

APPLICATION OF THE *LEX MERCATORIA* IN INTERNATIONAL COMMERCIAL ARBITRATION

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I INTRODUCTION

The *lex mercatoria* conjures up romantic notions of ancient laws and practices adopted by merchants in medieval times as they traded from place to place. In recent decades it has been resurrected and has gathered appeal as a type of international commercial law which may displace national laws in international transactions.

There has always been discord surrounding the application of national laws, primarily directed at domestic transactions, to transnational contracts. The better, and more attractive approach, is to apply international commercial laws to international commercial transactions. The desirability of this approach is readily apparent. Not only would an appropriate body of law developed for international transactions be applied but the complex process of selecting domestic laws, such as through conflict of laws rules, would disappear. However, this solution presupposes that there is a body of international commercial law, that there is a *lex mercatoria*, which is developed and identifiable and capable of being applied to international transactions.

There is no legislature which drafts international commercial laws. Nor is there an international commercial court which is capable of developing a 'precedent' for international commercial disputes. As such, opponents of a *lex mercatoria* deny its character as a law and question whether there are sufficiently developed principles which are capable of universal application to complex international transactions. However, proponents of the *lex mercatoria* maintain that it does exist, or can be sufficiently ascertained, to provide legal principles to govern international commercial transactions. They point to some international legislation in the form of conventions and model laws drafted by bodies such as United Nations Commission on International Trade Law ('UNCITRAL'). Moreover, while there is no international commercial court there has developed an extensive system of international commercial arbitration and a number of arbitral awards are now published. Can these form the basis of a *lex mercatoria* and are they sufficient?

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In his detailed and comprehensive book entitled *The Creeping Codification of the Lex Mercatoria*,¹ Professor Berger describes the *lex mercatoria* as follows:

Opinions about the terminology and the legal quality of the *lex mercatoria* diverge widely, especially with respect to its nature as a third legal system alongside domestic law and public international law. There is, however, a strong similarity in the starting points of all theories on transnational commercial law: the combined perspective of comparative law, usages, customs and practices of international commerce and trade leads to the evolution of transnational legal principles, rules and standards which are applied in practice in order to arrive at economically sensible solutions to transnational commercial disputes. The preference for substantive law solutions reflected in this transnational approach serves to avoid the uncertainties and unpredictable effects caused by the application of complicated conflict of laws doctrines and of domestic substantive law rules, which are frequently inadequate to solve the manifold legal problems of contemporary international commercial law.²

Lord Mustill, who has written incisively and critically about the *lex mercatoria*, refers to the work of Professor Lando and states that the sources of the *lex mercatoria* include:

- public international law;
- uniform laws;
- general principles of law;
- the rules of international organisations;
- international customs and usages;
- standard form contracts; and
- reporting of arbitral awards.³

The debate on the *lex mercatoria* is centred on the basic questions of (1) whether these sources actually constitute an autonomous legal order and can therefore be classified as a ‘law’, (2) whether, if not a law, it comprises a sufficiently comprehensive body of rules to be capable of application to decide a dispute, or (3) whether it simply represents usage in international trade.⁴

A Related Concepts

Sometimes, when contracting parties or arbitrators seek to subject a contract to or decide a dispute by reference to non-national rules, they refer to terms other than the *lex mercatoria*. Examples include ‘general principles of international commercial law’, ‘generally-recognised legal principles’ and ‘principles common

1 Klaus Berger, *The Creeping Codification of the Lex Mercatoria* (1999).

2 Ibid 2.

3 Lord Michael Mustill, ‘The New Lex Mercatoria: the First Twenty-Five Years’ (1988) 4 *Arbitration International* 86, 109.

4 See Laurence Craig, William Park and Jan Paulsson, *International Chamber of Commerce Arbitration* (3rd ed, 2000) 626–39; Berger, above n 1, 39–41.

to several legal systems'.⁵ Proponents of the *lex mercatoria* recognise that general principles of law and common principles of law represent sources of the *lex mercatoria* and demonstrate an intention that the contract is not to be governed by national laws. Nonetheless, arbitrators faced with such expressions must take care to exactly establish what the parties had in mind when they used a particular expression to describe the rules applicable to the dispute.⁶

Further, sometimes contracting parties authorise an arbitrator to decide as *amiable compositeur* or *ex aequo et bono*. This frees the arbitrator from the obligation to decide according to law. It is said that this is an entirely different basis for determining a dispute to the application of the *lex mercatoria*.⁷ It is true that an obligation to apply the *lex mercatoria* is an obligation to apply international rules or law and not to decide free from any legal principles. But sometimes, an arbitrator who is empowered to decide as *amiable compositeur* or *ex aequo et bono* will, in the exercise of his or her discretion, resolve the dispute by applying the *lex mercatoria* or general principles of law.

II TWO BASIC APPROACHES

Two basic approaches have been adopted in the ascertainment of the *lex mercatoria*. First is an identification of principles of the *lex mercatoria* and their collation or codification in a list. The second approach is the identification of a particular rule on an as-needs basis as and when a question arises. Below each is briefly examined in turn.

A Collation of Rules

Various lists of rules or principles of the *lex mercatoria* have been prepared from time to time. Lord Mustill has compiled a list of 20 principles which he describes as a rather modest haul considering the past 25 years of international arbitration. His list is as follows:

1. A general principle that contracts should prima facie be enforced according to their terms: *pacta sunt servanda*. The emphasis given to this maxim in the literature suggests that it is regarded, not so much as one of the rules of the *lex mercatoria*, but as the fundamental principle of the entire system.
2. The first general principle is qualified at least in respect of certain long term contracts, by an exception akin to *rebus sic stantibus*. The interaction of the principle and the exception has yet to be fully worked out.
3. The first general principle may also be subject to the concept of *abus de droit*, and to a rule that unfair and unconscionable contracts and clauses should not be enforced.
4. There may be a doctrine of *culpa in contrahendo*.
5. A contract should be performed in good faith.

5 See Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, *International Commercial Arbitration* (1999) [1446]; David Rivkin, 'Enforceability of Arbitral Awards based on Lex Mercatoria' (1993) 9 *Arbitration International* 67, 68–70.

6 Fouchard, Gaillard and Goldman, above n 5, [1448].

7 Mustill, above n 3, 91.

6. A contract obtained by bribes or other dishonest means is void, or at least unenforceable. So too if the contract creates a fictitious transaction designed to achieve an illegal object.
7. A State entity cannot be permitted to evade the enforcement of its obligations by denying its own capacity to make a binding agreement to arbitrate, or by asserting that the agreement is unenforceable for want of procedural formalities to which the entity is subject.
8. The controlling interest of a group of companies is regarded as contracting on behalf of all members of the group, at least so far as concerns an agreement to arbitrate.
9. If unforeseen difficulties intervene in the performance of a contract, the parties should negotiate in good faith to overcome them, even if the contract contains no revision clause.
10. 'Gold clause' agreements are valid and enforceable. Perhaps in some cases either a gold clause or a 'hardship' revision clause may be implied.
11. One party is entitled to treat itself as discharged from its obligations if the other has committed a breach, but only if the breach is substantial.
12. No party can be allowed by its own act to bring about a non-performance of a condition precedent to its own obligation.
13. A tribunal is not bound by the characterisation of the contract ascribed to it by the parties.
14. Damages for breach of contract are limited to the foreseeable consequences of the breach.
15. A party which has suffered a breach of contract must take reasonable steps to mitigate its loss.
16. Damages for non-delivery are calculated by reference to the market price of the goods and the price at which the buyer has purchased equivalent goods in replacement.
17. A party must act promptly to enforce its rights, on pain of losing them by waiver. This may be an instance of a more general rule, that each party must act in a diligent and practical manner to safeguard its own interests.
18. A debtor may in certain circumstances set off his own cross-claims to extinguish or diminish his liability to the creditor.
19. Contracts should be construed according to the principle *ut res magis valeat quam pereat*.
20. Failure by one party to respond to a letter written to it by the other is regarded as evidence of assent to terms.⁸

Professor Berger has proposed his own list. His technique is described as that of 'creeping codification'. The essential point is that his list of the *lex mercatoria* principles is not intended to be static and closed but is of an open-ended character, and should be updated and extended from time to time.⁹ Professor Berger's list is derived from many sources. He states:

The list unifies the various sources that have fostered the evolution of a transnational commercial legal system into one single, open-end set of rules and

8 Ibid 110–4.

9 Berger, above n 1, 212.

principles: The reception of general principles of law, the codification of international trade law by 'formulating agencies', the case law of international arbitral tribunals, the law-making forces of international model contract forms and general conditions of trade, and finally the analysis of comparative legal science. Scientific research in this area of highly practical law is of particular relevance because many authors of case notes, articles and books on transnational commercial law are themselves active in the field of international commercial arbitration. It is therefore not necessary to advocate the acceptance and promotion of the efforts of international practice through legal doctrine. The often heard prejudice that the *lex mercatoria* doctrine is purely theoretical is unjustified as long as the list does not only reflect comparative research but also the comprehensive case load of international arbitral tribunals which, in their function as 'social engineers', play a pivotal role in the evolution of transnational commercial law. It is this comprehensive coverage of all possible sources of the *lex mercatoria* which provides the necessary legitimacy and authority to the rules and principles contained in the list.¹⁰

Professor Berger's list comprises 78 rules or principles, a number of which are shared with Lord Mustill's list. In the interests of brevity, Professor Berger's list will not be reproduced here.

B Ad Hoc Determination

Professor Gaillard, while not denying the use of lists of principles, maintains that the *lex mercatoria* is not so much a list but a method for determining the appropriate rule or principle. In his words:

The other approach to defining the contents of transnational law is to view transnational law as a method of decision-making, rather than as a list. This approach consists, in any given case, of deriving the substantive solution to the legal issue at hand not from a particular law selected by a traditional choice-of-law process, but from a comparative law analysis which will enable the arbitrators to apply the rule which is the most widely accepted, as opposed to a rule which may be peculiar to a legal system or less widely recognized. This comparative law analysis is greatly assisted today not only by the extremely comprehensive compilations of principles previously discussed, but also by the existence of a number of international treaties which, whether in force or not, reflect a broad consensus, by the increasingly large number of published awards providing as large a number of precedents to international arbitrators and by the availability of extensive comparative law resources such as monographs on a large number of specific issues.¹¹

Professor Gaillard goes on to explain how his method would work in practice:

The transnational law method should thus, in our opinion, be conducted in the following three steps. First, the utmost attention should be given to the parties' intentions. They may have suggested a methodology themselves, for instance in limiting the comparative law analysis to two legal systems or to those of a region. They may have used clumsy terminology which arbitrators need to interpret in order to give effect to the parties' true intent. In all of these instances, the first task of the arbitrators will be to implement the parties' instructions. Second, the arbitrators will determine, on the basis of the comparative law sources mentioned above, whether the contentions made by the parties are supported by a widely accepted rule, or whether they merely reflect the idiosyncrasies of one legal system,

10 Ibid 210–1.

11 Emmanuel Gaillard, 'Transnational Law: a legal System or a Method of Decision-Making?' (2000) 17 *Arbitration International* 59, 62–3.

in which case they should be rejected. This will be the case, for instance, of the French rule pursuant to which a subcontract will be void if certain conditions including the placing of a bond in favour of the subcontractor are not met, of the English rule denying the validity of agreements to agree, or of the Algerian rule prohibiting agents, as each of these doctrines are fairly peculiar to the legal system in which they are found. Third, in determining whether the acceptance of a given rule is sufficiently wide for that rule to qualify as a general principle of law, the unanimous acceptance in all legal systems is by no means required.¹²

Gaillard maintains that his method has a distinct advantage over the list approach because it eliminates the criticism based on the alleged paucity of the list. While Professor Berger's list is considerably longer than predecessors produced by other authors, it is still modest. The multitude of questions which can arise in international commercial arbitrations could not all be conceivably answered by reference to the lists produced to date. It is here that Gaillard's approach offers a workable method and therefore a possible solution.

However, Professor Berger criticises Gaillard's approach on two bases. The first is that it underestimates the considerable problems that are related to the determination of the contents of the *lex mercatoria*. The second is that the approach of codifying the *lex mercatoria* is not necessarily inconsistent with the functional comparative methodology. This latter point is acknowledged by Professor Gaillard who states that even in the course of his functional approach, use can be made of available lists to establish the relevant rule or principle.¹³

III CRITICISM AND SUPPORT

The *lex mercatoria* has been subject to trenchant criticism, particularly in common law countries. The classic case against the *lex mercatoria* has been advanced by Lord Mustill in his thoughtful and incisive article.¹⁴ Lord Mustill, employing careful, meticulous and critical analysis, so typical of common law lawyers, has presented a strong case against the *lex mercatoria*. His arguments may be classified under two principal headings; namely practical objections and philosophical or conceptual objections.

Turning first to the practical objections, Lord Mustill notes that while the *lex mercatoria* is detached from national law, some of its rules are to be ascertained by a process of distilling several national laws. Today the international business community is immeasurably enlarged and he asks, 'how could the arbitrators or the advocates who appear before them, amass the necessary materials on the laws of, say, Brazil, China, the Soviet Union, Australia, Nigeria and Iraq?'¹⁵ Lord Mustill proceeds to point out that some proponents, evidently oppressed by these difficulties, had suggested that the *lex mercatoria* may be one which is 'common to all or most of the states engaged in international trade'.¹⁶ In his view, this

12 Ibid 63.

13 Ibid 62.

14 Mustill, above n 3. The arguments against the *lex mercatoria* have been meticulously collated by Berger, above n 1, 43–110.

15 Mustill, above n 3, 91.

16 Ibid 92.

fatally compromises the appeal of the *lex mercatoria* as a *lex universalis*. Another approach which he terms the '*micro lex mercatoria*' is that an arbitrator should confine his investigation to those legal systems which are connected with the subject matter of the dispute. This aids the practicability of the arbitrator's task but, questions Lord Mustill, what is the nature of this regional law? He proceeds to ask whether there exists a constellation of para-laws, for example Franco-Belgian law, Anglo-Dutch law, Italo-Hispano law and so on.

Lord Mustill raises further questions concerning the sources of the *lex mercatoria*. Insofar as reference can be had to standard form contracts, he notes that there is no guarantee of homogeneity even within a single trade. But standard form contracts between trades may also vary significantly. Other practical objections raised concern as to the paucity of rules of the *lex mercatoria* and the process of ascertaining it. Lord Mustill postulates that an advisor will face two distinct problems. One is how to discover the substandard content of the *lex mercatoria*. The second is how to predict, in a case where the relevant rule has not yet been firmly established by a consensus of opinion or by one or more arbitral awards, what sources a tribunal will deploy when addressing the new principle at issue, and what conclusion it will reach.¹⁷

Apart from practical difficulties concerning sources, ascertainment and predictability there are also philosophical objections to the *lex mercatoria*. A basic question is whether it can properly be classified as a 'law'. From where does it derive its authority? Does it have the organisation, conceptual framework and detailed rules which would be expected of a legal system? These are searching questions which have been posed by critics of the *lex mercatoria* with some vigour.

A Support

The *lex mercatoria* has its proponents as well as its critics. Early advocates were eminent lawyers such as Professors Goldman and Schmitthoff. More recently the *lex mercatoria* has found support from Professors Berger, Lando and Gaillard.

Professor Lowenfeld¹⁸ takes issue with Lord Mustill and states:

Together with Goldman, Lando, and most of its other proponents, I do not view *lex mercatoria* as some arcane mystery, open only to anointed guardians of an ambiguous flame. It is perfectly appropriate, in my view, for counsel to submit argument to the tribunal about the content of the *lex mercatoria*, as well as about the usages of the particular trade and the circumstances on which the parties had, or fairly could have, relied. In fact, in my experience, counsel nearly always do present such evidence and argument, in one guise or another.¹⁹

Fouchard, Gaillard and Goldman contend that 'it is by no means evident that to be the object of a valid choice of governing law the rules chosen must necessarily be organised in a distinct legal order'.²⁰

17 Ibid 114.

18 Andreas Lowenfeld, 'Lex Mercatoria: An Arbitrator's View' (1990) 6 *Arbitration International* 133.

19 Ibid 140.

20 Fouchard, Gaillard and Goldman, above n 5, 809.

In truth, the argument as to whether the *lex mercatoria* qualifies as a system of law is purely academic in cases where the parties have expressly chosen it, or a version of it, to govern their contract or in cases where the arbitrator is empowered to decide a dispute by reference to ‘rules of law’ as opposed to a ‘legal system’. This matter is discussed below.

The practical difficulties identified with the *lex mercatoria* are of more serious concern. Identifying the relevant principles, and indeed predicting what they may be, are difficult. It is here that the critics of the *lex mercatoria* make a telling point. But the concerns of lawyers, theoretical or practical, and often pedantic, must be weighed against the needs of the international system. Where parties choose to govern their relationship by the *lex mercatoria*, or a version of it, or where an arbitral tribunal deems it appropriate to depart from a domestic national law and apply the *lex mercatoria*, a transnational or international standard is selected. The parties may have good reason for doing so. In particular, they may not wish to subject their relationship to the laws of any particular state. Likewise, an arbitrator, when given sufficient freedom to determine the applicable rule, may conclude that the relevant rules found in the laws of the states connected to the dispute are not appropriate, or work an injustice, on the international plane. It is here that an international or transnational solution may be sought. It is going too far to say that there is a sophisticated and comprehensive body of international and commercial law. But it is by no means impossible to identify an international standard which may be appropriate. This international standard may be founded on general principles of law – principles enshrined in widely adopted international conventions or in trade usages. It will be for the parties, who will each have an opportunity to submit on the relevant standard, to persuade the arbitrators what it is. The functional method, advocated by Professor Gaillard, will enable an appropriate international standard to be identified and therefore applied in the particular case. In appropriate cases this will meet the needs of justice and international commerce.

IV VALIDITY

Can an arbitral award be challenged on the basis that the arbitral tribunal purported to decide the dispute by applying the *lex mercatoria*, or some species of it? The answer could arise in two ways. In the first place an application may be made to the courts of the seat of the arbitration to set aside the award. Alternatively, enforcement of the award in another state may be resisted. In either case the relevant court will have to determine whether the arbitral tribunal’s resort to the *lex mercatoria* has affected the validity of the award.

In the English case of *Deutsche Schachtbau-und Tiefbohrergesellschaft v Ras Al Khaimah National Oil Co*²¹ enforcement of a foreign award was resisted on the ground that the tribunal had chosen as the governing law a common denominator of principles underlying the laws of the various nations governing contractual

21 [1987] 3 WLR 1027; rev’d on other grounds *Deutsche Schachtbau-und Tiefbohrergesellschaft mbH v Shell International Petroleum Co Ltd (No 1&2)* [1990] 1 AC 295.

relations. The court decided that this did not affect the enforceability of the award in England. As far as arbitrations held in England are concerned, the *Arbitration Act 1996* (UK) contains relevant provisions. It provides:

- 46 (1) The arbitral tribunal shall decide the dispute—
- (a) in accordance with the law chosen by the parties as applicable to the substance of the dispute, or
 - (b) if the parties so agree, in accordance with such other considerations as are agreed by them or determined by the tribunal.
- (2) For this purpose the choice of the laws of a country shall be understood to refer to the substantive laws of that country and not its conflict of laws rules.
- (3) If or to the extent that there is no such choice or agreement, the tribunal shall apply the law determined by the conflict of laws rules which it considers applicable.

Regardless of whether the *lex mercatoria* is a ‘law’ and therefore falls within subsection (1)(a), it would clearly be caught by subsection (1)(b).

Some national laws, and some arbitration rules, use the term ‘rules of law’ in connection with the selection of the governing law. The reference to the term ‘rules of law’ as opposed to ‘law’ is said to encompass the selection of a non-national system of law such as the *lex mercatoria*. The position is stated thus by Fouchard, Gaillard and Goldman:

This terminology was first used by the 1981 French decree on international arbitration, which provided in Article 1496 of the New Code of Civil Procedure that the parties (and, in the absence of a choice by them, the arbitrators) were free to select the ‘rules of law’ applicable to their dispute. Commentators were unanimous in recognising the implicit reference to transnational rules in the text and the courts have never questioned that interpretation. Several other legal systems have used the same expression with the same meaning. When Article 1054 of the Netherlands Code of Civil Procedure was presented to the legislature in 1986, the Dutch government emphasized in an explanatory memorandum that the expression ‘rules of law’ encompassed not only national rules of law but also *lex mercatoria*. Likewise, Article 187 of the 1987 Swiss Private International Law Statute provides that ‘[t]he arbitral tribunal shall decide the case according to the rules of law chosen by the parties’, thus giving the parties the option of applying *lex mercatoria*, in one form or another. A large number of laws, including those of Italy, Egypt, Mexico and Germany followed suit. This is largely due to the fact that, in 1985, the UNCITRAL Model Law embraced the trend by providing in its Article 28 that ‘the arbitral tribunal shall decide the dispute in accordance with such rules of law as are chosen by the parties as applicable to the substance of the dispute’. Some authors have argued, rather curiously, that the expression ‘rules of law’ found in the UNCITRAL Model Law covers certain transnational rules, such as international conventions, but that it is not intended to enable the parties to submit their dispute to general principles of law or to *lex mercatoria*. However, neither the terminology employed, nor the Model Law’s *travaux préparatoires* justify such a restrictive interpretation.²²

22 Fouchard, Gaillard and Goldman, above n 5, 802–3.

V UNIDROIT PRINCIPLES

In 1994 the *Institut International pour l'Unification du Droit Privé* [International Institute for the Unification of Private Law] ('UNIDROIT') published its Principles of International Commercial Contracts ('UNIDROIT Principles'). These comprise a preamble and 119 articles divided into seven chapters prescribing general principles and rules for formation, validity, interpretation, content, performance and non-performance. The UNIDROIT Principles are intended to set out general rules for international commercial contracts and have been described as a 'modern expression of what is commonly called *lex mercatoria*'.²³

In the introduction to the UNIDROIT Principles, the Governing Council of UNIDROIT states that the UNIDROIT Principles, for the most part, reflect concepts to be found in many, if not all, legal systems. However since the principles are intended to provide a system of rules especially tailored to the needs of international commercial transactions, they also embody what are perceived to be the best solutions, even if still not yet generally adopted. The Governing Council goes on to state that the objective of the UNIDROIT Principles is to establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they may be applied.

The preamble to the UNIDROIT Principles sets out the purpose of the principles but also defines how and when they can be utilised. The preamble states:

These Principles set forth general rules for international commercial contracts. They shall be applied when the parties have agreed that their contract be governed by them. They may be applied when the parties have agreed that their contract be governed by 'general principles of law', the '*lex mercatoria*' or the like. They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law. They may be used to interpret or supplement international uniform law instruments. They may serve as a model for national and international legislators.

VI CONCLUSION

Sometimes contracting parties or arbitrators decide that a contract is not to be governed by a national law but by transnational rules or principles. This occurs where the parties expressly designate transnational rules to govern or, in the absence of a designation, where arbitrators called upon to resolve a dispute, and with authority to do so, decide that transnational rules apply. In such cases the contract is subject to an international standard which is different to the domestic rules of a single nation state.

23 Berger, above n 1, 3–4 citing Michael Bonell, 'Das UNIDROIT-Projekt für die Ausarbeitung von Regeln für internationale Handelsverträge' (1992) 56 *Rabel Zeitschrift* 275, 287. See also Gesa Baron, 'Do the UNIDROIT Principles of International Commercial Contracts Form a New *Lex Mercatoria*?' (1999) 15 *Arbitration International* 115; International Chamber of Commerce, *UNIDROIT Principles of International Commercial Contracts: Reflections on their Use in International Arbitration* (2002).

The transnational rules or principles selected may differ in formulation from case to case. Sometimes the *lex mercatoria* is applied. Sometimes reference is made to common legal principles either generally or of particular countries, and sometimes reference is made to general principles of law. In truth there is a bewildering possibility of formulations.

Application of the *lex mercatoria* is the subject of some controversy. Critics question whether it actually constitutes a '*lex*'. Its sources, content, identification and rules are also subject to scrutiny. Proponents point to the desirability of resorting to an international standard in appropriate cases and contend that rules can be identified, and help derived from more detailed international formulations such as the UNIDROIT Principles.

Ultimately the intent of the parties, and method employed, is crucial. Where contractors designate an international standard it must be carefully analysed to ascertain its ambit and extent. Then the disputing parties should be asked to make submissions as to its content. It can then be determined in exactly the same way as other issues which arise in an arbitration.

Leaving aside detailed regimes such as the UNIDROIT Principles, the *lex mercatoria*, 'common principles of law' and other such formulations remain somewhat vague and uncertain. When measured against traditional national legal systems they can be found wanting. But contractors in international transactions may have sound and compelling reasons for seeking to subject their arrangements to an international or transnational standard. When they do so it does not strain credibility to suggest that the parties will be able to establish appropriate international standards utilising the significant resources now available and comprising formulations such as the UNIDROIT Principles, academic writings, international conventions and published awards.

The percentage of cases subjected to the *lex mercatoria* or other transnational standards is still modest. But it may well increase over time and perhaps is already doing so, as the not insignificant number of references to the UNIDROIT Principles in recent arbitral awards may testify.