Through the Convention relations are formed through an international community that shares the values of the Convention and uses the same to negotiate and form contracts and also to resolve disputes through the

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<sup>62</sup> Available at [www.cisg.law.pace.edu/cisg/countries/cntries.html](http://www.cisg.law.pace.edu/cisg/countries/cntries.html) (Accessed on 2<sup>nd</sup> August 2007).

<sup>63</sup> Frischkorn, Michael (note 24) at 335.

same Convention.<sup>64</sup> This makes the Convention have an autonomous nature distinct from that of the national law and therefore forms part of the modern *lex mercatoria*. The Convention however raises some problems to the future of the *lex mercatoria* as a legal entity due to its application and domestication.

The CISG applies to contracts of sale of goods of contracting states, where the parties are from different states and are party to the Convention or where their place of business is in different states.<sup>65</sup> It is also applicable where the rules of private international law lead to the application of the law of that contracting state.<sup>66</sup> Inevitably this means that the choice of law rules that are to be applied are those of contracting states.<sup>67</sup> Contracting states have the option of opting out of Part II and III of the convention.<sup>68</sup> This raises the problem of non-conformity of the application of the Convention where different states are bound by different parts. Similarly under article 95 states have the option of declaring that article 1(b)<sup>69</sup> of the Convention does not apply. This in essence means that the rules of private international law will not apply and that the domestic law of the state will apply where there is a conflict of laws. The lack of the uniform application of the Convention raises a problem as to the viability of the *lex mercatoria* as a source of law since as a result of the differential application the same loses consistency. Despite all these weaknesses the CISG forms a coherent source of law for the sale of goods it has been used countless times to govern contracts of sale of goods. Its domestication into national laws does not render it oblivious as a source of *lex mercatoria* as arbitrators, lawyers and practitioners can refer to it as a set of general principles to govern the contract in its international character. Additionally its broad

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<sup>64</sup> Kastely, Amy H. 'Unification and Community: A Rhetorical Analysis of the United Nations Sales Convention' (1988) Vol. 8 *Northwestern Journal of International Law & Business* 574 at Available also at [www.cisg.law.pace.edu/cisg/biblio/kastely.html](http://www.cisg.law.pace.edu/cisg/biblio/kastely.html) (Accessed on 2nd August 2007).

<sup>65</sup> Article 1(a) of the CISG.

<sup>66</sup> Article 1(b) of the CISG.

<sup>67</sup> Frischkorn, Michael (note 24) at 336.

<sup>68</sup> Article 92 of the CISG.

<sup>69</sup> This Convention applies to contracts of sale of goods between parties whose place of business is in different states: when the rules of Private International Law lead to the application of the law of Contracting State.

language that has been seen as a weakness can be advantageous to the lex mercatoria community as it allows them to ‘work within the convention’.<sup>70</sup>

### 2.2.3 Principles of European Contract Law

The Principles of European Contract law (PECL) were developed by a Commission on European Contract Law in 1998. The Commission consists of lawyers from all member states of the European Union under the chairmanship of Professor Ole Lando.<sup>71</sup> The Principles are meant to be applied as general principles of contract law in the European community.<sup>72</sup> They may also be used to govern contract where parties to a contract incorporate them into the contract and in relevance to this study they may be applied when parties agree that their contract is to be governed by ‘general principles of law’, the ‘lex Mercatoria’ or the like.<sup>73</sup> The Commission on European Contract Law notes that one of the crucial aims they seek to achieve is the acceptance of these principles within Europe in such a way that they can be applied directly by arbitrators as a governing law and as a result attain the status of a modern European lex mercatoria.<sup>74</sup>

### 2.2.4 CENTRAL Transnational Law Digest and Bibliography

The TLDB is a digest that provides an ‘easy-to-use online’ information hub of the codification of international commercial law and the new lex mercatoria.<sup>75</sup> The digest is prepared by the Centre for transnational law at the University of Cologne to serve the function of being an information source for international Practitioners and academicians. The digest provides probably the largest bibliography for transnational commercial law. The CENTRAL conducted an enquiry on the use of transnational law in international practice between 1998 and 2000. The findings of the enquiry revealed that the new lex mercatoria is in use in international practice worldwide however the main stumbling

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<sup>70</sup> Frischkorn, Michael (note 24) at 336.

<sup>71</sup> The Commission on European Contract Law, Ole Lando(ed), Hugh Beale(ed) *Principles of European Contract Law Parts I and II* (2000) Kluwer Law International, The Hague/London/Boston at xxi.

<sup>72</sup> Article 1:101:1 of the Principles of European Contract Law.

<sup>73</sup> Article 1:101:3 of the Principles of European Contract Law.

<sup>74</sup> Supra (note 71) at xxiv.

<sup>75</sup> Available at [www.tldb.net](http://www.tldb.net) (Accessed on 10<sup>th</sup> August 2007).



block is the lack of knowledge of the content of *lex mercatoria*.<sup>76</sup> The digest provides an open-ended list of principles and rules of *lex mercatoria* that are regularly updated in form of a code. These principles are supported by references to their sources, that is, international arbitral awards, domestic statutes, international conventions, trade usages and academic writings.<sup>77</sup>

The Centre for transnational law notes that the codification of the principles and reproduction of their sources does not serve as a formal universal law making process but it serves two purposes; to save time and money that would be used to do a comparative study to identify principles that form part of *lex mercatoria* and also the sources give the user an opportunity to make a judgment on the authenticity of the listed principles. It is noted by the CENTRAL on the website that some purposes of the principles made available by the TLDB is; to assist parties in determining the applicable rules in a dispute if they have chosen transnational commercial law or to be applied by arbitrators to disputes, for the ‘autonomous’ interpretation of and filling gaps where international conventions fall short or uniform laws. The digest provides a good source for international practitioners, academicians, arbitrators of transnational commercial law. The principles outlined on the digest reflect the principles that have been recognized by various scholars as will be identified below.

### **2.2.5 Customs and Usages**

The evolution of customary international law is through the ‘behaviour of actors of the international community’.<sup>78</sup> Through their negotiations and constant use of various practices customs become structured and evolve into sources of international law.<sup>79</sup> Wiener Jarrod<sup>80</sup> refers to Clive M. Schmitthoff whom he notes accredited a lot to the importance of international customs which he noted were ‘formulated by the work of international agencies’. In addition he notes that there are customs that have been

<sup>76</sup> Berger Klaus Peter, at el, ‘The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration’ *Center for Transnational Law, University of Cologne, Germany*. Also available at [www.tldb.de](http://www.tldb.de), (Accessed on 5<sup>th</sup> May 2007).

<sup>77</sup> See the CENTRAL website [www.tldb.net](http://www.tldb.net) (Accessed on 15 July 2007) .

<sup>78</sup> Fazio, Silvia (note 47) at 23.

<sup>79</sup> Ibid.

<sup>80</sup> Wiener, Jarrod *Globalization and the Harmonization of Law* (1999) Pinter, London & New York at 165.

integrated into standard form contracts. He gives examples of contracts such as the International Air Transport Association (uniform air way bills) and the Lloyds Marine Insurance Policy. Ole Lando outlines some of the codified customs as the INCOTERMS the current version being the INCOTERMS 2000, the Uniform Customs of Practices of Documentary Credits UCP 600, and the hardship or force majeure clause formulated by the ICC.<sup>81</sup> These customs are applied where parties agree to their application. They have guided international practitioners and arbitrators in their conduct in international trade and commercial arbitration.<sup>82</sup>

### 2.2.6 International Commercial Arbitral awards

One of the advantages of arbitration is the fact that the proceedings and sometimes the arbitral awards are kept private. This however has been a disadvantage as the reporting of these awards is crucial to the formalization of the modern *lex mercatoria*.<sup>83</sup> There is however a new trend on publication of arbitral awards by international arbitral institutions.<sup>84</sup> These awards are useful to the proponents of the modern *lex mercatoria* as they give proof that *lex mercatoria* has been used and recognized as the law governing contracts by parties to arbitration and also by arbitrators. Arbitral awards are not binding and sometimes lack consistency as decisions made by arbitrators are solely dependent on the issues in dispute; however for purposes of *lex mercatoria* the evidence that these principles are being applied in international trade is what is essential to the evolution of the *lex mercatoria* to a legal norm. International commercial arbitration has specialized these principles by applying them to practical situations where through their interpretation the principles are given substance.<sup>85</sup> The study looks at some of the arbitral awards in the European Union which have applied the *lex mercatoria* and whether the courts of member states of the European Union other than those of the English have acknowledged the legitimacy of these awards by way of enforcement.

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<sup>81</sup> Lando, Ole (note 56) 751.

<sup>82</sup> Ibid.

<sup>83</sup> Ibid.

<sup>84</sup> Brunetti Maurizio 'The Lex Mercatoria in Practice: The Experience of the Iran-United States Claims Tribunal' (2002) Vol. 18 - No 4 *Arbitration International* 355.

<sup>85</sup> Ibid.

### 2.2.7 General Principles of Law that form Part of the Lex Mercatoria

Several authors have tried to identify principles that constitute sources of the lex mercatoria and have formulated lists that outline what these principles are. As earlier noted it is not possible to exhaustively list these principles in a study such as the one I am undertaking as it will undertake quite a lot of comparative study to identify the various principles that through their consistent use can be termed as persuasive sources of lex mercatoria. I will identify the various lists that have been drawn by several authors and outline some of the principles that have been recognized as forming part of the lex mercatoria by these scholars.

Suffice to note it is argued that the authenticity of these lists is dependent on the ‘credibility’ of the authors in the field of international trade and international commercial arbitration.<sup>86</sup> Lord Mustill’s list has been recognized by many authors as authentic due to the respect he holds from his peers in international trade and arbitration.<sup>87</sup> Most of the general principles that Lord Mustill has listed<sup>88</sup> have been reiterated by other sources and reproduced by other authors in various articles.<sup>89</sup> Another list that has been identified by Michael Frischkorn is that of a Harvard law student. The law student in his article<sup>90</sup> lists the following principles; A sovereign government may make and be bound by contractual agreements with foreign private parties, the corporate veil may be pierced to prevent a beneficial owner from escaping contractual liability, *force majeure* justifies non-performance of a contract such that the loss is borne fairly by the parties, contracts that seriously violate *bonos mores* or international public policy are invalid, equitable compensation constitutes the primary remedy for damages, the right of property and of acquired vested rights is generally inviolable and finally a state may not effect a taking without equitable compensation and a party may not receive unjust enrichment.<sup>91</sup>

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<sup>86</sup> Frischkorn Michael (note 24) at 339.

<sup>87</sup> Ibid.

<sup>88</sup> M, Mustill (note 57) at 109-114

<sup>89</sup> See note 70 of Maniruzzaman, Abul F.M. ‘The Lex Mercatoria and International Contracts; A Challenge for International Commercial Arbitration?’ 1998-1999 *Am. U. Int’ I L Rev* at 673

<sup>90</sup> Note ‘General Principles of Law in International Commercial Arbitration’ (1987-1988) Vol. 101 *Harv. L. Rev* 1816. An unsigned Harvard Law student.

<sup>91</sup> Ibid at 1826-1833.

Most of the principles listed above form part of the principles that have been collated by the CENTRAL for transnational law in their digest.<sup>92</sup> Michael Frischkorn notes however that the lists are problematic due to the fact that they are prepared by academicians in their studies and as a result of which they might not reflect the position of the *lex mercatoria* when the authors come down to publishing their lists.<sup>93</sup> He notes that the solutions to the problem is that there should be a balance between the comparative research of the past and present rules and principles and devise the rules and principles that will be applicable in future.

E. Gaillard and J. Savage in their book note that the presentation of general principles of law in a list ‘will inevitably be too simplistic an approach’.<sup>94</sup> They note that these lists are not exhaustive. Further they give the example of principles of good faith and *pacta sunt servanda* which they note have been repeatedly referred to in commercial arbitration as a result of which they have been given a very wide scope. Their conclusion is that general principles are not confined in specific rules which are broad in nature but that they cover most of the issues in international contract law. They divide the general principles into three categories; principles relating to the validity of contracts, principles relating to the interpretation of contracts and principles relating to the performance of the contract.

Similarly Emmanuel Gaillard in his article<sup>95</sup> asks the question whether the contents of *lex mercatoria* are to be found in the various lists that have been published by scholars or are they to be derived from a case-by case basis using a specific methodology that makes use of these lists but is not confined to them. He notes that the content of transnational commercial law should be determined by a specific methodology where firstly, the intentions of the parties are considered where they have chosen for instance the method of comparative study to be undertaken, secondly the arbitrator will determine

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<sup>92</sup> Available at [www.tldb.net](http://www.tldb.net) some examples include: No. 1.1 Good faith and fair dealing in international trade, No. IV.2.1 Sanctity of Contracts (*pacta sunt servanda*), No.IV.6.1 Invalidation of the Contract that violates *bonis mores*, No.IV.6.2 Invalidation of the Contract due to bribery (Accessed on 15 July 2007).

<sup>93</sup> Frischkorn Michael (note 24) at 343

<sup>94</sup> E. Gaillard, Savage Gaillard (note 38) at 818.

<sup>95</sup> E. Gaillard (note 45) at 62

from a comparative study whether the rule is widely supported or whether it reflects the view of one legal system which would then be unacceptable. Finally that the unanimous acceptance of the rule in all legal systems is not required but that it finds general support in comparative law.

All these authors note the significance of these lists as a source of the modern *lex mercatoria*. Despite their weaknesses which have been identified as the non-exhaustive nature of the lists and the contradictory nature of the lists these lists play a vital role in commercial law. Given that the specialization of these rules can only be done when they are applied to practical situations the work of academicians who provide a comparative study is relevant to the future of *lex mercatoria*. This is so because in international commercial arbitration there is no room for making decisions by referring to previous interpretations as arbitral awards have been kept out of the public domain for a long time. The only way that a concise interpretation of these rules can be achieved is through the work of scholars who carry out a comparative study of the various interpretations of these rules by arbitrators and give a decisive interpretation of the same.<sup>96</sup> A good example is the drafting of the UNIDROIT principles which was possible through the comparative study of various legal systems and the insightful contributions of various scholars from different legal systems. As earlier noted the ambiguity of the rules gives room for flexible application and should not be seen as a weakness.

### **2.3 Conclusion**

The content of the *lex mercatoria* as illustrated by the various sources identified should not be in question. As noted earlier we should acknowledge *lex mercatoria* as an autonomous source of law by looking at its evolution from a modern point of view, that is, that the law making process is not only done by state agencies. The relations of collective parties and the recognition of various practices that regulate the conduct of these parties gives rise to the recognition of a legal norm which through universal acceptability gains the status of an autonomous legal system that governs the conduct of these parties and others who are affected by their activities. The decision to apply these

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<sup>96</sup> Frischkorn, Michael (note 24) at 342

sources of *lex mercatoria* lays on both the parties and the arbitrators. The following chapter looks at the considerations that are taken when deciding the law governing the contract in dispute.

## CHAPTER THREE

### 3. CHOICE OF LAW IN INTERNATIONAL COMMERCIAL ARBITRATION

#### 3.1 Introduction

It is always the hope of every party to a contract that the terms of the agreement shall be met. However this is not always the case. It is the practice of parties to a contract to provide for dispute resolution mechanisms in the event of a dispute arising during the performance of the contract. This study focuses on arbitration which is one of the modes of dispute resolution. Parties to a contract must consent to submit their disputes through an arbitration agreement. An arbitration agreement can be a separate agreement from the contract or be part of the contract. An agreement to arbitrate is not affected by the validity of the main contract. There are however several considerations that have to be attended to when parties enter into agreements, for instance, what law will govern the validity of the arbitration agreement, what will be the procedural law governing the arbitration tribunal and what law governs the substance of the contract that is in dispute. This study is limited to the substantive law governing the substance of the contract that is in dispute.

The substantive law governing the contract is determined by various issues. These include the parties' choice of law at the commencement of the contract, during the life of the contract or when a dispute arises. In the absence of choice of law by the parties the choice of conflict of law rules selected by the parties will determine the law governing the contract. If the parties do not decide on the choice of law to govern the contract it is upon the arbitrators when a dispute is submitted to them to make a determination on the law applicable to the contract. Arbitrators make such determination by applying the conflict of law rules applicable at the place of arbitration or other rules that are more closely connected to the contract. In addition there is the possibility of the direct application of substantive law by arbitrators where the law of a country provides for the direct application.<sup>97</sup>

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<sup>97</sup> Wortmann Beda 'Choice of Law by Arbitrators: The Applicable Conflict of Laws System' (1998) Vol. 14, No. 2 *Arbitration International* © LCIA 97 at 100 (hereinafter referred to as Wortmann Beda).

Berger K. P notes that the uncertainty connected to the traditional conflict of laws has led advocates of transnational commercial law to evade these rules.<sup>98</sup> He points out that the American approach when faced with conflict of law is looking at the ‘better law approach’<sup>99</sup>, where the determination of the substantive law is achieved by asking the question, which substantive domestic law provides the most adequate and most advanced solution thus replacing the conflict of laws considerations.<sup>100</sup> He notes that this approach may be useful in the Inter-American context, where the judge is able to weigh the pros and cons of the various laws of the various federal states. However it may not be useful in the international context where the judge and the arbitrator may not be able to carry out a functional comparison of the various domestic systems that may be involved in the case or dispute as it is too open and vague.<sup>101</sup>

### 3.2 Choice of Law by the Parties

There is universal recognition of the right of the parties to a contract to choose the substantive law applicable to their contract, that is, party autonomy<sup>102</sup>. The freedom of the parties to choose the law applicable to their contract provides them with the opportunity to choose a law that is favourable to their circumstances and resolution of their disputes.<sup>103</sup> Parties would normally be inclined to choose the national law of their country for the reason that they are more familiar with the national law and in most cases their representatives urge them to choose the same.<sup>104</sup> Where parties fail to choose their national law it is the tendency as seen in various contracts that they will choose a “well-developed law such as English law or the law of New York”.<sup>105</sup>

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<sup>98</sup> Berger K P *Creeping Codification* (note 20) at 10

<sup>99</sup> *Ibid* at 17.

<sup>100</sup> *Ibid* at 18.

<sup>101</sup> *Ibid*.

<sup>102</sup> Lew, Julian D. M., Loukas A. Mistelis, Stefan M. Kroll *Comparative International Commercial Arbitration* 2003 Kluwer Law International, The Hague at 413.

<sup>103</sup> *Ibid*.

<sup>104</sup> Born G A *International Commercial Arbitration* 2ed (2001) Kluwer Law International at 542 (hereinafter referred to as Born G A).

<sup>105</sup> *Ibid*.



It is noteworthy that in most cases parties omit to make a choice of the substantive law applicable to their contract. This is so because in most instances parties do not wish to be subjected to the laws of the other party. A better option would be to try find a middle ground by applying the law of a different nation other than that of both parties as earlier noted or the application of general principles of law, the *lex mercatoria* as opposed to omitting to make a decision on the law governing the contract. The international aspect of a transnational contract makes it crucial that parties make a decision on the substantive law applicable to the contract. The choice of the parties is binding and is applicable to resolve disputes before an arbitral tribunal.<sup>106</sup>

The freedom of the parties to choose the law governing the contract can however be limited by the private international law system of the place of arbitration<sup>107</sup>, therefore the choice cannot be said to be absolute. Various states provide limitations to the enjoyment of the right of the parties to make a choice of law. Wortmann gives the example of English system where the private international law conflicts of law rules require that the choice must be 'legal and *bona fide*'.<sup>108</sup> He notes that in order to determine the validity of the choice of law by the parties the arbitrator must look at the conflict of law rules applicable. He states that several questions will arise when the arbitrator seeks to determine the validity of the choice of law, for example, can the parties choose some provisions of a legal system and omit others, can the parties subject one part of the contract to the law of country A and the other part of the contract to the law of country B, and must the choice of law comply with certain formal requirements. Additionally he states that in some cases, English law as the example, some statutory provisions apply to the merits of the contract despite the fact that the parties have chosen the law of a foreign country.<sup>109</sup> Parties to a contract cannot therefore choose a law that derogates mandatory rules.<sup>110</sup> The mandatory rules applicable are determined by the procedural law of the place of arbitration. It is noteworthy that mandatory rules applicable to the various countries where arbitral tribunals sit are beyond the scope of this

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<sup>106</sup> Ibid at 543.

<sup>107</sup> Wortmann Bada (note 97) at 98.

<sup>108</sup> Wortmann Bada (note 97) at 98.

<sup>109</sup> Wortmann Bada (note 97) at 98.

<sup>110</sup> Rome Convention (note 31) Article 7.

study. Parties should however be aware of the effect of mandatory rules at the place of arbitration.

The choice of the substantive law by the parties may be express or implied from the terms of the contract.<sup>111</sup> As the focus of the study is on the choice of *lex mercatoria* the discussion center on ways of identifying the express or implied choice of *lex mercatoria*. It is identified that the express choice of *lex mercatoria* is rare given its evolving nature, in most instances parties will express their choice by referring to its elements, for instance, general principles of international law or reference to principles of national laws common to each other and to international law.<sup>112</sup> Rivkin notes that some jurists argue that an implied choice of *lex mercatoria* as applicable law can be inferred where parties empower arbitrators to decide as *amiable compositeurs*, however, this argument has been subjected to several debates where some jurists conclude that a line should be drawn differentiating the two.<sup>113</sup> He concludes that even though the choice of *amiable compositions* does not necessarily imply choice of *lex mercatoria* per se as governing law it does permit the application of some elements of *lex mercatoria*.<sup>114</sup>

From the foregoing, it is apparent that the parties' choice of law will be upheld as long as it does not offend public policy of the place of arbitration, does not derogate from mandatory rules and it meets standards determined by the system of law of the place of arbitration.

### **3.3 Choice of Law by Arbitrators**

As earlier noted most parties to an international contract omit to choose the law to govern the contract. This is the case more so with international contracts between states and foreign individuals. Most individuals or corporations contracting with a state have the fear that when the state imposes its national law in the contract it will change the 'legal

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<sup>111</sup> Frick G, Joachim *Arbitration and Complex International Contracts* 2001 Kluwer Law International, The Hague at 99 (hereinafter referred to as Frick G, Joachim).

<sup>112</sup> Rivkin, D W (note 23) at 68 see examples of express choices of *lex mercatoria*.

<sup>113</sup> *Ibid* at 71.

<sup>114</sup> *Ibid* at 72.

environment to the detriment of the other party'.<sup>115</sup> Where there is no choice of substantive law by the parties the arbitral tribunal is required to choose the law to govern the substance of the contract by applying the relevant conflict of law rules and or the rules of private international law.<sup>116</sup> The tribunal must decide whether it has a free choice of law or whether it must follow the conflict of law rules of the seat of arbitration<sup>117</sup>. The tribunal may be assisted by the place of the execution of the contract, the terms of the contract, the circumstances of the case, the place of contracting, the place of business, the place of arbitration and other factors.<sup>118</sup> The law of the place of arbitration may require the arbitrator to apply a substantive law to the contract.<sup>119</sup>

Every nation state has its own set of conflict of laws rules that are used to determine the law applicable to a contract.<sup>120</sup> There are various theories of conflict of law rules that have been developed to solve the choice of law problems. William M. Richman and William L. Reynolds<sup>121</sup> note some of the theories as, characterization, renvoi and the substance/procedure distinction. They note that the characterization of the problem for example, in categories of contract or tort law does not play a very vital role in the modern theories as the focus has shifted to the 'policies that the rules are designed to serve'.<sup>122</sup> The choice of law rules applicable to the determination of the substantive and procedural law differs under the traditional approach were based on the notion that the procedural law was determined by the law of the forum and the substantive law was determined by the laws of other jurisdiction different from that of the forum.<sup>123</sup> The determination of the choice of law on the basis of the choice of forum holds water when reference is made to the court system; however as concerns the assumption that it also determines the

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<sup>115</sup> Maniruzzaman, A. F. M. 'Conflict of law issues in International Arbitration: Practices and trends' (1993) Vol. 9 No. 4 *Arbitration International* 371 at 371 (hereinafter referred to Maniruzzaman, Conflict of Laws).

<sup>116</sup> Ibid.

<sup>117</sup> Redfern A. & Hunter M, *Law and Practice of International Commercial Arbitration*, 4ed (2004) Sweet & Maxwell, London at 144 (hereinafter referred to as Redfern & Hunter).

<sup>118</sup> Maniruzzaman, Conflict of Laws (note 115) at 374-375.

<sup>119</sup> Wortmann Benda (note 97) at 100.

<sup>120</sup> Redfern & Hunter (note 117) at 144.

<sup>121</sup> Richman, William M, Reynolds, William L, *Understanding Conflicts of laws*, 3ed (2002) LexisNexis, United States at 160.

<sup>122</sup> Ibid at 162.

<sup>123</sup> Ibid.

substantive law of a contract in arbitration the said assumption is “less compelling”.<sup>124</sup> The argument against the said assumption is that the choice of the forum by parties is determined by factors that do not necessarily imply their will to be governed by the law of the forum, for example, ‘geographical convenience to the parties, the suitability of the venue because of the reputation of the arbitration services and many more reasons’.<sup>125</sup> The choice of the forum may however still influence the choice of substantive law governing the contract.

Maniruzzaman notes that where there is no choice of law the arbitrator may use a cumulative approach by looking at all conflict of law rules that have a connection with the contract rather than one system of conflict of laws<sup>126</sup>, the application of an international conflict of laws system and the dispensation of the conflict of laws rules where direct application of a national law or a non-national law is possible. The determination of the applicable conflict of laws rules is best decided by arbitrators on a case by case basis. Where the parties feel that the same is uncertain it is better to express the conflict of laws rules they wish to apply to their contract when deciding the law governing the contract.

Wortmann outlines a three-stage procedure that can be used to determine the choice of law by arbitrators.<sup>127</sup> These are; firstly by application of a cumulative approach by looking at all conflict of laws systems having a contact with the dispute and determining whether they lead to the same substantive law, if there is no solution determine choice of law by application of the rules of conflict of laws being in effect at the seat of arbitration if the parties have chosen it and finally by application of the general principles of private international law which can be found by a comparative review of the conflicts of laws rule connected with the dispute. Christie R. H states that the procedure outlined by Wortmann is designed to ensure that the rules that are favourable by the parties are taken into consideration before making a determination of which conflict of

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<sup>124</sup> Redfern & Hunter (note 117) at 143.

<sup>125</sup> Ibid.

<sup>126</sup> Maniruzzaman, Conflict of Laws (note 115) at 387.

<sup>127</sup> Wortmann Bada (note 97) at 113.

law rules will be applied.<sup>128</sup> He focuses on the law governing international construction contracts under English law. He notes that the Contracts (Applicable Law) Act 1990 gave statutory force to the Rome Convention to apply where there is a question on law governing a contract. Article 4 of the Rome Convention provides guidance on considerations that are taken into account when deciding the law governing the contract in the absence of a choice by the parties. As will be noted later the English courts do not contemplate the choice of *lex mercatoria* as governing law. The thesis uses the English position as an example to illustrate the determination of law governing. Suffice to note one cannot endeavour to outline conflicts of law rules applicable around the world exhaustively.

The application of the Rome Convention rules would therefore not be favourable to the application of the *lex mercatoria*. The arbitrator is not however bound by these rules, if he feels that the conflict of law system does not provide the answer he can look at the conflict of law rules laid down by the courts in the United Kingdom. As noted by Christie<sup>129</sup> the common law position was laid down by the courts in *Bonython v. Commonwealth of Australia*<sup>130</sup> and *Re United Railways of Havana and Regla Warehouses Ltd.*<sup>131</sup>

‘The substance of the obligation must be determined by the proper law of the contract that is the system of law by reference to which the contract was made or that with which the transaction has its closest and most real connection.’<sup>132</sup>

Christie notes that principle laid down in the *Bonython* case has to be read together with the principle laid down in the *Re United Railways case* which he quotes as;

“In an inquiry as to what is the proper law of a contract in which the parties have not expressed their own selection of the law to be applied, many matters have to be taken into

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<sup>128</sup> Christie R. H ‘The Law Governing an International Construction Contract’ (2007) Vol. 24 Part 3 *International Construction Law Review ICLR* 343 at 344 (hereinafter referred to as Christie R H *ICLR*).

<sup>129</sup> *Ibid* at 345.

<sup>130</sup> [1951] AC 201.

<sup>131</sup> [1961] AC 1007.

<sup>132</sup> [1951] AC 219-220.

consideration. Of these, the principal are the place of contracting, the place of performance, the place of residence or business of the parties respectively, and the nature and subject-matter of the contract.”<sup>133</sup>

Arbitrators can additionally look to the conflict of law rules under public international law. Wortmann advises against this approach on the view that it is difficult to identify the conflict of law rules laid down by public international law.<sup>134</sup> The approach is favourable to the proponents of *lex mercatoria* as it may lead to its application as opposed to the conflict of law rules of several countries which mainly contemplate the law of a country. Awards where arbitrators have rightly found that the conflict of law rules lead to the application of *lex mercatoria* have been enforced and therefore the argument that the only law that can be contemplated is the law of a country can be challenged. It is therefore possible for conflict of law rules to point to the application of the *lex mercatoria*; however arbitrators should exhaust the three steps identified by Wortmann to come up with a concise decision.

### 3.4 Choice of *Lex Mercatoria* as Substantive Law

The express choice of *lex mercatoria* as substantive law is in line with the principle of party autonomy.<sup>135</sup> Frick G, Joachim notes that this freedom is a platform for the evolution of *lex mercatoria*. The implicit choice of *lex mercatoria* as substantive law can be inferred from a ‘negative choice’.<sup>136</sup> Where the parties specify that they do not wish to have their contract governed by any national law this has been inferred to mean that the parties’ intention was the application of the *lex mercatoria*. Redfern and Hunter in their book<sup>137</sup> note that the authority to apply *lex mercatoria* by an arbitral tribunal is derived from the agreement of the parties and the provisions of the applicable law.

Most conflict of law rules give specific considerations to be looked at when determining the applicable law. The most common is the “closest connection” rule. The

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<sup>133</sup> Christie R H *ICLR* (note 128) at 358.

<sup>134</sup> Wortmann *Beda* (note 97) at 110.

<sup>135</sup> Frick G, Joachim (note 111) at 101.

<sup>136</sup> *Ibid.*

<sup>137</sup> Redfern & Hunter (note 117) at 139.

facts to consider include; the place of performance of the contract, the place of business of the party performing the contract, place of contracting of the contract and several other considerations. These factors imply that the law chosen should be that of a nation. It is noted however that the term closest connection should not be interpreted only as requiring a geographical connection when one applies conflict of law rules to make a determination of the law applicable but also a 'logical and intellectual sense'.<sup>138</sup> He gives an example of the Swiss Federal Act on Private International Law Article 187 Section 1 which refers to 'the law' and not the 'law of the country' which has the closest connection. The same interpretation can be inferred from the Common law position where a determination is made by taking into consideration as one of the elements the nature and subject matter of the contract.

The words nature and subject matter of the contract imply that the choice can be determined taking into account considerations such as, the need for the parties to transact their contract without the fear of an adverse advantage of one party who applies the legal system of his own country. Additionally it infers the diverse nature of international contracts taking into consideration facts such as person's place of business, place of administration, nationality and domicile of the parties to the contract which are different and tend to create serious conflict of laws issues. The nature of the contract can also give rise to the inference that the practices of a particular industry should be followed. Michael Douglas in his article 'The Lex Mercatoria and the Culture of Transnational Industry' notes that parties to an international construction contract speak the same language.<sup>139</sup> He states that FIDIC conditions of contractual obligations are observed across the world when parties enter into a construction contract. As a result of the observance of these conditions a universal culture has been created in the construction industry. The nature of the contract herein being the construction contract renders the choice of lex mercatoria viable as the said FIDIC conditions of contract can be said to form part of the lex mercatoria.

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<sup>138</sup> Frick G, Joachim (note 111) at 106.

<sup>139</sup> Douglas, Michael 'The Lex Mercatoria and the Culture of Transnational Industry' (2005-2006) Vol. 13 *U. Miami Int'l & Comp. L. Rev* 331 at 394.

The evolution of the law merchant in the Roman times and the middle ages was as a result of the collective need for merchants to govern their conduct through practices and customs that were distinct for the merchants. Modern international trade has evolved over the years to a sophisticated status that requires the independence and flexibility of a legal norm to provide for the ever changing circumstances of the trade and interests of contracting parties. The restriction of conflict of law rules to the choice of the law of a country limits the evolution of *lex mercatoria* in international commercial arbitration.

### **3.5 Consequences of Choosing the Lex Mercatoria as the Law Governing the Contract**

Arbitration agreements are upheld by virtue of the recognition of the courts of their validity. One of the limitations of arbitration is the requirement that the arbitral tribunal depends on the tolerance of the state for survival.<sup>140</sup> The determination of what is public policy lies in the hands of the state. To some extent therefore the application of the *lex mercatoria* as governing law is pegged on the attitude of the nation states towards *lex mercatoria*. Just like any other legal system the application of *lex mercatoria* as governing law to a contract brings about several consequences; positive and negative.

One such consequence is that it leads to the application of flexible and open-ended principles<sup>141</sup> that are legal and binding on the parties. Most of the controversy revolving around the viability of *lex mercatoria* is that there is no concise list of principles that form part of the *lex mercatoria* and that where parties apply *lex mercatoria* they run the danger of having a contract that is too vague and therefore void.

The work of international institutions such as the International Institute for the Unification of Private Law who have drafted the UNIDROIT principles 2004 has given the international practitioners, arbitrators and judges a comprehensive set of rules that can be applied to international contracts without fear of unenforceability on grounds that there is no concise set of rules to govern the obligations and conduct of the parties to the

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<sup>140</sup> Frick G, Joachim (note 111) at 128.

<sup>141</sup> Berger K P *Creeping codification* (note 20) at 100.



contract. Similarly the Centre for Transnational Law digest provides a comprehensive list of principles that are updated regularly which can be used as a guide by members of the international trading community. These principles are open-ended and provide for various situations in the international context. The open-endedness of the principles which is seen as a weakness is an advantage to the evolution of international trade and *lex mercatoria* as the parties, arbitrators and judges have opportunity to work around them.<sup>142</sup>

The application of *lex mercatoria* as the law governing a contract by the parties and by arbitrators in the absence of a choice of law leads to a binding and an enforceable award. Several international Conventions and treaties have guaranteed the enforceability of arbitral awards.<sup>143</sup> These include the Geneva Protocol of 1923, Geneva Convention of 1927, the Moscow Convention, the Washington Convention, the Panama Convention, the Amman Convention and the New York Convention.<sup>144</sup> The New York Convention replaces the Geneva Convention of 1927 and the protocol and applies to arbitral awards not considered to be domestic awards in the state where the recognition and enforcement is sought.<sup>145</sup> The New York Convention provides that the recognition and enforcement of an arbitral award may be refused if an opposing party proves one of the reasons outlined under article V (2) of the Convention. It is argued that the use of the word ‘*may*’ implies that the language of the Convention is permissive and not mandatory therefore the court must not refuse to recognize and enforce an arbitral award.<sup>146</sup> Furthermore given the fact that the seven grounds outlined under the Convention are the only grounds that recognition and enforcement of the award can be refused<sup>147</sup>, the court’s jurisdiction is limited to these grounds.

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<sup>142</sup> Frischkorn, Michael (note 24) at 336.

<sup>143</sup> Okuma Kazutake ‘Confirmation, Annulment, Recognition and Enforcement of Arbitral Awards’ (2005), Vol. 37, No. 4 *the Seinan Law Review* 1.

<sup>144</sup> See an outline of grounds considered where a party seeks to enforce an award in the various conventions in Redfern A and Hunter M, *Law and Practice of International Commercial Arbitration*, 2004 Sweet & Maxwell, London at 521-549.

<sup>145</sup> Redfern & Hunter (note 117) at 523.

<sup>146</sup> *Ibid* at 528.

<sup>147</sup> *Ibid*.

The New York Convention does not provide for refusal of recognition and enforcement of arbitral awards which contracts are based on *lex mercatoria* as the law governing the contract.<sup>148</sup> Rivkin notes that the argument that the New York Convention only provides for the law governing the contract to be that of the law of a country is narrow as it can be inferred that the failure of convention to refuse recognition and enforcement of awards that are based on other laws, for example, the *lex mercatoria* means that the said awards are recognized. He gives various examples of cases that have been enforced where *lex mercatoria* has been applied. The most famous cases referred to by various authors are the *Norsolor*<sup>149</sup> and *Rakoil* case<sup>150</sup> where the arbitral tribunals while applying the general principles of law gave awards that were subsequently enforced. The recognition of the arbitration agreements and minimal intervention of courts of the arbitral process guarantees that the process is respected and that an award that is proper is enforced.

The application of *lex mercatoria* by arbitrators directly without the authorization of the parties or statute may lead to the award being rendered as an *ex aequo et bono* decision.<sup>151</sup> If a party challenges the enforcement of the award for illegality on grounds that the application of *lex mercatoria*, by the arbitrators, without the authorization of the parties is illegal for reasons that *lex mercatoria* is not a legal system there is the risk that the said award may not be enforceable in some jurisdictions. This is based on the assumption that *lex mercatoria* is not a system of law and therefore the award is not an award in law but a compromise agreement. Berger K P states that equating *lex mercatoria* with *ex aequo et bono* decisions overlooks the difference between the two types of decision making processes.<sup>152</sup> He argues that judges sometimes make decisions taking into account equitable considerations which decisions remain in the framework of the law and that arbitrators who make decisions by applying equitable considerations are in the

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<sup>148</sup> Rivkin, D W (note 23) at 80.

<sup>149</sup> *Pabalk Ticaret Limited Sirketi v. Norsolor S. A* reprinted in IX YB Com. Arb. 109 (1984) (award of 26 October 1979).

<sup>150</sup> *Deutsche Schachtbau- und Tiefbohrgesellschaft GmbH v. R'AS al-KHAIMAH National Oil Company*, 1987 3 W.L.R. 1023.

<sup>151</sup> Berger K P *Creeping Codification* (note 20) at 57.

<sup>152</sup> *Ibid* at 58

same position despite the fact they do not enjoy the same discretion judges enjoy.<sup>153</sup> It would therefore be advisable for arbitrators to seek the consent of the parties to avoid rendering awards that will eventually not be enforced.

### **3.6 Conclusion**

The conclusion derived from this study is that without a consensus as to the applicability of *lex mercatoria* and the fact that most conflict of law rules arrive at the conclusion that the proper law as the law of a country, parties should endeavour to expressly or implied provide for the application of *lex mercatoria* as governing law. The trend is however changing as a result enforcement of awards where arbitrators in the absence of choice of law of the parties have rightly applied *lex mercatoria*. In addition the recognition of the evolution of *lex mercatoria* as an autonomous legal system in recent years gives an indication of its acceptance in some jurisdictions. The following chapter looks at the attitudes of different countries towards the recognition of *lex mercatoria* as an autonomous legal system, focusing mainly on two regions, Europe and Africa.

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<sup>153</sup> Ibid

## CHAPTER FOUR

### 4. APPLICABILITY OF THE LEX MERCATORIA IN INTERNATIONAL COMMERCIAL ARBITRATION: CASE STUDY

#### 4.1 Introduction

The acceptance by national courts of the applicability of lex mercatoria as substantive law plays a big role in its recognition as an autonomous legal system. Various countries in the world have different ideologies of law and the reception of a foreign system of law that has not been formulated by the sovereign power of a state in some countries is inconceivable. National courts in most instances inevitably link circumstances such as, place of contracting or the place of business of party performing the contract to the determination of the law governing the contract. A good example is the English courts whose attitude towards the applicability of lex mercatoria as law governing the contract has been received with much scepticism leading to mixed positions on the topic. This Chapter tries to explore the successes of international commercial arbitration as a result of continued enforcement of arbitral awards by national courts and peg the same to the recognition of lex mercatoria as a system of law.

#### 4.2 Applicability of the Lex Mercatoria: English Perspective

The codification of the law merchant in English law in the earlier ages resulted in the loss of some of its identifying characteristics which in effect reduced its role in the Common law system<sup>154</sup>. English courts have paid lip-service to the precepts of the law merchant, while in reality undermining the flexible foundations of the law merchant principles.<sup>155</sup> English Judges have often required that the customs of the merchants must be proved and that the trade customs must conform to the stringent legal tests before they will be binding in English law.<sup>156</sup>

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<sup>154</sup> Trakman, *The Law Merchant* (note 7) at 29.

<sup>155</sup> *Ibid* at 30.

<sup>156</sup> *Ibid*.

Christie R. H points out arbitrators were bound by the 1979 act to decide any dispute in accordance with the law.<sup>157</sup> His article revolves around the concept of Amiable Composition in French and English Law. The significance of the concept and the article to this study is its relevance to commercial arbitration and *lex mercatoria* as a governing law. He identifies that the concept is defined as a form of arbitration in which the arbitrator is not bound hand and foot to the law but is empowered to decide in accordance with other criteria.<sup>158</sup> He notes that the concept is French and is derived from the *Nouveau Code de Procedure Civile* in which article 1496 require an international arbitrator to settle disputes in accordance with the rules of law which the parties have chosen or in the absence of such choice such rules of law as he may consider appropriate.<sup>159</sup>

The concept of amiable composition is however differentiated from *lex mercatoria* as a decision in equity as opposed to *lex mercatoria* which are general principles of law that are applicable to contracts which are binding to parties and arbitrators where they are required to decide a dispute with reference to the said rules.<sup>160</sup> The arguments in the article are of relevance to this study as the article illustrates that the position on application of general principles of law by arbitrators acting as amiable compositeur or as sources of *lex mercatoria* is unclear. Additionally the English courts have a bias on the application of English law as opposed to general principles of law. This is evident from the rules of the courts where the application of rules of law by arbitrators when deciding disputes as amiable compositeur was highly condemned.<sup>161</sup>

Court of Appeal has noted that the law that should be administered is the law of the land and not principles that have been formulated by arbitrators on a case by case

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<sup>157</sup> Christie R H 'Amiable Composition in French and English law' (1992) Vol. 58, No. 4 *The Journal of the Chartered Institute of Arbitrators* 259 at 260 (hereinafter referred to as Christie R H Amiable Composition).

<sup>158</sup> *Ibid* at 259.

<sup>159</sup> *Ibid*.

<sup>160</sup> *Ibid* at 263.

<sup>161</sup> *Ibid*.

basis.<sup>162</sup> The decisions of the judges of the English courts in favour of English law over general principles of law was reaffirmed in the judgment of *Orion Cia Espanola de Seguros v Belfort Mij*.<sup>163</sup> The court made the conclusion that it is the policy of the law in England that in their conduct arbitrators must in general apply a fixed and recognized system of law which they noted is inevitably English law.<sup>164</sup> However in the 1970's the attitude seemed to changed, judges were seen to be less rigid on the application of English law. In the *Eagle star case*<sup>165</sup> Lord Denning MR held that the dictum in the *Orion case* above was not correct. He was faced with a clause in the contract that required arbitrators not to be bound by strict rules of law, instead were required to make a decision in accordance to an equitable rather than a strictly legal interpretation of the provisions of the agreement. He noted that such a clause does not render the contract void as was held in the *Orion case*; it does so only on the ground that it is contrary to public policy. In the present case it was the view of Lord Denning that the contract was perfectly okay.<sup>166</sup> Attempts to reconcile the decisions *Eagle Star* and *Orion* were made in *DST v Rakoil* [1987] 2 Lloyd's Rep 246 where the court was faced with the determination of the validity of equitable clauses.<sup>167</sup> Donaldson M. R. recommended considerations that should be taken into account;

Did the parties intend to create legally enforceable rights and obligations? Is the resulting agreement sufficiently certain to constitute a legally enforceable contract? Would it be contrary to public policy to enforce the award, using the coercive powers of the state?<sup>168</sup>

The award was held to be enforceable under English law.<sup>169</sup> Christie R. H concludes that the position still remains unclear as the views of English writers are mixed.<sup>170</sup> He points out that the abolition of the compulsory stated case procedure by the

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<sup>162</sup> Christie R H Amiable Composition (note 157) at 261, see quotes of the ruling of Bankes LJ in *Czarnikow v Roth Schmidt & Co* [1922] 2 KB 478.

<sup>163</sup> [1962] 2 Lloyd's Rep 257, 264.

<sup>164</sup> Christie R H Amiable Composition (note 157) at 261.

<sup>165</sup> *Eagle Star Insurance Co Ltd v Yuval Insurance Co Ltd* [1978] 1 Lloyd's Rep 357.

<sup>166</sup> [1978] 1 Lloyd's Rep 361-362.

<sup>167</sup> Christie R H Amiable Composition (note 157) at 261 see also D W Rivkin (note 23) at 76.

<sup>168</sup> [1987] 2 Lloyd's Rep 253-254.

<sup>169</sup> Rivkin, D W (note 23) at 76.

<sup>170</sup> Christie R H Amiable Composition (note 157) at 262

Arbitration Act of 1979 s 1(1) has substantially weakened the weight of the *Czarnikow* and *Orion* decisions. The position as to the application of general principles of law in contract is now clear. The aforementioned author revisits the position of the English courts as to the applicability of general principles of law or *lex mercatoria* in a different angle, that of, the law governing international construction contracts.<sup>171</sup> He notes that the position was cleared up by the court of appeal in the *Shamil Bank case*<sup>172</sup> where the court was faced with a contract where the Parties had chosen a combination of English and Sharia law to govern their contract. Where there is a question as to the law governing the contract English law looks to the Rome Convention.<sup>173</sup> This is as a result of the statutory force given to the Rome Convention by the Contracts (Applicable law) Act of 1990. The Convention gives parties the right to choose the law governing their contract under article 3. Court of Appeal in the *Shamil Bank Case* held that the Rome Convention does not contemplate the choice of any other law other than that of a country. This in effect means that the choice of *lex mercatoria* as law governing the contract does not bind English courts.

It is argued that this reasoning contradicts the principles applied in cases such as *General Building & Maintenance plc v. Greenwich Borough Council* [1993] 65 BLR 57, 62-65 and *Ballast Nedam Group NV v. Belgian State* [1997] 88 BLR 32 (ECJ) that United Kingdom legislation giving effect to EU legislation must be interpreted so as to give effect to its purpose rather than its strict wording. The conclusion is therefore that the purpose of the Convention is to support the autonomy of the parties' choice of law governing a contract.<sup>174</sup> There is however some positive view towards the application of *lex mercatoria* as concerns arbitration agreements. The Convention provides its rules shall not apply to contractual obligations between parties in arbitration agreement and agreements on the choice of court.<sup>175</sup> The conclusion is that the *Shamil Bank* case was concerned with the issue whether English courts are permitted to apply the parties' choice

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<sup>171</sup> Christie R H *ICLR* (note 128) at 343.

<sup>172</sup> *Shamil Bank of Bahrain v Beximco Pharmaceuticals Ltd* [2004] 2 Lloyd's Rep 1 (CA).

<sup>173</sup> Christie R H *ICLR* (note 128) at 344.

<sup>174</sup> *Ibid* at 348.

<sup>175</sup> Article 1(2) d.

of transnational Commercial law and not whether arbitrators are free to do so.<sup>176</sup> This was held in the case of *Halpern & Ors v. Halpern & Anor* [2007] EWCA Civ 291 paragraph 38 where the court noted that; ‘if parties wish some form of rules or law not of a country to apply to their contract, then it is open to them to so agree, provided that there is an arbitration clause. The court will give effect to the parties' agreement in that way.’

Christie R. H states further that arbitrators will be required to apply the law chosen by the parties with reference to ICC Arbitration Rules, article 17.1<sup>177</sup>, the LCIA Arbitration Rules, article 22.3<sup>178</sup> and the UNCITRAL Arbitration Rules, article 33.1.<sup>179</sup> This position is reaffirmed in *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA* [2007] UKHL 4.

Perhaps the most important consideration is the practical reality of arbitration as a method of resolving commercial disputes. People engaged in commerce choose arbitration in order to be outside the procedures of *any* national court. They frequently prefer the privacy, informality and absence of any prolongation of the dispute by appeal which arbitration offers. Nor is it only a matter of procedure. The choice of arbitration may affect the substantive rights of the parties, giving the arbitrators the right to act as *amiables compositeurs*, apply broad equitable considerations, even a *lex mercatoria* which does not wholly reflect any national system of law. The principle of autonomy of the parties should allow them these choices.<sup>180</sup>

<sup>176</sup> Christie R H *ICLR* (note 128) at 348.

<sup>177</sup> The parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute. In the absence of any such agreement, the Arbitral Tribunal shall apply the rules of law which it determines to be appropriate.  
[www.iccwbo.org/court/english/arbitration/pdf\\_documents/rules/rules\\_arb\\_english.pdf](http://www.iccwbo.org/court/english/arbitration/pdf_documents/rules/rules_arb_english.pdf) (Accessed on 30th August 2007).

<sup>178</sup> 22.3 The Arbitral Tribunal shall decide the parties' dispute in accordance with the law(s) or rules of law chosen by the parties as applicable to the merits of their dispute. If and to the extent that the Arbitral Tribunal determines that the parties have made no such choice, the Arbitral Tribunal shall apply the law(s) or rules of law which it considers appropriate  
[www.jus.uio.no/lm/lcia.arbitration.rules.1998/22.htm](http://www.jus.uio.no/lm/lcia.arbitration.rules.1998/22.htm) (Accessed on 30th August 2007).

<sup>179</sup> The arbitral tribunal shall apply the law designated by the parties as applicable to the substance of the dispute. Failing such designation by the parties, the arbitral tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.  
[www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf](http://www.uncitral.org/pdf/english/texts/arbitration/arb-rules/arb-rules.pdf) (Accessed on 30th August 2007).

<sup>180</sup> *West Tankers Inc v. RAS Riunione Adriatica di Sicurta SpA* [2007] UKHL 4 paragraph 17.



The warning sounded by Christie R. H<sup>181</sup> that if arbitration in England does not offer the services international businessmen want the trade will go elsewhere has been observed by the House of Lords in their decision in the *West Tankers case*.<sup>182</sup> Lord Hoffman notes that arbitration cannot be self sustaining as it needs the support of the courts. However the support given should not be that of stifling the efforts of arbitration. He quotes the argument of an advocate by the name General Darmon in *The Atlantic Emperor* that it is important for the commercial interests of the European Union to give such support as is done by different national systems which give support to arbitration in different ways and observe that an important aspect of party autonomy is that the right to choose the governing law and seat of the arbitration according to what they consider will best serve their interests will be upheld.

Article 18 of the Convention provides that in interpretation and application of the uniform rules in the Convention, regard shall be had to their international character and to the desirability of achieving uniformity in their interpretation and application. The intention of the provision is that national courts of contracting states should take into account the decisions of other courts.<sup>183</sup> The Rome Convention has been under review by the European Commission and its replacement by a Regulation and modernization is under consideration.<sup>184</sup> The Commission in 2005 presented a proposal that the Convention should be converted into a Regulation of the European Parliament and the Council.<sup>185</sup> The draft regulation allows in addition to the choice of law by the parties, the choice of principles and rules of the substantive law of contract recognized internationally or in the community.<sup>186</sup>

### **4.3 Enforcement of Foreign awards French Experience**

The enforcement of foreign arbitral awards where the law applicable to the contract is the *lex mercatoria* is proof of the acceptance of national courts of its viability as a system of

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<sup>181</sup> Christie R H Amiable Composition (note 157) at 262.

<sup>182</sup> Supra (note 180) at paragraph 18.

<sup>183</sup> Dicey, Albert Venn, 1835-1922, Lawrence Collins (ed) *Dicey, Morris and Collins on The Conflict of Laws* Vol. 2, 4ed (2006) Sweet & Maxwell, London at 1546.

<sup>184</sup> Ibid at 1543.

<sup>185</sup> Ibid see footnote 42 at 1543.

<sup>186</sup> Supra (note 183) at 1544.

law. The repeated recognition of these awards has added weight to the argument that the *lex mercatoria* has attained the status of an autonomous legal system. ‘Economic operators’ have looked into international arbitration for the resolution of their disputes as opposed to private international law and national courts due to the dynamic nature of international trade.<sup>187</sup> It has been the common practice of international traders to refer their disputes to international institutes such as International Chamber of Commerce in Paris (ICC), the London Chamber of International Arbitration (LCIA), and the World Bank’s International Centre for the Settlement of Investment Disputes (ICSID).<sup>188</sup> These tribunals have discretion to apply the *lex mercatoria* in form of private transnational legislation, trade usages and principles of customary law to formulation of their arbitral awards.<sup>189</sup> They have been seen to do so as evidenced by several awards that have been made public. It is hoped that national courts will eventually apply *lex mercatoria* as law governing international contracts when faced with the determination of choice of law.

Civil law jurisdictions such as France have evidently been the most receptive of awards formulated through the application of the *lex mercatoria*. In France courts have enforced awards that have been set aside in other countries.<sup>190</sup> Emmanuel Gaillard notes that it is an established rule in France that awards set aside in their country of origin will be enforced even so in France. He states that this principle was laid by a clear line of three separate cases where awards set aside in their states of origin were subsequently enforced in France.

The *Norsolor case* is the best example of the enforcement of an award based on the *lex mercatoria*. The arbitrators when confronted with the conflict of having to choose the law of a nation, a choice that was compelling, considering the international character of the contract and the desire to eliminate reference to a specific body of law such as that

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<sup>187</sup> Fazio, Silvia (note 47) at 12.

<sup>188</sup> *Ibid.*

<sup>189</sup> *Ibid.*

<sup>190</sup> Emmanuel Gaillard ‘Enforcement of Awards set aside in the country of origin: The French Experience’ (Paris/1999) *ICCA Congress series no. 9* 505 at 507.

of Turkey or France.<sup>191</sup> The award was deposited with the *Tribunal de Grande Instance* in Paris on January 28<sup>th</sup> 1980 and the president of the court ordered the enforcement of the award in France on February 1980.<sup>192</sup> Norsolor appealed against the enforcement of the award on the basis that the arbitrators had exceeded their powers under the old Article 1028 CCP by acting in equity as *amiables compositeurs* when deciding on both liability and damages.<sup>193</sup> The court held that, notwithstanding that the arbitrators had used the word ‘equity’ in their award; they had applied the law designated by the rules of conflict of laws which they considered appropriate, namely the general principles relating to obligations generally applicable in international commerce.<sup>194</sup> The Austrian Supreme Court and the Commercial Court of Vienna found the application of the *lex mercatoria* justified.<sup>195</sup> The Cour de Cassation subsequently upheld the enforcement of the award. Rivkin notes that the upholding of the Norsolor award by the Austrian and the French Supreme Courts is an indication that they recognize its “status as a valid, enforceable body of law”.<sup>196</sup>

The Fougerolle case<sup>197</sup> is another example given by Rivkin of enforcement of an award based on *lex mercatoria*. He notes that the French courts upheld the validity of the arbitrators’ choice of a-national law.<sup>198</sup> The issue before the arbitral tribunal was the termination of an agency agreement before completion of the task. The arbitrators based their award of partial remuneration for services rendered on ‘general principles of obligation generally applicable in international trade’. Respondents contested the award through the hierarchy of the courts on the grounds that the arbitrators had wrongly decided as *amiable compositeurs* citing article 1028-1 of the Ancien Code de Procedure Civile. Courts found that the arbitrators had ‘implicitly and necessarily referred to the usages of international trade’ which they noted was clearly in force and had thus based

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<sup>191</sup> Cour de Cassation (Ire Ch. Civ.), 3<sup>rd</sup> October 1984, (1985) Vol. 2 No. 2 *Journal of International Arbitration* 67.

<sup>192</sup> *Ibid* at 68.

<sup>193</sup> *Ibid*.

<sup>194</sup> *Ibid* at 70.

<sup>195</sup> Rivkin, D W (note 23) at 77.

<sup>196</sup> *Ibid* at 78.

<sup>197</sup> *Fougerolle (France) v. Banque de Proche Orient (Lebanon)*, 1982 Rev. Arb. 183.

<sup>198</sup> Rivkin, D W (note 23) at 78.

their award on a rule of law. Cour de cassation states expressly that general principles of international commerce form part of the law and that the arbitrators had not exceeded their powers when they defined the applicable law.<sup>199</sup>

Another example of the French acknowledgement of the status of the *lex mercatoria* as a system of law is a case where arbitrator applied usages of international trade and referred to the UNIDROIT principles.<sup>200</sup> The dispute before the arbitral tribunal revolved around the effectiveness of notices exchanged in contractual relations. The contract was governed by French law and had a fixed term providing for implied renewal in the absence of notice of cancellation by the defendant three months before expiry. Two days before the three month period began to run, plaintiff sent a notice of cancellation to defendant, which however reached the defendant two days later after the three months had begun to run. Arbitrator held that due to the fact that there was no clear rule in French law with respect to notices exchanged in contractual relationships on whether the dispatch principle or the receipt principle prevailed, on grounds of article 13(5) of the ICC Rules of Arbitration referred to the usages of international trade and found according to the trade usages that the receipt principle was generally accepted.

In challenging the award plaintiff claimed that the sole arbitrator, in applying international trade usages and the UNIDROIT Principles without being requested by the parties to do so, had violated the principle laid down in Article 1502 (3) and (4), i.e., the arbitral tribunal's duty not to exceed the terms of the submission to arbitration, and the right of the parties to present their case. The Cour d'appel rejected the objection on the ground that according to both Article 13(5) of the ICC Rules of Arbitration and Article 1496 of the French Code of Civil Procedure the arbitral tribunal is entitled to base its decision on the rules of law it considers most appropriate and to refer to trade usages. In the case at hand the reference to the latter was arguably justified as the law chosen by the parties as the applicable law did not provide a clear answer to the issue at stake<sup>201</sup>.

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<sup>199</sup> The case is as summarized in D W Rivkin (note 23) at 78.

<sup>200</sup> *Societe FORASOL v. Societe mixte Franco-Kazakh Cistm*, Cour d'appel de Paris (1er Ch. C.) 5 March 1998.

<sup>201</sup> See as summarized on the UNILEX website [www.unilex.info-case](http://www.unilex.info-case) (Accessed on 30<sup>th</sup> August 2007).

These cases illustrate the attitude of the French courts towards *lex mercatoria*. The cases however are limited to the enforcement of arbitral awards. It is not clear as to what the courts views are when a dispute brought before a court of law in France would decide if the international contract applied *lex mercatoria* or in the absence of choice of law whether the courts would apply *lex mercatoria* with respect to the international character of the contract.

#### 4.4 International Commercial Arbitration in Africa

For decades nation states in Africa have predominantly used the court system for the resolution of disputes. This evolved from the practice of their colonial masters who used the court system to create law and order. Arbitration as an alternative dispute resolution was not so common in the early 20<sup>th</sup> century. Parties to a dispute would normally try to resolve their differences through negotiations and if the same failed then they would inevitably resort to the court system. International business and commerce has for long been controlled by the state or state agencies.<sup>202</sup> Arbitration could therefore not develop in Africa as the principles of arbitration which encompass activities of private actors could not find root due to the dominance of states.<sup>203</sup>

The development of economies around the world and the influx of investors into markets of independent African states led to the implementation of arbitration as a dispute resolution mechanism to accommodate private actors. However there are various hindrances that led to the slow development of arbitration to the level of sophistication that has been achieved in other parts of the world.<sup>204</sup> These include; 'lack of adequate information about the arbitral process, lack of the doctrinal discussions by African scholars of the major multilateral formulations of the past few decades that are undertaken by international institutions such as UNCITRAL and the fears and suspicions

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<sup>202</sup> Hon. Amos Wako cited in Eugene Cotran & Austin Ammissah (eds), *Arbitration in Africa*, (1996) Kluwer Law International, The Hague at 9 (hereinafter referred to as Eugene Cotran & Austin Ammissah).

<sup>203</sup> Ibid.

<sup>204</sup> Sempasa L.Samson, 'Obstacles to International Commercial Arbitration in African Countries' (1992) Vol. 41 *Int'l & Comp. L. Q.* 387 at 395 (hereinafter referred to as Sempasa L. Samson)

of the arbitration process which is viewed as largely beneficial to the western trading bodies.<sup>205</sup>

Sempasa notes that African states when faced with a dispute between a multinational and its state agencies prefer to resolve the dispute through negotiations rather than arbitration for fear of exploitation.<sup>206</sup> This he notes is due to the fact that African lawyers and their governments lack sufficient information on the arbitration process as opposed to their counterparts who come from countries with developed systems of law.<sup>207</sup> He states that African countries are right to feel threatened by the overwhelming power of some multinational corporations whose financial resources far outdo their own and whose influence traverses many nations.<sup>208</sup> He points out that these fears have been brought about by the;

unhappy experiences of African countries with regard to developing rules in the area of transfer of technology, the insistence by western entities and their governments on the application of certain minimum standards and the resulting impermissible double standards of treatment in the resolution of certain recent disputes involving African states.<sup>209</sup>

These fears are enhanced by involvement of multinationals in the initial establishment of the some of the renowned 'western arbitration centres', the extensive support of the harmonization of 'western arbitration practices', the excessive lobbying for liberal rules and many other reasons.<sup>210</sup>

Sempasa notes that the fear is that the drive by multinationals for rapid changes in international arbitration is not genuine and that they stand to benefit in some way. He makes several conclusions on the way forward for arbitration in Africa. He states that African governments should rethink their half-hearted use of arbitration as a dispute

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<sup>205</sup> Sempasa L. Samson (note 204) at 395.

<sup>206</sup> *Ibid* at 392.

<sup>207</sup> *Ibid*.

<sup>208</sup> *Ibid* at 393.

<sup>209</sup> *Ibid*.

<sup>210</sup> *Ibid*.

resolution mechanism to avoid being left out from the progressive modernization of conflict resolution mechanisms. Additionally African scholars should be more involved in the ongoing formulations of rules and practices that are undertaken by international institutions such as International Institute for the Unification of Private law. However for African scholars to participate significantly in these processes they should be abreast with the current trends in international arbitration as they have been left out for a long period.<sup>211</sup> It is noteworthy that the UNIDROIT has over the years involved many states in its work on the unification of laws including African states.

The study below reviews the position of international commercial arbitration and *lex mercatoria* in three African states; South Africa, Kenya and Egypt. Suffice to note South Africa and Egypt are members of the UNIDROIT since 1971 and 1951 respectively; however South Africa has not contributed to the work of the UNIDROIT. The continued participation scholars from African states in work of UNIDROIT will bring about a change of attitude towards arbitration. Similarly Kenya should become a member of the UNIDROIT to be able to participate in forums held by the organization and benefit from its work.

#### **4.5 Lex Mercatoria in Africa**

The scepticism on the application of *lex mercatoria* is more prevalent in the African states where there is very little knowledge of its existence. The slow development of arbitration in the African states has played a big role to the blackout in Africa of the existence of a legal order that is autonomous from national and private international law. Additionally the scepticism of the same by legal scholars in developed countries of the uncertainty of its viability and existence has reduced the chances of its application in arbitration in Africa.<sup>212</sup> It is noted that there is no where in Africa that the extreme liberal approach that treats arbitration as delocalized or denationalized has been embraced.<sup>213</sup> This can be

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<sup>211</sup> Ibid at 406.

<sup>212</sup> Ibid at 408.

<sup>213</sup> Ibid at 407.

attributed to the unsophisticated state of arbitration rules in African states that still provide for the application of rules established by former colonial masters.<sup>214</sup>

The rejection of application of *lex mercatoria* is due to the fact that African lawyers view it as a western thesis that was conceptualized without their views and that it was developed at a time when as Sempasa notes, trade relations with Africa were conducted mainly for the benefit of the colonial masters. He does not altogether dismiss its viability. He notes that the rules must be conceptualized taking into account the needs and interests of all parties, including the emerging trading entities of developing states and that the conceptualisation can be achieved as the *lex mercatoria* is still in ‘a state of inception and requires a great deal of purposeful co-ordination’.<sup>215</sup> He notes that conflict of interests between the western ideologies and those of developing countries should not be overemphasized such that they overshadow the benefits that the *lex mercatoria* can achieve in a growing industrial environment.<sup>216</sup>

#### 4.5.1 South Africa

Arbitration in South Africa is governed by the Arbitration Act 42 of 1965.<sup>217</sup> Its preamble provides that the act ‘provides for the settlement of disputes by arbitration tribunals in terms of written arbitration agreements and for the enforcement of the awards of such arbitration tribunals’.<sup>218</sup> It has been noted that the arbitration act makes South Africa an unsuitable place of arbitration.<sup>219</sup> Further businessmen will be ill advised to enter into an international contract contain an arbitration clause naming South Africa as the place of arbitration.<sup>220</sup>

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<sup>214</sup> Ibid at 408.

<sup>215</sup> Ibid at 411.

<sup>216</sup> Ibid.

<sup>217</sup> Commencement date 14<sup>th</sup> April 1965.

<sup>218</sup> Juta’s Statutes of South Africa (as at 30 March 2007).

<sup>219</sup> Christie R H ‘South Africa as a venue for international Commercial Arbitration’ (1993) *Arbitration International* 153 at 165.

<sup>220</sup> Ibid.



The South African Law Commission has noted in its working paper<sup>221</sup> that the reason for the state of affairs is due to the fact that the Arbitration Act 40 of 1965 contains no provisions which expressly deal with international arbitration. Further the recognition and enforcement of foreign arbitral awards act 40 of 1977 is limited to the enforcement of foreign awards only. The Commission notes that the act does not provide for the disparities between domestic arbitration and international arbitration which vary given the differences in the nations laws of the parties to a contract in the case of international arbitration.<sup>222</sup>

The unsuitability of South Africa as place of arbitration is enhanced by the imbalance that exists between party autonomy and court intervention under the South African Arbitration Act of 1965.<sup>223</sup> Christie R. H notes that the imbalance between party autonomy and court intervention under the act can be likened to that of the English position where before 1979 courts had statutory powers to intervene with the arbitral process.<sup>224</sup> The South African Law commission's recommendations on the draft legislation is that South Africa should adopt the UNCITRAL model law for international arbitrations with minimum alterations so as to harmonize its laws to be uniform to other national laws pertaining to international arbitration procedures and make the South African law attractive to foreign investors.<sup>225</sup> One of the aims of the model law noted by the South African Law Commission is the liberalization of international arbitration by limiting the roles of the national courts and reaffirmation of party autonomy by allowing the parties the freedom to choose how to resolve their disputes.<sup>226</sup> One way that international law has been liberalized is the application of *lex mercatoria* as law governing the contract. It is clear from the revision of the model law by the

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<sup>221</sup> South African Law Commission *Working Paper 59* 1995 at 3.

<sup>222</sup> *Ibid*

<sup>223</sup> South African Law Commission *Working Paper 59* 1995 at 4.

<sup>224</sup> Christie R H 'Arbitration: party autonomy or curial intervention: The Historical Background' 1994 *SALJ* 143.

<sup>225</sup> South African Law Commission *Discussion Paper 69* 1997 at 4.

<sup>226</sup> South African Law Commission *Discussion Paper 69* 1997 at 6.

Commission<sup>227</sup> in 2006 that it has recognized the importance of general principles of law to international arbitration.<sup>228</sup> Article 2 A provides;

(1) In the interpretation of this Law, regard is to be had to its international origin and to the need to promote uniformity in its application and the observance of good faith.

(2) Questions concerning matters governed by this Law which are not expressly settled in it are to be settled in conformity with the general principles on which this Law is based.<sup>229</sup>

Despite the recommendations being made in 1997 the draft legislation on international arbitration has not been adopted in South Africa.<sup>230</sup> If the same is adopted with the recommendations noted above the application of *lex mercatoria* in international commercial arbitration is foreseeable. Christie R. H notes that the momentum on the existence and viability of the *lex mercatoria* is irresistible.<sup>231</sup> He shows the difference between some provisions on the law of contract in South Africa and the *lex mercatoria* and makes recommendations that some of those provisions should be amended to be in line with international trade practices but notes that some provisions should remain as they are. He concludes that these differences are minimal and can be reduced or eliminated.

The reaffirmation of the fundamental principles underlying international arbitration in South Africa by the Supreme Court of Appeal on party autonomy and limited judicial interference with respect to courts, has reassured parties choosing South

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<sup>227</sup> United Nations Commission on International Trade Law.

<sup>228</sup> Report of United Nations Commission on International Trade Law on the work of the thirty-ninth session A/61/17 19<sup>th</sup> June – 7<sup>th</sup> July 2006 New York at 29 [www.uncitral.org/uncitral/en/commission/sessions/39th.html](http://www.uncitral.org/uncitral/en/commission/sessions/39th.html) (Accessed on 27 August 2007).

<sup>229</sup> As adopted by the Commission at its thirty-ninth session, in 2006.

<sup>230</sup> Lane Patrick SC, Correspondent's Report South Africa 'The Reaffirmation of Party autonomy in South Africa' [2007] Vol. 24, Part 3 *ICLR* 382.

<sup>231</sup> Christie R H 'Our Law of Contract and the Modern *Lex Mercatoria*' in Glover, Graham *Essay in Honour of Aj Kerr* 2006 LexisNexis Butterworths, Durban 59 at 59.

Africa as a place of arbitration that this principles will be observed.<sup>232</sup> It is therefore true to conclude that the future of lex mercatoria in Africa is not grey given the developments that have been achieved, for example, the improvements of law of contract and hopefully with the adaptation of the model law in South Africa legal practitioners will interpret contracts and disputes in line with international trade practices.

#### 4.5.2 Kenya

Arbitration in Kenya is governed by the Arbitration Act of 1995.<sup>233</sup> The act applies to both domestic and international arbitration and has been modelled around the provisions of the UNCITRAL model law with minor alterations.<sup>234</sup> As noted these include the omission of provisions for costs and interest and provision for appeal in international arbitrations. The Hon. S. Amos Wako Attorney-General of Kenya at the inaugural conference of the Pan African Council of the LCIA<sup>235</sup> in 1994 noted that Kenya is witnessing tremendous changes politically, economically and legally in its effort to join the international community by playing its role in accordance with the existing rules governing international commerce.<sup>236</sup> He stated that the concept of arbitration as a mode of resolving international disputes had not been fully appreciated and only recently have African states freed the business community from the bureaucracy of state trading.<sup>237</sup> He stated further that Africa is ready to apply arbitration as a dispute resolution mechanism and enjoy the benefits that arise from it. He noted however that there are certain principles that businessmen in Africa should pay attention to, one such principle that is relevant to this study is the lex mercatoria. He stated that lex mercatoria constitutes international trade norms whose binding nature does not depend on the promulgation by

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<sup>232</sup> Lane Patrick note (230) See the summary of the judgment of Supreme Court of appeal in *Telcordia Technologies Inc v. Telkom SA Ltd* Case No. 26.05, unreported.

<sup>233</sup> The Arbitration Act, 1995 No. 4 of 1995 Laws of Kenya.

<sup>234</sup> Brainch Brenda 'The climate of Arbitration and ADR in Kenya' Colloquium on international commercial arbitration and ADR in African States (June 2003) *Center for Effective Dispute Resolution* [www.cedr.co.uk/index.php?location=/library/articles/Arb\\_and\\_ADR\\_in\\_Kenya.htm](http://www.cedr.co.uk/index.php?location=/library/articles/Arb_and_ADR_in_Kenya.htm) (Accessed on 28 August 2007).

<sup>235</sup> London Court of International Arbitration.

<sup>236</sup> Eugene Cotran & Austin Ammissah (note 202) at 9.

<sup>237</sup> *Ibid* at 10.

state authority but that the same is recognized as an autonomous norm by the business community.<sup>238</sup>

Section 29 of the arbitration act provides for the rules applicable to the substance of a dispute. It states as follows;

29(1) The arbitral tribunal shall decide the dispute in accordance with the rules of law chosen by the parties as applicable to the substance of the dispute.

(2) The choice of the law or legal system of any designated state shall be construed, unless otherwise agreed by the parties, as directly referring to the substantive law of that state and not to its conflict of laws rules.

(3) Failing a choice of the law under subsection (1) by the parties, the arbitral tribunal shall apply the rules of law it considers, to be appropriate given all the circumstances of the dispute.

(4) The arbitral tribunal shall decide on the substance of the dispute according to considerations of justice and fairness without being bound by the rules of law, only if the parties have expressly authorized it to do so.

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

The arbitration act recognizes the principle of party autonomy. It is however unlikely for parties to a contract to provide for *lex mercatoria* as substantive law as such principles are not known to many in the legal fraternity. The comments of the Attorney General reaffirm this position where he notes that this is one of the principles that businessmen should pay attention to. Additionally the cases that have been brought to the attention of the courts in Kenya with reference to the applicable law show parties only explore the option of the law of a foreign country. In the case of *Tononoka Steels Ltd v.*

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<sup>238</sup> Ibid.

*The E & S Africa Trade & Dev Bank*<sup>239</sup> where the court was faced with a dispute as to whether an arbitration clause ousted the jurisdiction of the court the court held that;

turning now to the arbitration clause, the submission of Mr. Muthoga, for the PTA Bank, that by providing in the agreements that they would be governed and construed in accordance with the laws of England, and that any dispute or difference between the parties shall be finally settled by the rules of conciliation and arbitration of international Chamber of Commerce sitting in London, and that the arbitration award shall be final and binding on both parties, amounted to a complete ouster or exclusion of the jurisdiction of Kenya courts. With respect, I do not think this submission is correct. While the jurisdiction to deal with the substantive disputes and differences is given to the International Chamber of Commerce in London, the Kenyan courts retain residual jurisdiction to deal with peripheral matters and see to it that any disputes or differences dealt with in the manner agreed between the parties under the agreements.<sup>240</sup>

The same position was held in the case of *Indigo EPZ Ltd v. Eastern and Southern African Trade and Development Bank*.<sup>241</sup> On both cases the parties applied the laws of England to their agreements. From the judgments one can infer that the courts would uphold the choice of *lex mercatoria* as substantive law but not as procedural law governing the contract as the application of English law to the substance of the dispute was not opposed. The argument is also grounded on the fact that the powers of the court are confined to granting interim measures for the protection of parties and not to adversely intervene with the arbitration process.<sup>242</sup>

The Attorney General's allusion to the fact that *lex mercatoria* is an autonomous system of law is a positive indication to the recognition of the same in Kenya taking into consideration the position he holds in the legal fraternity. The arbitration act gives room for the application of the same by recognizing that an arbitral tribunal may decide the substance of a dispute without being bound by the rules of law. This can be interpreted to mean general principles of international law or the *lex mercatoria*. With increased use of

<sup>239</sup> [2000] 2 EA 536 (CAK) lawAfrica, LexisNexis Butterworths.

<sup>240</sup> [2000] 2 EA 549 (CAK) lawAfrica, LexisNexis Butterworths.

<sup>241</sup> [2002] 2 EA 388 (CCK) lawAfrica, LexisNexis Butterworths.

<sup>242</sup> Article 7 of the Arbitration Act.

arbitration as a dispute resolution mechanism and publicity of the existence and viability of *lex mercatoria* as substantive law through publications, inclusion of the same in the legal curriculums and express choice by parties to a contract *lex mercatoria* will find root in Kenya.

### 4.5.3 Egypt

The Egyptian arbitration system and applicable rules derive their sources from three areas; sharia, the old French law and a socialist arbitration system.<sup>243</sup> The relevance of these three sources is taken into consideration where parties resolve their disputes to arbitration, for example, the arbitrator must respect Moslem public order and the courts must make sure of this when they consider granting leave to enforce an arbitral award.<sup>244</sup> In the last few decades Egypt has made tremendous steps towards the modernization of its laws in international commercial arbitration.<sup>245</sup> These include the ratification of the New York Convention, the establishment of the Cairo Regional Centre for International Commercial Arbitration (CRCICA) and the promulgation of a new arbitration law<sup>246</sup> in April 1994 which repeals articles 501 to 513 of the Code of Civil procedure on arbitration.<sup>247</sup> The new arbitration law extends the scope of its application to include arbitrations held between public or private law parties in civil and commercial matters.<sup>248</sup> It applies to both domestic and international arbitration.<sup>249</sup> It recognizes the principle of party autonomy making the choice of the parties recognized by the courts.<sup>250</sup>

The study explores the possibility of applicability of *lex mercatoria* as substantive law; it is therefore encouraging that the new arbitration law acknowledges the choice of parties. Where a choice of *lex mercatoria* is made it is possible to infer that the parties' choice will be upheld. The applicability of the New York Convention on the enforcement

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<sup>243</sup> Dr. Abdul Hamid El-Ahdad cited in Eugene Cotran & Austin Amisshah (eds) see (note 202) at 233.

<sup>244</sup> Ibid at 234.

<sup>245</sup> Aboul-Enein, M.I.M. 'Reflection on the New Egyptian Law on Arbitration' (1995) Vol. 11 No. 1 *Arbitration International* 75 (hereinafter referred to as Aboul-Enein, M.I.M.).

<sup>246</sup> Act No. 27/1994 issued on 18 April 1994 in the Official Gazette No. 16 dated 21 April 1994

<sup>247</sup> Aboul-Enein, M.I.M. (note 245) at 75.

<sup>248</sup> Article 1.

<sup>249</sup> Ibid.

<sup>250</sup> Article 4(1).

of arbitral awards is a positive step towards the evolution of international commercial arbitration. However the new arbitration law provides as one of the grounds that the courts should take into consideration before enforcement of the award the public policy of Arabic Republic of Egypt as opposed to the position in the New York Convention where public policy is that of an international nature. Dr M.I.M. Aboul-Enein view is that the changes made by the new arbitration law have rectified the defects which blemished the practice of arbitration in Egypt.<sup>251</sup>

Egypt is an important example for African states as it reflects the practices of both a civil system and that of Arabic countries. Similarly the creation of the CRCICA is a step towards the institutionalization of arbitration in Africa. The CRCICA was established in 1979 as an independent international institution with jurisdiction over Arab countries in the West Asia and Africa.<sup>252</sup> Its rules were initially modeled on the UNCITRAL Arbitration Rules however the same were revised taking into account the developments in the practice of international commercial arbitration. The CRCICA has conducted a number of arbitrations whose awards are occasionally published by the center.

A compilation of translated awards is published by Dr. Mohie Eldin I. Alam Eldin.<sup>253</sup> These awards reflect that most of the disputes referred to the center apply Egyptian law as the law governing the contract. Some of the awards provide the law applicable to be both Egyptian law and principles and terms of international contracts applied in foreign commercial transactions for the sale of commodities; however Egyptian law has been applied to the substance of the dispute.<sup>254</sup> Annexed to the publication are articles of the Egyptian Civil Code (No. 131 of 1948) which provides that the contract must be performed in accordance with its contents and in compliance with

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<sup>251</sup> Aboul-Enein, M.I.M. (note 245) at 84.

<sup>252</sup> [www.kluwerarbitration.com/arbitration/arb/home/about/cairo](http://www.kluwerarbitration.com/arbitration/arb/home/about/cairo) (Accessed on 30th August 2007).

<sup>253</sup> Mohie Eldin I. Alam Eldin *Arbitral Awards of the Cairo Regional Centre for International Commercial Arbitration* [2000] Kluwer Law International. (hereinafter referred to as Mohie Eldin I. Alam Eldin)

<sup>254</sup> *Ibid* at 3, Case No. 3 Award of 30 July 1990, Case no. 13/1989.

requirements of good faith.<sup>255</sup> The code also recognizes the principle of force majeure.<sup>256</sup> These principles form part of the modern *lex mercatoria*.

Most civil law countries have recognized the significance of *lex mercatoria* in contract law examples being France where awards which have been formulated through *lex mercatoria* have been enforced. It is hoped that other international arbitration institutions such as the International Chamber of Commerce which has delivered awards that have applied the *lex mercatoria* as law governing the contract will influence the proceedings of the CRCICA and arbitration in general in Egypt.

#### 4.6 Conclusion

One of the major limitations to the thesis that *lex mercatoria* has evolved to the status of an autonomous law is the fact that in very few cases have the parties expressly chosen to have their contract governed by the *lex mercatoria*. Similarly its application is limited to contracts where any dispute that arises is to be submitted to arbitration. The rejection of its application by the English courts in *Shamil Bank* is a backlash to its viability. However the response of the international community and the European Union is a positive step towards its acknowledgement as a source of substantive law.

International institutions such as the International Institution on Private International Law have compiled codes that form sources of the *lex mercatoria*. In addition various authors have written numerous articles on the existence and viability of the *lex mercatoria* as a system of law. As earlier noted the European Commission has recognized the need to incorporate the choice of international principles under the Rome Convention. If these changes are incorporated under the Rome Convention it is safe to argue that the interpretation of the Convention by the English courts might change to allow application of the *lex mercatoria* where the choice does not offend public policy. The modernization of the arbitration laws in Africa is a positive step towards the harmonization of international arbitral practices. The recognition of some of the

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<sup>255</sup> Mohie Eldin I. Alam Eldin (note 253) at 249-258 Annex III Articles of the Egyptian Civil Code (No. 131 of 1984) relating to the Contracts: Obligations or Personal Rights Article 148.

<sup>256</sup> *ibid* at 258 Article 159.



arbitration laws of African states of the application of general principles of law by arbitrators in the absence of a choice of law by the parties it a positive indicator of evolution of international trade.

It is now possible to expect the application of *lex mercatoria* as substantive law governing a contract where a dispute is referred to arbitration.<sup>257</sup> As noted earlier there is need for the edification of the *lex mercatoria* concept in Africa. The concept should be incorporated in the curriculum of the various law schools in Africa, parties to contracts should informed of its viability as a substantive law option and legal practitioners should do more work on international trade in Africa. The final chapter calls for the rethinking of the legal ideologies from the traditional legal thinking to a modernistic approach that accommodates the existence of transnational laws such as the *lex mercatoria*.

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<sup>257</sup> Eugene Cotran & Austin Ammissah (note 202) at 231.

## CHAPTER FIVE

### 5. CONCLUSION

#### 5.1 Conclusion

Many theories have been formulated to define the parameters that determine what the true nature of law is. Most critics of the status of *lex mercatoria* as an autonomous legal system are allied to the positivist theory.<sup>258</sup> The theory rests on the notion that there is a hierarchy of norms (the constitution is seen as the *grundnorm* whose essential function is to determine the organs and procedure for the setting up of general law and to determine legislation) that are created by supreme law making body that creates sanctions to coerce people to obey the law.<sup>259</sup>

The critics of the *lex mercatoria* are said to adhere firmly to state authority.<sup>260</sup> The conclusion made by these critics is that the *lex mercatoria* is not an autonomous legal system of law capable of governing modern day contracts due to the fact that the authority of the international law merchants and institutions to create rules and principles that are binding is not recognized.<sup>261</sup> It is argued that international trade law merchants and international community lack a global organizational structure to create uniform rules.<sup>262</sup> They are seen as a diverse group composing trade associations, individual traders who lack coherence and therefore incompetent to create law.<sup>263</sup>

A suggestion made by the proponents of the *lex mercatoria* is that a different perspective is required when seeking an answer to the questions as to what is the true nature of law.<sup>264</sup> The state is not the only agent that has the competence to make and safeguard the law. The creation of the law merchant in the early ages was as a result of the recognition by traders of the need to provide for uniform practices and principles to govern their conduct at the international level. The same need exists today as the

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<sup>258</sup> Howarth Richard J (note 1) at 46.

<sup>259</sup> Dicey, Albert Venn, 1835-1922, Lawrence Collins (ed) *Dicey, Morris and Collins on The Conflict of Laws* Vol. 2, (2006) 4ed Sweet & Maxwell, London. See Kelsen's Pure theory of law at 276-326.

<sup>260</sup> Howarth Richard J (note 1) at 46.

<sup>261</sup> *Ibid* at 47.

<sup>262</sup> Berger K P *Creeping Codification* (note 20) at 105.

<sup>263</sup> *Ibid*.

<sup>264</sup> *Ibid* at 104.

international community is ever changing and therefore there is need for norms and principles that are responsive to the transnational nature of international trade a characteristic of a global world. The effects of globalization have been said to undermine some of the deep-rooted assumptions of modern legal thought.<sup>265</sup> The proliferation of supranational sources of law emanating from the international community cannot be ignored when undertaking a study of the operations of formal state law.<sup>266</sup> It is noted that at the international level sovereignty is being undermined by greater acceptance of interference in the internal affairs of states, for instance, through the doctrine of humanitarian intervention.<sup>267</sup> In addition the argument is that while the traditional jurisprudence focuses entirely on municipal and public international law, globalization requires the recognition of other forms of legal ordering, formal or informal, such as the *sui generis* legal order of the EU and the transnational *lex mercatoria* respectively.<sup>268</sup>

Attempts to address the challenges brought about by globalization have been studied through the work of William Twining and Boaventura de Sousa Santos.<sup>269</sup> Twining notes that we are living in a global neighbourhood that is not a global village yet.<sup>270</sup> He notes that this does not mean that we are inevitably moving towards a single world government nor does it mean the end of nation-states as the single most important actor.<sup>271</sup> However globalization has necessitated interaction of state actors and non-state actors. He quotes Boaventura de Sousa Santos theory that one needs to distinguish between “‘globalised localism’ and ‘localized globalism’”, where under globalised localism some local phenomenon is successfully globalised, for example the spread of the English language or Coca Cola or American copyright laws; localized globalism occurs when local conditions, structures and practices change in response to transnational influences.<sup>272</sup> An example given that is of relevance to this study is the adaptation of local

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<sup>265</sup> Veitch Scott, Christodoulidis E, Farmer L *Jurisprudence: Themes and Concepts* 2007 Routledge.Cavendish, London & New York at 200 (hereinafter referred to as Veitch Scott, et al).

<sup>266</sup> *Ibid.*

<sup>267</sup> *Ibid.*

<sup>268</sup> *Ibid.*

<sup>269</sup> *Ibid* at 201.

<sup>270</sup> Twining, William L *Globalization & Legal Theory* 2000 Butterworths, London at 4.

<sup>271</sup> *Ibid* at 5.

<sup>272</sup> *Ibid.*

commercial law to deal with transnational transactions giving rise to the development of a new *lex mercatoria*, seen to regulate interactions between global commercial firms outside official law through practices such as international arbitration.<sup>273</sup>

This study is based on the hypothesis attested by the authors above of the growing importance of legal pluralism.<sup>274</sup> They note that there should be a distinction between the view of the law as consisting exclusively of state law and the idea that there are multiple forms of law, whether customary and state law coexisting in postcolonial societies, or non-state forms of law such as the *lex mercatoria*.<sup>275</sup> It is noted that Twining has helped concretize the relation between globalization and legal study, which has brought about change of who are the important actors, through the inclusion of actors such as the transnational nongovernmental organizations and multinational companies and also expanded the settings and places where the law can be expected to be found.<sup>276</sup>

States have in many instances rejected to recognize other sources of law apart from municipal law and public international law. The application of *lex mercatoria* as law governing the contract is not favoured by states where the contracts are subjected to the court system and sometimes to arbitration. It is argued that the fear is that the application of *lex mercatoria* is an escape from the jurisdiction of the state.<sup>277</sup> States have inevitably applied their national law to disputes that have been referred to their jurisdictions for arbitration where there is no choice of law by the parties. As previously noted the choice of a forum for dispute resolution is not determined by the parties always on grounds of the favourability of its laws. There are other reasons that influence this decision, they include, the convenience of the place to the parties to the contract and the availability of renowned arbitration institutions. It is therefore unresponsive of states to impose their national laws to dispute where the parties have chosen the state as the place of arbitration.

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<sup>273</sup> Twining W (note 270) at 5, Veitch Scott, et al (note 259) at 200.

<sup>274</sup> Veitch Scott, et al (note 265) at 201.

<sup>275</sup> Ibid.

<sup>276</sup> Ibid at 201-202.

<sup>277</sup> Paulsson Jan 'Delocalization of International Commercial Arbitration: When and Why it matters' (1983) Vol. 32 *Int'l & Comp. L.Q.* 53 at 54.

Proponents of the *lex mercatoria* have pointed out that there is growing recognition of its principles evidenced by the continued application of general principles of international law in international arbitration.<sup>278</sup> This is evidenced by the numerous awards that have been formulated through the application and guidance of the *lex mercatoria*. The future is not bleak with reference to the acceptance of the autonomous nature of the *lex mercatoria*. The introduction of public international law was met with much scepticism; however it has transcended national boundaries and gained recognition as a source of law. The acceptance of the autonomous nature of the *lex mercatoria* and its application as a source of law requires the rethinking of legal theories to accommodate the emergence of non-state actors as authorities with the capacity to formulate principles of law. There is a multitude of information on the nature and existence of *lex mercatoria* prepared by international institutions, arbitrations and various authors.

There is need for a change of attitude by legal practitioners and judges of the national courts towards the *lex mercatoria*. The existence of a new *lex mercatoria*, its viability as a source of law with respect to arbitration is not in question, what is left to be seen is its acceptance as a source of law when a dispute is brought before a court of law. The recognition of state-less awards, the modernization of arbitration laws by African states, recognition by the European Union of the possibility of application of general principles of law reflect trends towards the acceptance of the autonomous nature of *lex mercatoria*. The question is therefore one of time, with the trends mentioned above it will not be long before some national courts accept the viability of a *lex mercatoria* as a source of law.

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<sup>278</sup> Howarth Richard J (note 1) at 47.

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