EQUITY IN INTERNATIONAL ARBITRATION: HOW FAIR IS "FAIR"? A Study of *Lex Mercatoria* and *Amiable Composition*

International arbitration has exploded in recent years as an alternative means for resolving international business disputes. Many practitioners believe arbitration is the sole acceptable dispute resolution process, particularly where parties from different countries have rejected recourse to one another's legal system from the inception of the relationship. The apparent neutrality of the forum, divorced from the sovereign influences of a nation's judiciary, offers perhaps the primary motivation for recourse to arbitration.

This concern with the distortion of the arbitral process by an adversary's national law may also justify the modern trend toward "anational" arbitration. Resolution by "anational" arbitration is reached through application not of any particular municipal law, but of general principles of international trade (the *lex mercatoria*) and "equity" in the form of arbitration by *amiable composition*.[1] The actual meaning of both of these terms, *lex mercatoria* and *amiable composition*, is contested both in practice and in scholarship. What is clear, however, is that each system involves resort to principles not necessarily defined within any one nation's statutory law, thus requiring the arbitrator to look outside the law ordinarily applicable to the dispute in order to resolve the matter.

Part I of this Note addresses the conflicting definitions of *lex mercatoria* and *amiable composition*, as well as the reasons for vesting such powers in an arbitrator. Part II addresses the recognition and scope of such powers in England, France, and the United States, three jurisdictions with divergent views on such matters. Part III addresses the effect of such systems on the legal process in general. Part IV analyzes the validity, advisability, and need for such systems in the international business arena, concluding that *lex mercatoria* and *amiable composition* are too inconsistent and indeterminate to provide the uniformity that is essential to the integrity and viability of the international business community.

I. DEFINITIONS

Submitting to arbitration under an adversary's national law, or even a neutral legal system, may seem dangerously biased or conciliatory. While resort to "general principles" of international trade or equity might seem a reasonable alternative, parties cannot be certain of the implications of such a choice when neither *lex mercatoria* nor *amiable composition* can be defined with much precision. Nonetheless, there exist several ways for parties to apply either system, as well as several justifications for doing so.

A. *What are* Lex Mercatoria *and* Amiable Composition?

Both *lex mercatoria* and *amiable composition* involve the application of certain equitable principles, although what those principles are is not always obvious. However, the two systems are clearly distinct.

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[1] The law applicable to the underlying dispute (the substantive law) differs from the law applicable to the dispute's resolution by arbitration (the procedural law). Both *lex mercatoria* and *amiable composition* refer to the substantive law of the dispute, which is, accordingly, the focus of this Note.

1. *Lex Mercatoria*

Scholars and practitioners define the concept of *lex mercatoria* in various ways.[2] Trade usage, a common law of international contracts, and the entirety of transnational legal norms affecting international business operations have all been connected at one time or another to the concept.[3] Generally, *lex mercatoria* represents an autonomous legal order, "independent of any one national legal system,"[4] which brings to bear general principles of international trade and commerce, such as *pacta sunt servanda*[5] and the idea that substantial breach justifies termination.[6] Often, *lex mercatoria* is seen as a tool "to clarify, to fill gaps, and to reduce the impact of peculiarities of individual countries[']laws, often not designed for international transactions at all."[7]

Clearly, Professor Filip De Ly's assertion that "*lex mercatoria* is now . . . well settled"[8] must be acknowledged as an overstatement. The "father of *lex mercatoria*" himself, Berthold Goldman, has stated that the *lex mercatoria* is incomplete.[9] In fact, the very existence of a "*lex mercatoria*," a general body of principles of international trade and com-

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[2] *Lex mercatoria* has been defined as "a system of law that does not rest exclusively on the institutions and local customs of any particular country, but consists of certain principles of equity and usages of trade which general convenience and a common sense of justice have established to regulate" international commercial activity, Bank of Conway v. Stary, 200 N.W. 505, 508-09 (N.D. 1924); as "the *law proper to international economic relations* . . . not only transnational customary law, . . . but also law of an interstate, or indeed state, which relates to international trade," Berthold Goldman, *The Applicable Law: General Principles of Law—the Lex Mercatoria*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113, 113 (Julian D.M. Lew ed., 1987) (emphasis in original); or as the "rules of law which are common to all or most of the States engaged in international trade . . . [and] where such common rules are not ascertainable, . . . the rule . . . which appears to [the arbitrator] to be the most appropriate and equitable[,] . . . consider[ing] the laws of several legal systems." Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 747 (1985).

[3] William W. Park, *Arbitration of International Contract Disputes*, 39 BUS. LAW. 1783 (1984).

[4] Andreas F. Lowenfeld, *Lex Mercatoria: an Arbitrator's View*, *in* LEX MERCATORIA AND ARBITRATION: A DISCUSSION OF THE NEW LAW MERCHANT 49 (Thomas E. Carbonneau ed., 1990) (citing Lord Justice Mustill, *The New Lex Mercatoria*, *in* LIBER AMICORUM FOR LORD WILBERFORCE 149 (M. Bos & I. Brownlie eds., 1987)).

[5] *Pacta sunt servanda* is the doctrine that contracts should be enforced according to their terms. *Id.* at 54.

[6] Keith Highet, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 623 (1989).

[7] Lowenfeld, *supra* note 4, at 56.

[8] FILIP DE LY, INTERNATIONAL BUSINESS LAW AND LEX MERCATORIA 208 (1992).

[9] *Id.* at 213 (citing Berthold Goldman, LEX MERCATORIA 22, and Berthold Goldman, UNE BATAILLE JUDICIAIRE AUTOUR DE LA LEX MERCATORIA 407).

merce, is contested. One commentator, for example, calls the *lex mercatoria* "a sort of shadowy, optional, aleatory, international commercial congeries of rules and principles."[10]

Despite the uncertainty of *lex mercatoria*, many compilations of laws have recognized its influence on international transactional practice. Both the Hague[11] and Vienna Conventions[12] on the international sale of goods are said to be the product or a part of *lex mercatoria*.[13] In the United States, the Uniform Commercial Code defers to the authority of *lex mercatoria* for gapfilling purposes: section 1-103 states that unless specifically displaced by the provisions of the Code, "the principles of law and equity, including the law merchant . . . shall supplement its provisions."[14] In fact, the authors of the Code proclaimed it to be a modern *lex mercatoria*.[15] Some commentators have even asserted that *lex mercatoria* takes precedence over national laws.[16] Uncertain though it may be, *lex mercatoria* must surely be acknowledged as an influence in the international legal realm.

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[10] *See, e.g.*, Highet, *supra* note 6, at 618.

[11] Hague Convention Providing a Uniform Law on the International Sale of Goods, July 1, 1964, 834 U.N.T.S. 107 (1972) [hereinafter Hague Convention].

[12] United Nations Convention on Contracts for the International Sale of Goods, concluded at Vienna, Apr. 1, 1980, U.N. Doc. A/Conf.97/18 (1990), *reprinted in* 19 I.L.M. 671 (1980) [hereinafter Vienna Convention].

[13] Goldman, *supra* note 2, at 113.

[14] U.C.C. § 1-103 (1992).

[15] Friedrich K. Juenger, *The Lex Mercatoria and the Conflict of Laws, in* LEX MERCATORIA AND ARBITRATION (Thomas E. Carbonneau ed., 1990) (citing U.C.C. § 1-105, cmt. 3 (1992)). It must be noted, however, that opponents of the U.C.C. point to this very fact as one of the U.C.C.'s greatest weaknesses. What certainty can there be, they argue, in a system which promotes such gapfilling, which gives such discretion to those who interpret it? Professor Maureen O'Rourke, Lecture to a Boston University School of Law class on the Uniform Commercial Code (Jan. 10, 1994).

[16] *See, e.g.*, Eric Plouvier, *Perspectives Droit: Les secrets de l'arbitrage; La "loi des marchands,"* LE MONDE, June 16, 1992 ("'. . . *[L]a lex mercatoria . . . devrait avoir, dans son domaine, la primauté sur les ordres juridiques nationaux', commente le père et promoteur de cette doctrine, Berthold Goldman.*") "'*Lex mercatoria* seems to have, in its own domain, primacy over national legal systems,' comments the father and advocate of this doctrine, Berthold Goldman.") (Note author's translation); Lando, *supra* note 2, at 759 ("[I]t is now established by . . . the Convention [of 18 March 1965 on the Settlement of Investment Disputes between States and Nationals of Other States, which instituted the International Centre for the Settlement of Investment Disputes (ICSID)] that, in the case of a conflict between the law of a Contracting State and 'the rules of international law,' the latter rules may be given preference to the former."). *Id.*

2. *Amiable Composition*

Perhaps more uncertain in nature than *lex mercatoria* is the ability of an arbitrator to act as an *amiable compositeur*. The original function of *amiable composition*, an institution derived from the *Code Napoléon* and the French Code of Civil Procedure of 1806,[17] was to restore harmony between the parties, with the goal of working out a new kind of legal relationship between them.[18] The earliest evidence of an English court's interpretation of an "equity clause"[19] described the power of *amiable composition* as one that exempts the arbitrator "at all events from the strictness of the obligations" of deciding according to the rules of law without wholly disregarding them.[20] Traditionally, *amiable composition* simply "provided an equity correction . . . to the strict rules of law" applicable to a dispute.[21]

Today, the concept of *amiable composition* remains quite similar. Such power apparently permits an arbitrator to "depart from the strict application of rules of law"[22] and "decide [the dispute] according to justice and fairness,"[23] when necessary. Today, parties usually choose *amiable composition* as a substitute for, rather than an addition to, national law. For this reason, some scholars call the grant of this power a negative choice of law clause,[24] since the arbitrator is appointed to apply "equity and good conscience"[25] instead of a specific national law.[26] In some cases, though,

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[17] W. LAURENCE CRAIG, WILLIAM W. PARK, & JAN PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 310 n.1 (1990) [hereinafter ICC ARBITRATION].

[18] RENÉ DAVID, ARBITRATION IN INTERNATIONAL TRADE 334-35 (1985). The influence of such origins on the present state of arbitration with respect to its similarity to mediation is addressed in Part IIB.

[19] Rolland v. Cassidy, [1888] 13 AC 770, *cited in* The Rt. Hon. Sir Michael Kerr, *"Equity" Arbitration in England*, 2 AMER. REV. INT'L ARB'N 377, 388 (1991).

[20] *Id.*

[21] DE LY, *supra* note 8, at 124.

[22] Sigvard Jarvin, *The Sources and Limits of the Arbitrator's Powers*, *in* CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION, *supra* note 2, at 50, 70.

[23] WOLFGANG PETER, ARBITRATION AND RENEGOTIATION OF INTERNATIONAL INVESTMENT AGREEMENTS 172 (1986).

[24] *Id.*

[25] Jarvin, *supra* note 22.

[26] The concept of *amiable composition* is somewhat similar to the idea of a decision *ex aequo et bono*. Indeed, whether there is a difference between the two concepts is a question not sufficiently answered by the scholarship on the subject. One scholar wrote that the two expressions are "considered to mean the same thing." *Id.* at 70. Others point out that at least some systems draw a clear distinction. Under Swiss law, for example, the power to act *ex aequo et bono* entitles the arbitrator to "disregard the relevant legal rules, including mandatory rules, subject only to international public policy," while an *amiable compositeur* "must comply with mandatory rules of law."

the parties do choose an applicable law, but still ask that the arbitrator act as *amiable compositeur* when necessary.[27]

Nevertheless, typically, an arbitrator rendering a decision based on principles of fairness or equity is not necessarily acting as an *amiable compositeur*; equitable principles are already incorporated into the substantive law of many legal systems.[28] The concept of *amiable composition*, then, must mean something more; this "something" will be addressed throughout this Note.

3. *Lex Mercatoria* vs. *Amiable Composition*

While the characteristics of both *lex mercatoria* and *amiable composition* are somewhat uncertain, the distinction between the two remains clear. An *amiable compositeur* need not apply the law as it stands, while an arbitrator applying *lex mercatoria* must determine the principles of equity that exist and whether these principles may be applied to the dispute at issue.[29] Some commentators see the difference as one between a particular arbitrator's sense of equity (*amiable composition*) and the application of rules of law which are nonetheless not tied to any one national legal system (*lex mercatoria*).[30] In addition, an arbitrator would not need the powers of *amiable composition* in order to apply the rules of *lex mercatoria*,[31] although a clause permitting *amiable composition* might be seen as implying a reference to *lex mercatoria*.[32]

In effect, *amiable composition* refers to the structure of an arbitration, whereas *lex mercatoria* is a body of rules that might be applied in any arbitration. Ole Lando gives a clear example. Suppose the buyer of certain goods does not discover a defect in those goods until three years after delivery. Knowing the Vienna Convention on Sales[33] provides the buyer no more than two years to give the seller notice of defects, an *amiable compositeur* might decide that it would nonetheless be unfair to deprive the buyer of his right to a claim against the seller, whereas an

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Christine Lecuyer-Thieffry & Patrick Thieffry, *Negotiating Settlement of Disputes Provisions in International Business Contracts: Recent Developments in Arbitration and Other Processes*, 45 BUS. LAW. 577, 592 n.75 (1990). Those noting this distinction assert that the two principles only "remotely resemble" each other. *Id.* at 592. In practice, whatever distinction may exist apparently makes little difference, since in either case the arbitrator is asked to apply something other than the strict letter of the applicable law.

[27] Jarvin, *supra* note 22, at 71.

[28] DE LY, *supra* note 8, at 124.

[29] ICC ARBITRATION, *supra* note 17, at 137.

[30] RESOLVING TRANSNATIONAL DISPUTES THROUGH INTERNATIONAL ARBITRATION 134 (Thomas E. Carbonneau ed., 1984) [hereinafter RESOLVING DISPUTES].

[31] DE LY, *supra* note 8, at 222.

[32] Goldman, *supra* note 2, at 117.

[33] Vienna Convention, *supra* note 12, art. 39.

arbitrator deciding under the *lex mercatoria* could not permit a claim to be brought due to the restrictions in the Convention.[34]

B. *How May Parties Provide for Such Systems?*

There are several ways in which parties might empower an arbitrator to act as an *amiable compositeur* or under the *lex mercatoria.* Initially, the parties might provide for such systems either in the arbitration clause itself or in the Terms of Reference[35] consented to prior to the arbitration. In addition, the parties might consent to arbitration under the aegis of any of several arbitral institutions, the rules of which might provide for the use of either system. Both the International Chamber of Commerce (ICC) Rules[36] and the UNCITRAL Model Law (Model Law) require that the arbitrator consider the provisions of the contract as well as relevant trade usages when making a decision, a reference which many scholars consider to mean application of *lex mercatoria.*[37] Further, article 13(4) of the ICC Rules[38] and articles 28(3) and 33(2) of the Model Law allow the arbitrators to act as *amiable compositeurs*, but only if the parties confer such powers upon them.[39] Thus, an arbitration clause or Terms of Reference which requires arbitration under at least the ICC Rules might permit the use of either system.[40]

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[34] Lowenfeld, *supra* note 4, at 47.

[35] "Terms of Reference" refers to the document setting out the terms and conditions, agreed to by the parties, by which a dispute is referred to arbitration, and thus, by which an arbitrator must act. *See* BLACK'S LAW DICTIONARY 1281 (6th ed. 1990) (definition of "Reference").

[36] Article 13(5) of the ICC Rules. ICC ARBITRATION, *supra* note 17, at 309. Note that under the current ICC Rules, the ability to provide for *amiable composition* no longer depends on whether the procedural law of the seat of arbitration would permit such use. The 1975 version of the Rules, unchanged in the 1988 version, made this change from the 1955 version, which placed an additional condition on the power to act as *amiable compositeur* besides requiring that the parties agree to the use of such power: such use "[must] not in any way interfere with the legal enforcement of the award." *Id.* at 312.

[37] Article 33(3) of the UNCITRAL Model Law. ISAAK I. DORE, ARBITRATION AND CONCILIATION UNDER THE UNCITRAL RULES: A TEXTUAL ANALYSIS 65, 209 (1986).

[38] ICC ARBITRATION, *supra* note 17, at 309.

[39] Kerr, *supra* note 19, at 384.

[40] The uniform law of the Council of Europe puts an interesting spin on the application of *amiable composition.* Article 21's reference to the "rules of law" has been interpreted to mean that while *amiable composition* is recognized, "there is a presumption that the parties have opted for arbitration at law," that is, according to a particular national legal system. Moreover, another provision in Annex II states that the parties can appoint arbitrators as *amiable compositeurs* "only after a dispute has arisen." Thus, the parties may provide for *amiable composition* only in their Terms of Reference, but not in an arbitration clause of a contract. Belgium is the only

C. *Why Provide for Such Systems?*

The apparent neutrality of the arbitration forum and the procedure mentioned in the introduction to this Note[41] often justify the resort to arbitration itself. The rationale for using *lex mercatoria* or *amiable composition*, though, must reach farther than just denationalization, for these systems are inherently more uncertain and unpredictable than either adjudication or arbitration at law.

Sir Michael Kerr suggests four bases for preferring systems based on *lex mercatoria* or *amiable composition*.[42] First, the contrast in attitudes between lawyers and businessmen from different countries as to the unqualified application of their national laws in the arbitration context might lead some to agree to a less strict standard[43] such as a "general standard of fairness applied in lieu of a legalistic approach."[44] The scope and effects of *lex mercatoria* and *amiable composition* in different jurisdictions vary according to these contrasting views and according to a country's view of arbitration as either equivalent to or separate from adjudication. This issue is discussed in Part II below.

Second, these systems may be particularly suitable in the context of a continuing, long-term relationship, where a degree of flexibility in the dispute resolution process might be desirable. The implications of such flexibility for the legal process, in terms of fairness, predictability, party autonomy, and finality, are discussed in Part III below.

Third, the use of such systems might make the process (if not the outcome) of dispute resolution simpler and thus less costly, which could discourage "over-zealous or legalistic advocates and arbitrators."[45] Finally, the possibility of a less precise, more lenient assessment of damages, for example, due to the presence of an equity-type clause, might serve to "soften the blow" for the losing party.[46] This adaptability is sometimes seen by the business community as particularly necessary in the international commercial context, where "laws made primarily for local con-

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European State to have ratified the European Convention, which provides for a uniform law of arbitration. DAVID, *supra* note 18, at 339.

[41] *See* discussion *supra* text preceding Part I.

[42] Kerr, *supra* note 19, at 378.

[43] Kerr points out that "on the Continent," the law is sometimes seen as a system "imposed" by the state, whereas the English often view the law as "an acceptable set of rules which have been evolved by pragmatic judges for the benefit of the commercial community." *Id.* The latter view often leads to a desire to apply a national law to a contract, as a matter of principle, although such a desire could be carried out by the choice of a national law combined with the powers of *amiable composition*. ICC ARBITRATION, *supra* note 17, at 313.

[44] *Id.* at 312.

[45] Kerr sees this justification as "anti-lawyer," rather than as "anti-law," as most opponents of *lex mercatoria* and *amiable composition* believe the purpose of such clauses to be. Kerr, *supra* note 19, at 378.

[46] *Id.*

sumption"[47] are either imperfectly assessed by parties from different countries[48] or are simply "deficien[t] as norms for transnational dispute resolution."[49] Whether *lex mercatoria* and *amiable composition* are needed to accomplish these two purposes of speed and adaptability, and whether such use is advisable or indeed even valid, is addressed in Part IV below.

II. Comparison of the Scope and Effect of Such Systems

The decision to resort to *lex mercatoria* or *amiable composition* would be irrelevant if a party's home country, or the country where a party sought enforcement of an arbitral award, refused to recognize an arbitration conducted under either system. Part II analyzes the recognition of such systems by England, France, and the United States; the scope of such recognition; and the extent to which each jurisdiction sees *lex mercatoria* or *amiable composition* as approaching mediation. Additionally, Part II analyzes whether such an approach is permissible.

A. *General Use and Recognition*

The highest courts of England, France, and the United States have all attempted in recent years to facilitate the conduct of international arbitration within their respective jurisdictions. England has finally incorporated a public policy favoring the autonomy of contracting parties to choose arbitration as a dispute resolution method which "prevails over the public policy favoring judicial review of arbitration awards."[50] The Supreme Court of France has interpreted certain restrictive domestic policies as inapplicable to international commercial arbitration.[51] Lastly, the United States Supreme Court has expanded the role of arbitration as a method of international dispute resolution, for instance by holding that international securities disputes are arbitrable.[52] Yet, the same level of tolerance has not consistently been applied to the use of *lex mercatoria* and *amiable composition* in the arbitration context. Perhaps the most revealing difference among England, France, and the United States in terms of arbitration policy is the attitude of the particular jurisdiction

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[47] Juenger, *supra* note 15, at 213.

[48] ICC Arbitration, *supra* note 17, at 139.

[49] Juenger, *supra* note 15, at 213; *accord* Lando, *supra* note 2, at 748 ("By choosing the *lex mercatoria* the parties oust the technicalities of national legal systems and they avoid rules which are unfit for international contracts.").

[50] Steven J. Stein & Daniel R. Wotman, *International Commercial Arbitration in the 1980s: A Comparison of the Major Arbitral Systems and Rules*, 38 Bus. Law. 1685 (1983).

[51] *Id.* at 1685 n.11 (citing Thomas E. Carbonneau, *The Elaboration of a French Court Doctrine on International Commercial Arbitration: A Study In Liberal Civilian Judicial Creativity*, 55 Tul. L.Rev. 1 (1980)).

[52] Scherk v. Alberto-Culver Co., 417 U.S. 506 (1974).

toward the purpose of the arbitral process: is arbitration viewed as a strict substitute for adjudication or as a method of reaching settlement between the parties? The jurisdiction's attitude in this respect often explains the effect and recognition given equity-type clauses such as *lex mercatoria* and *amiable composition.*

1. England

In England, arbitration is "firmly treated" as an adjudicatory alternative to litigation, and an arbitrator must decide a dispute in precisely the same way as would a judge in an English court.[53] As a consequence, the judiciary in England views the powers of *lex mercatoria* and *amiable composition* with great skepticism. Because the English generally believe arbitrators must apply the laws of England, an equity clause would have uncertain legal effect. Indeed, some have said that such a contract clause would imply that there was no contract at all "because the parties did not intend the contract to have legal effect."[54] One judge, speaking as author rather than adjudicator at the time, took this attitude so far as to say that English law "frowns upon arbitration *ex aequo et bono* and will have nothing to do with that disreputable person the *amiable compositeur.*"[55]

This attitude has changed over the years, however. Even the above-quoted judge suggested in the same article that "that disreputable person the *amiable compositeur*" *was* used in English arbitration, that such use in fact made English arbitration "as successful as it is," but that not having to state any reasons for an arbitral award prevented arbitrators from having to admit to its use.[56] In fact, the court in *Eagle Star Insurance Co. v. Yuval Insurance Co.* rejected the quoted *Orion* interpretation of an equity clause as making the contract no contract at all, stating that such a clause "does not oust the jurisdiction of the courts. It only ousts technicalities and strict constructions."[57] Other judges in the same case stated that by an equity clause, the arbitrators "would be able to view the matter more leniently and have regard more generally to commercial considerations than would be done if the matter be heard in court."[58] Further, the case of *DST v. Rakoil*[59] presented the question (unanswered there) whether an award subject to the *lex mercatoria* was valid; as recently as 1989,

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[53] Kerr, *supra* note 19, at 381-82.

[54] *Id.* at 389 (quoting Orion v. Belfort, [1962] 2 Lloyd's List. L. Rep. 257). *Accord* DAVID, *supra* note 18, at 332 ("arbitrators are bound to apply the law and . . . any agreement purporting to exempt them from such an obligation would not be an arbitration agreement" (citations omitted)).

[55] ICC ARBITRATION, *supra* note 17, at 311 (quoting Lord Tangley, *International Arbitration Today*, 15 INT'L & COMP. L.Q. 719, 722 (1966)).

[56] ICC ARBITRATION, *supra* note 17, at 311.

[57] [1978] 1 Lloyd's Rep. 357, *cited in* Kerr, *supra* note 19, at 390.

[58] *Id.* at 363-64.

[59] [1987] 2 Lloyd's Rep. 246, *cited in* Kerr, *supra* note 19, at 391.

Home and Overseas Insurance Co. v. Mentor answered in the affirmative, although in dicta.[60] According to Sir Michael Kerr, *Mentor* "appears to contain the first recognition of the *lex mercatoria* in an English court."[61]

Moreover, the traditional English view that the decision of an arbitrator acting as *amiable compositeur* is not subject to execution as an award in England has arguably been modified by recent decisions, including *Eagle Star*.[62] In that case, the court upheld the clause providing for *amiable composition*,[63] suggesting that enforcement of the award would be possible. Some commentators have suggested that the end of the "case stated" procedure, terminated by the Arbitration Act of 1979, might also increase the probability that an *amiable composition* award rendered in England would be subject to enforcement in England,[64] particularly since the Act permits the parties to an international arbitration to exclude the jurisdiction of the English courts to review the arbitrator's decision on questions of law.[65] By denying the courts a "second look" at the arbitral decision, the award is more likely to be enforced as is, even if rendered by *amiable composition*.

English arbitration law apparently is finally moving in the direction of countries such as France and the United States in accepting equity-type clauses.[66] Still, in England, equity is a "system of rules and remedies which form part of the law and do not in any way lie outside it,"[67] so that perhaps the English have not in fact come so far from their original position.[68]

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[60] [1989] 1 Lloyd's Rep. 473, *cited in* Kerr, *supra* note 19, at 393.

[61] Kerr, *supra* note 19, at 395.

[62] *Eagle Star*, [1978] 1 Lloyd's Rep. 357.

[63] ICC ARBITRATION, *supra* note 17, at 311.

[64] *Id.*; *accord* DE LY, *supra* note 8, at 122 n.290 ("One may assume that the liberal policy of the Act may favorably affect the validity of *amiable composition* and similar clauses under English law.").

[65] Stein & Wotman, *supra* note 50, at 1726.

[66] As a supplement to the above reasoning, see, e.g., Kerr, *supra* note 19, at 396 ("[W]ith the increasing pressure on the courts, and the trends towards simplification in the resolution of legal disputes and ADR generally, the accepted scope of equity clauses is much more likely to be widened than to remain as it is, let alone to be cut down."); *UK: Insurance Law Gridlock Predicted*, POST MAG., Dec. 17, 1992 (Mr. Johnny Vedeer, a leading Queen's Counsel, "was optimistic about the prospect of *ex aequo et bono* finally being adopted."). Whether such a conclusion can be drawn, however, is still hotly contested, at least among scholars. *See, e.g.*, Plouvier, *supra* note 16 ("*Si la doctrine [de la lex mercatoria] ne fait pas fortune outre-Atlantique, elle est franchement méprisée outre-Manche.*" ("If the doctrine [of *lex mercatoria*] has not gone over well outside the Continent, it is truly detested in England.")) (Note author's translation).

[67] Kerr, *supra* note 19, at 380.

[68] This assessment depends, however, on the scope of such powers, which will be addressed below in Part B.

2. France

Even before the Decree of May 12, 1981[69] (the Decree) was enacted, France had a reputation as a jurisdiction in which international arbitration was relatively free from judicial interference.[70] One famous application of the powers of *amiable composition* dates back to 1956, when the French arbitrators, after deciding that it would be unfair not to compensate a winning party for the devaluation of money, implied a currency stabilization clause in the contract.[71] With the enactment of the Decree, however, French acknowledgment of, and even deference to, the ability to decide an arbitration by reference to the *lex mercatoria* or as *amiable compositeur* became clear.[72]

The Decree permits "almost unlimited freedom" in the choice of law to be applied in international commercial arbitration[73] by providing that "[t]he arbitrator shall decide the dispute in conformity with the rules of law chosen by the parties; in the absence of a party choice, he shall decide according to the rules that he deems appropriate."[74] In this respect, the French Code "appears to go farther than any other document on international commercial arbitration,"[75] permitting the use of *lex mercatoria*, and of *amiable composition*[76] when expressly provided for by the parties.

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[69] Decree of May 12, 1981, 1 *J.O.* 1492, *translated in* 20 I.L.M. 878, 917 (1981).

[70] Gerald Pointon & David Brown, *France: Resolving Disputes*, EUROMONEY 13 (Supp. Sept. 1991).

[71] SEEE v. République Populaire Fédérale de Yougoslavie, 1074 J.D.I. (1959), *cited in* PETER, *supra* note 23, at 172. It would seem that by the present standards in France, this award would still stand, because the arbitrators were, in fact, given the authority to rule as *amiable compositeurs. Id.*

[72] Under Articles 12 and 58 of the *Nouveau code de procédure civile*, even a judge can be given the power to decide as an *amiable compositeur.* NOUVEAU C. PR. CIV., art. 12 & 58 (Edition du 1 Janvier 1983) (Fr.) [hereinafter FRENCH CODE].

[73] John R. Crook, *Applicable Law in International Arbitration: The Iran-U.S. Claims Tribunal Experience*, 83 A.J.I.L. 278, 285-86 (1989).

[74] FRENCH CODE, *supra* note 72, art. 1496 ("*L'arbitre tranche le litige conformément aux règles de droit que les parties ont choisies; à défaut d'un tel choix, conformément à celles qu'il estime appropriées.*").

[75] RESOLVING DISPUTES, *supra* note 30, at 133.

[76] Other provisions in the French Code specifically allow for *amiable composition* as long as the parties choose it. *See, e.g.*, FRENCH CODE, *supra* note 72, at art. 1474 ("*L'arbitre tranche le litige conformément aux règles de droit, à moins que, dans la convention d'arbitrage, les parties ne lui aient conféré mission de statuer comme amiable compositeur.*" ("The arbitrator decides the dispute according to the rules of law, unless, in the Terms of Reference, the parties give the arbitrator permission to act as *amiable compositeur.*")); art. 1483 ("*Le juge d'appel statue comme amiable compositeur lorsque l'arbitre avait cette mission.*" ("The judge may act as *amiable compositeur* if the arbitrator was given such permission.")); art. 1497 ("*L'arbitre statue comme amiable compositeur si la convention des parties lui a conféré cette mission.*" ("The arbitrator may act as *amiable compositeur* if the Terms of Reference give the arbitrator such permission.")) (Note author's translations).

Several cases demonstrate this comprehensive acceptance of such systems. In 1982, an arbitral tribunal established under ICC Rules permitted an award based on *lex mercatoria*, where the parties had not stipulated to any specific national law (nor had they granted the power to rule by *amiable composition*). The court in *Pabalk Ticaret v. Norsolor* held that the award did not offend any "mandatory norms" of the forum in applying *lex mercatoria*.[77] As a result of the application of this concept, the French company was held in breach against the Turkish company and was required to pay 800,000 French francs in damages. The court "considered that it was appropriate, given the international nature of the agreement, to leave aside any compelling reference to a specific legal system, be it Turkish or French, and to apply the international *lex mercatoria*."[78]

A much more recent case, decided in 1989 by the Paris *Cour d'Appel*, also upheld the application of *lex mercatoria*, where the parties could not agree which national law was applicable but did not expressly authorize the use of *lex mercatoria*.[79] The parties had, however, agreed to arbitration under ICC Rules[80] which do permit the use of *lex mercatoria*.[81] The *Cour d'Appel* held that the arbitrator, who had applied "general principles of the conflicts of laws" in applying *lex mercatoria*, had properly fulfilled the terms of reference.[82]

The Decree of 1981 also established the deference of the courts to arbitration, including resolution under *lex mercatoria* or by *amiable composition*, by limiting the grounds for judicial intervention to set aside an arbitral award. In domestic arbitrations expressly established under the powers of *amiable composition*, article 42 of the 1980 Decree provides that, except in certain specific instances,[83] the arbitral award is not subject to appeal unless the parties agree otherwise.[84] Judicial review of an international arbitral award, by contrast, is permitted only on even more limited grounds.[85] Article 1482 of the French Code, regarding international arbitrations, provides specifically that there is no right of appeal where

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[77] Judgment of Oct. 9, 1984 (Pabalk Ticaret v. Norsolor), Cass., Pourvoi N# 83-11.355 (Fr.), *reprinted in* 24 I.L.M. 360 (1985) (English translation).

[78] *Id.*

[79] Compania Valenciana de Cementos Portland S.A. v. Primary Coal, Inc., *cited in* Pointon & Brown, *supra* note 70.

[80] *Id.*

[81] *See supra* text accompanying notes 36-40.

[82] Pointon & Brown, *supra* note 70.

[83] Those instances are: absence or invalidity of an arbitration agreement; excess of jurisdictional authority; lack of due process; improperly appointed tribunal; noncompliance with form requirements; or violation of domestic public policy. *Id.*

[84] Stein & Wotman, *supra* note 50, at 1714 n.185.

[85] The grounds for setting aside an international arbitral award are: absence or invalidity of an arbitration agreement; excess of jurisdictional authority; lack of due process; improperly appointed tribunal; or violation of international public policy. International public policy is more restricted than French domestic public policy,

the arbitrator was given *amiable compositeur* authority unless the parties expressly reserved this right in their Terms of Reference.[86] Moreover, article 1497 prevents either party from challenging the award in the course of a setting aside procedure, evidently because the arbitrators did, in fact, exercise their granted authority.[87] In practice, such awards are "distributed to the Rapporteur and to the members of the Court with the indication *amiable compositeur* stamped on the copy of the award as a reminder of the arbitral powers being exercised;"[88] although the arbitrator must comply with "fundamental notions of procedural fairness," must not violate public policy in the terms of the award, and must give reasons for the award, the Court "will use its power 'to lay down modifications . . .' in a very sparing fashion,"[89] thus affording great deference to the arbitral tribunal.

The same can be said for the use of *lex mercatoria*: the *Cour de Cassation* in *Fougerolle v. Banque de Proche Orient* upheld an award based on "general principles of obligation generally applicable in international trade," i.e. *lex mercatoria*, concluding that the arbitrators "only conformed to the duty imposed upon them" by the Terms of Reference drafted by the parties.[90] Thus, while recognizing the need for a minimum level of judicial control over arbitral proceedings, France "has continually attempted to provide a favorable legal environment for international arbitration" by restricting re-examination of the substance of an award.[91]

3. The United States

Although *amiable composition* is not expressly recognized in U.S. statutory or case law, or in the American Arbitration Association (AAA) rules,[92] it is used in practice perhaps even more frequently by U.S. arbitrators than by French arbitrators.[93] This reality exists, at least in part, because U.S. arbitrators "do not think of themselves as doing anything

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though, which accounts for the idea that international judicial review is more limited. *Id.*

86 FRENCH CODE, *supra* note 72, at art. 1482.

87 *See, e.g.*, DE LY, *supra* note 8, at 121.

88 ICC ARBITRATION, *supra* note 17, at 314.

89 *Id.* at 314-15.

90 Goldman, *supra* note 2, at 119-20. *But see* Agence de Diffusion et de Publicité v. Société Coopérative d'Etudes et de Librairie, Cr. Paris, 1re Ch. supp. (Feb. 4, 1966), *cited in* RESOLVING DISPUTES, *supra* note 30, at 114 n.168 (holding that by awarding damages according to trade practice rather than law, the arbitrator had taken on the non-granted power of *amiable compositeur*, and thus acted outside the scope of the Terms of Reference and rendered the award void).

91 Pointon & Brown, *supra* note 70.

92 Stein & Wotman, *supra* note 50, at 1714.

93 ICC ARBITRATION, *supra* note 17, at 137; *accord* Stein & Wotman, *supra* note 50, at 1714 ("a concept similar to the *amiable compositeur* is not unusual in American arbitration").

special in so acting."[94] In the United States, equity is an integral part of "the Law," so that, in essence, every arbitrator ought to make equitable considerations part of the body of law from which decisions are made, even without express authorization by the parties involved. One commentator questioned "whether *amiable composition* is not in fact the rule in the U.S.A."[95]

Moreover, while *lex mercatoria* is essentially foreign to American arbitrators, it appears that an American court would not likely challenge an agreement to apply such a system.[96] In fact, in a case made famous for other reasons, *Mitsubishi Motors Corp. v. Soler Chrysler-Plymouth, Inc.*,[97] the Supreme Court of the United States concluded that "the international arbitral tribunal owes no prior allegiance to the legal norms of particular states."[98]

Perhaps because the U.S. view of arbitration is closer to the French view than to that of the English, the United States restricts judicial review of arbitral awards in much the same way as France. According to U.S. law, the only grounds for challenging an international arbitral award in the courts of the country where the award was rendered are the fundamental fairness of the proceedings, the arbitrability of the subject matter, and the scope and validity of the arbitration agreement.[99] Typically, a party may not challenge an arbitrator's findings of law or fact in the country where the award was rendered;[100] "the interpretation of the law by the arbitrators . . . are [sic] not subject, in the federal courts, to judicial review for error in interpretation."[101]

Thus, United States law apparently shelters from judicial review awards rendered not only under *lex mercatoria*, but also by *amiable composition*. Indeed, the court in *International Standard Electric Corp. v. Bridas Sociedad Anonima Petrolera, Industrial Y Comercial*[102] stated that even if an arbitrator were to act as *amiable compositeur without authority*, the 1958 United Nations Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the New York Convention)[103] would not allow a court to refuse enforcement of the arbitral award, even for

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94 ICC ARBITRATION, *supra* note 17, at 137, *citing* a comprehensive study by Eric Loquin, *L'amiable Composition en droit Comparé et International*, LIBRAIRIES TECHNIQUES (Paris 1980).

95 DAVID, *supra* note 18, at 332.

96 Lando, *supra* note 2, at 759.

97 473 U.S. 614 (1985).

98 473 U.S. at 636.

99 Pointon & Brown, *supra* note 70.

100 *Id.*

101 San Martine Compania de Navegacion, S.A., v. Saguenay Terminals Ltd., 293 F.2d 796 (1961), *cited in* Lando, *supra* note 2, at 759.

102 745 F. Supp. 172 (S.D.N.Y. 1990).

103 3 U.S.T. 2517, *reprinted in* 7 I.L.M. 1042 (1968).

"manifest disregard of the law."[104] The Court said that it would frustrate the purposes of the New York Convention to permit judges to make a *de novo* inquiry into whether the law supposedly applied by the arbitrators was in fact properly applied by them.[105] Still, the freedom to apply *amiable composition* or *lex mercatoria*, even if not expressly acknowledged as being exercised as such, is not surprising in a country where arbitration is clearly identified as part of the realm of "alternative dispute resolution" (ADR) rather than as a mirror substitute for litigation.

B. *Scope of the Arbitration: Derogation from Systems of Law*

Although arbitration under the *lex mercatoria* or by *amiable composition* necessarily varies in scope according to the recognition given such systems under different jurisdictions, certain generalities can be made regarding just how far an arbitrator with such powers may go in departing from the typical framework. As noted in Part I of this Note, *lex mercatoria* is a system of laws based on international trade norms in which the norms implicated are not always agreed upon, and new norms are developed with time.[106] Thus, the general scope of an arbitration by *lex mercatoria* cannot be described with any precision. The scope of *amiable composition* powers, on the other hand, is more clear.

1. Derogation from the Applicable Law

Generally, arbitrators acting as *amiable compositeurs* must first consult the applicable law before diverging from it. They may, thereafter, diverge from that law only when they have been specifically empowered to do so, and even then only when they determine that the outcome would be unfair or inequitable.[107] Furthermore, the arbitrators may in no case disregard mandatory provisions of the applicable law,[108] or at least those of a public policy nature.[109] This restriction may follow from "the arbitrator's duty to make everything possible that the award is enforceable."[110] One authority, supported by others, asserts that "*amiable composition* is in fact only an extension of the powers granted to arbitrators beyond or inside the rule of law, but always based on the legal principles."[111]

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[104] *International Standard*, 745 F. Supp. at 181.

[105] *Id.* at 182 (emphasis added).

[106] *See supra* text accompanying notes 2-9.

[107] Lecuyer-Thieffry & Thieffry, *supra* note 26, at 592.

[108] *Id.*

[109] DE LY, *supra* note 8, at 120 n.284.

[110] Jarvin, *supra* note 22, at 71.

[111] Lecuyer-Thieffry & Thieffry, *supra* note 26, at 593, citing J. Robert, *L'Arbitrage* 185; *accord* DAVID, *supra* note 18, at 321 ("The *amiable compositeur* generally considers that his duty is to decide in accordance with the law; he makes only moderate and circumspect use of his equitable powers . . . .").

2. Derogation from the Terms of the Contract

The question of whether an arbitrator acting as *amiable compositeur* may derogate from the provisions of the parties' contract remains unsettled.[112] One scholar states firmly that the terms of the contract may not be modified by the *amiable compositeur*, at least those conditions that are "necessary for the safety of international business transactions,"[113] whatever those may be. Yet the same scholar cites conflicting cases resolved under ICC Rules for this proposition.[114] Other distinguished scholars do defend this assessment, however, at least insofar as *amiable compositeurs* "may not rewrite the contract by creating new obligations. They may adjust or disregard, but not create."[115] This view, that an *amiable compositeur* may not disregard an express term of the contract or rewrite the contract, but may nonetheless apply standards of commercial fairness in rendering an award, appears to be the prevailing view.

C. Lex Mercatoria *and* Amiable Composition *as Mediation*

Just how far does this ability to "adjust or disregard" go? Are arbitrators acting under the *lex mercatoria* or *amiable compositeur* authority really *de facto* mediators?[116] In other words, is the arbitrator's position one of settling a legal dispute or, instead, one of playing an actual role in the life of the contract? Again, the answer varies according to the jurisdiction addressing the issue. Here, though, the battle lines drawn are much clearer.

First, it must be noted that arbitration could never be true "mediation," since arbitration yields a result that is binding on the parties "independently of any assent on their part,"[117] whereas strict mediation is a nonbinding procedure.[118] *Amiable composition* was, in fact, originally based on the idea of conciliation, but its binding character makes it inherently different[119] in a significant way. The parties do not renounce their rights

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[112] DE LY, *supra* note 8, at 120 n.284.

[113] Jarvin, *supra* note 22, at 71.

[114] *Id.* at 71 and text accompanying notes 70-71.

[115] ICC ARBITRATION, *supra* note 17, at 141.

[116] Because *lex mercatoria* is less often expressly provided for in an arbitration clause or in the Terms of Reference, and because *amiable composition* permits application of *lex mercatoria*, this Note will address only the concept of *amiable composition* as mediation, since it comprises *lex mercatoria* within its bounds, at least in this context.

[117] DAVID, *supra* note 18, at 7.

[118] *See, e.g.*, STEPHEN B. GOLDBERG, FRANK E.A. SANDER, & NANCY H. ROGERS, DISPUTE RESOLUTION: NEGOTIATION, MEDIATION, AND OTHER PROCESSES 227 (2d ed., 1992).

[119] DAVID, *supra* note 18, at 7. *Accord* Park, *supra* note 3, at 1787 ("[*a*]*miable composition* should not be confused with conciliation or mediation"); ICC ARBITRATION, *supra* note 17, at 137 ("it would be a mistake to conclude . . . that [an

when they resort to arbitration,[120] even by *amiable composition*, and the *amiable compositeur* remains a "judge" in the binding sense of the term.

The original function of *amiable composition*, "to restore harmony between the parties[,] . . . to work out a new kind of legal relationship between the parties,"[121] has not been completely lost. Parties often do resort to arbitration in search of a resolution other than what a court would devise; in those cases, the parties may indeed be seeking a sort of "conciliation,"[122] a more flexible solution to their problems. As one author put it, arbitration "conjures up an idea, if not an ideal, of conciliation, of harmonization of interests, different from the concept of law."[123] Parties may find such flexibility in arbitration, certainly in arbitration conducted by *lex mercatoria* or *amiable composition*, although again the true extent of flexibility depends on the jurisdiction involved.

1. England

England imparts this flexibility to *amiable composition*, but for that reason sees it as an ADR method, rather than as a valid arbitration.[124] In England, ADR and arbitration are separate entities; arbitration represents a functional equivalent of adjudication, while ADR represents an alternative methodology from the court system. Because of this distinction, and because *amiable composition* is seen as mediation, the concept of *amiable composition* is "self-contradictory"[125] under English law.

Sir Michael Kerr posits three possible interpretations of an arbitration by *amiable composition* in England: (1) if the function of an *amiable compositeur* is mediation and conciliation, then he is not an arbitrator; (2) if the *amiable compositeur* may impose a settlement on the parties which departs from what the legal outcome would be, then he is not acting as an arbitrator "according to law," and his award would likely be set aside; and (3) if he is to act first as an *amiable compositeur* and then, if settlement should fail, as an arbitrator at law (essentially a hybrid between mediation and arbitration, known as "med-arb") then as an arbitrator he would have to ignore what had occurred as *amiable compositeur*, and the arbitration would no longer be subject to an "equity" clause.[126] Kerr con-

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amiable compositeur] is the same thing as a conciliator or mediator . . . ; he renders a decision that is binding on the parties").

120 DAVID, *supra* note 18, at 61.

121 *Id.* at 335.

122 *Id.* at 106.

123 *Id.* at 333-34.

124 Kerr, *supra* note 19, at 383.

125 *Id.*

126 *Id.* at 383-84. Another author cites a contract which clarifies this "sequential" interpretation of *amiable composition* as first mediation and then arbitration at law: Contract No. II (international) of the International Council of Hide and Skin Sellers' Association and of the International Council of Tanners specifically provides for

cludes that the third form is the only "natural" interpretation of *amiable composition*, and thus the reference to arbitration by such a system "would then not operate as an equity clause at all."[127] In any case, under English law, an equity clause permitting substitution of an arbitrator's sense of fairness "in accordance with his non-legal conscience" would not be a valid arbitration clause.[128]

2. France

In France, the English view would seem unreasonable, since arbitration and conciliation are seen as interrelated processes. Often, an arbitrator will attempt to conciliate the parties in the course of the arbitral mission. When the conciliation is successful, in fact, the arbitrator labels the award rendered a "*sentence rendue d'accord-parties*," or an award rendered by agreement of the parties.[129] Even the rules of the New York Convention would assure enforcement of this type of award.[130] That France sees arbitration by *amiable composition* as a mediation process is expressed by the *Cour de Cassation*, which has on at least one occasion used the term "arbitration clause of conciliation."[131] In France, *amiable composition* "is rooted in tradition and appears to be in accord with the very spirit of arbitration."[132]

3. The United States

The United States apparently takes the middle ground on the debate. The *amiable compositeur*, it is said, "is in fact a judge, but one who enjoys greater flexibility in adopting the solution which he regards as best, even though from a strictly legal point of view it may not be absolutely correct."[133] Generally, the attempt to conciliate or mediate between the parties in the course of arbitration is seen "as disqualifying the arbitrators and preventing them from rendering an award should the conciliation fail."[134] Arbitrators acting under *lex mercatoria* or *amiable composition*

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arbitration "failing amiable composition." DAVID, *supra* note 18, at 112 n.60. While such a system does have some advantages, the ability of the arbitrator to ignore completely the facts learned during the first stage of the process once the second stage, arbitration, is begun, is questionable. GOLDBERG ET AL., *supra* note 118, at 226-227. Both logically and realistically, it is extremely difficult for a neutral third party to be at once the judge of fairness and the agent of settlement.

127 Kerr, *supra* note 19, at 384.

128 *Id.* at 396.

129 Lecuyer-Thieffry & Thieffry, *supra* note 26, at 589.

130 *Id.*

131 Cass. civ. 2e (July 7, 1971).

132 DAVID, *supra* note 18, at 61.

133 *Id.* at 335.

134 Lecuyer-Thieffry & Thieffry, *supra* note 26, at 589. Still, the United States delegation to the 1907 Hague Conference asserted that "[i]t has been a very general

are instead seen not as intending to work out a compromise, but as being bound to decide as is prescribed by the law.

4. Express Provision for Mediation

Nevertheless, what of party autonomy where the arbitration clause or the Terms of Reference expressly provide for mediation, particularly under the rubric of *amiable composition*? One English language clause did so provide, stating that "[t]he arbitral tribunal shall have the broadest powers to decide as an equitable mediator upon the issues submitted to it. . . ."[135] Although one interpretation of the clause found it to be "a typical *amiable compositeur* clause," the interpreter called the expression "equitable mediator . . . a clear misnomer inconsistent with the very concept of the arbitrator."[136] Such a reading conforms with the English or American view of arbitration, but France would most likely accept the clause as a valid *amiable composition* reference. In fact, even one English author stated the proposition, as if unquestioned, that "[t]he *amiable compositeur* may not *adapt the contract* or act as *mediator, without express powers of the parties.*"[137] Perhaps, then, party autonomy would prevail even in systems viewing *amiable composition* with great reserve.

III. Effect of Such Systems on the Legal Process

If it is true that "[t]he force of the obligation in a contract comes from the force of the legal system that creates the obligation,"[138] then what are the implications of a contract designated to be governed by *lex mercatoria* or *amiable composition*, particularly where such terms may be interpreted as a grant of mediation authority? In terms of the predictability, authoritativeness, and accessibility that a "proto-typical system of legal rules" carries,[139] arguably neither *lex mercatoria* nor *amiable composition* has the true "force" of law.

A. *Uniformity and Predictability of Outcome*

The purpose of a written agreement is to give the contracting parties a certain measure of predictability as to their rights and obligations both in performance and in the event of a dispute.[140] This is particularly so in the

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practice for arbitrators to act, not as judges . . . , but as negotiators effecting settlements . . . ." Crook, *supra* note 73, at 282.

135 ICC Arbitration, *supra* note 17, at 141.

136 *Id.*

137 Jarvin, *supra* note 22, at 72 (last emphasis added) (citing at n.74 ICC Case No. 3938, 111 Clunet 926 (1984), as an example).

138 Highet, *supra* note 6, at 614.

139 *Id.* at 624.

140 William W. Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria, in* Lex Mercatoria and Arbitration 110 (Thomas E. Carbonneau ed., 1990).

uncertain world of international business transactions. While clearly, total predictability is impossible, it is not unreasonable to argue that parties usually seek more objective standards than a resort to "general principles" of international law or equity would afford. The choice of law clause in a contract, for example, is a highly negotiated, calculated balance of the risks involved in resorting to alternative legal systems, which is designed to maximize predictability and stability. Yet, where that choice of "law" is a choice of *lex mercatoria* or *amiable composition*, both uncertain in nature and in scope, that goal is not likely to be achieved. Further, where a jurisdiction includes, in the authority granted by either system, derogation from the contract itself, the thin line of predictability the parties themselves attempt to establish may be eliminated. The paradox is that while application of *lex mercatoria* or *amiable composition* is meant as a method of reaching an agreement that is closer to the parties' expectations and views of fairness, in practice such systems may seem, particularly to the losing party in such an arbitration, to result in arbitrary and capricious decisions.

This failure of *lex mercatoria* and *amiable composition* to achieve true fairness is due in large part to the uncertainty surrounding the content of these two systems. Such uncertainty prevents practitioners from being able to counsel clients with any conviction about the likely outcome of an arbitration. If the parties, the courts, or the legislature give arbitrators the freedom "to pursue more perfect justice by ignoring otherwise applicable rules of law that the arbitrator finds inconvenient in the case at hand,"[141] then the result is but an abstract or ad hoc justice. Arbitrators are permitted, through *lex mercatoria* and *amiable composition*, to apply the principles involved in those systems "either in accordance with their own comparative law interpretation of general principles and trade customs or refer to their favourite school of thought and its corresponding published arbitral awards."[142] In this manner, arbitrators act as "inventors" more than legal authorities, applying their own concept of fairness and thus implicating a personal creative process into a system meant for universal consumption. To apply such subjective values is truly "a dangerous thing in view of the fact that the international framework must fit a world where ethical values are not always shared."[143]

The conclusion that resorting to *lex mercatoria* and *amiable composition* results in divergent arbitral interpretation is, nevertheless, contested. Three main defenses for these systems emerge from the scholarship: the idea that arbitrators all follow a common understanding of what is "fair" in the business world;[144] that such systems are a necessary supplement to

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141 *Id.* at 113.

142 PETER, *supra* note 23, at 176.

143 ICC ARBITRATION, *supra* note 17, at 138.

144 Lando, *supra* note 2, at 753.

the strict rules of law;[145] and that the unforeseen circumstances that arise in international relationships, even more so than in domestic contexts, require such permissive systems.[146]

As to the first defense, at least one author has argued that "[m]ost arbitrators have common ethics and common notions of how business should be conducted. That leads them in the same direction."[147] This argument can be eliminated out of hand. Besides common sense, a simple survey of any two arbitrations, one conducted in England and one conducted in Libya, for example, would reveal the faults in this reasoning.[148]

The second defense is perhaps more legitimate: that systems such as *lex mercatoria* are "useful tool[s] for arbitrators . . . when faced with dissatisfying answers from their initial inquiries," providing an addition rather than an alternative to the applicable law.[149] Such a view is evident in the French and U.S. concepts of *lex mercatoria* and *amiable composition*, both which essentially view those systems as seeking "to achieve just results within a legal framework . . . [that is] by definition wider than the frontiers of any state."[150] Still, two problems arise from this analysis. First, should arbitrators be empowered to decide what are "dissatisfying answers?" Second, by implicating different rules according to the beliefs of the arbitrator involved, does either system represent a true system of law?

The third defense of advocates of these systems is the most convincing: the benefits afforded by the flexibility in both systems is necessary, especially (1) in long-term contracts where the rights and duties of parties cannot always be fixed from the beginning, (2) where unforeseen circumstances may arise throughout the life of the contract, and (3) where the parties involved may be more like joint venturers than adversaries with conflicting interests.[151] These concerns are all valid; however, *lex mercatoria* and *amiable composition* may be neither necessary nor appropriate methods for achieving the ends described.

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[145] Lowenfeld, *supra* note 4, at 51, 57.

[146] *Cf.* DAVID, *supra* note 18, at 336; ICC ARBITRATION, *supra* note 17, at 138, 312-13.

[147] Lando, *supra* note 2, at 753.

[148] Indeed, Lando's argument has been demonstrated, at least in a very limited context, to be inaccurate. An experiment was conducted during which divorce lawyers were asked to assess the quality of certain settlement agreements arrived at through mediation. The result: "Typically, one experienced attorney viewed a visitation arrangement as appropriate while another felt it was only fair and a third scored it as poor." GOLDBERG ET AL., *supra* note 118, at 161 (citing NANCY THOENNES, JESSICA PEARSON, & JULIE BELL, EVALUATION OF THE USE OF MANDATORY DIVORCE MEDIATION 163 (1991)).

[149] Lowenfeld, *supra* note 4, at 51.

[150] *Id.* at 57.

[151] DAVID, *supra* note 18, at 336; *accord* ICC ARBITRATION, *supra* note 17, at 138, 312-13.

In many legal systems,[152] both trade usage and equity are comprised within the rules themselves. Reference to *lex mercatoria* or *amiable composition*, then, covers no more ground than a substantive national law would. As Professor Highet suggests, such systems are "a quasi-legal recognition of rules of common sense, equity, and reasonableness that would probably have been suggested, and used, even in the absence of any reference [to] or thought" of them.[153] He does admit that these systems may provide the increased flexibility of interpretation often necessary in developing and evolving legal relationships.[154] If this is what parties seek, however, then they ought not to "stop half-way," and should instead seek true ADR and mediation,[155] rather than the deceptive label of arbitration, to satisfy their desires. If, instead, the parties seek what are perhaps the main characteristics of *amiable composition*, "the predominance of equity over law and restriction on the right of appeal,"[156] here too these desires may be satisfied without resort to this uncertain system. As one commentator suggested, "these features are known at common law[,] albeit arrived at by other means and without specific claims that the arbitration is not being conducted under law."[157]

B. *Effect on the Development of the Law*

The result of the ad hoc justice which *lex mercatoria* and *amiable composition* provide is a legal system which, far from being coherent, inevitably involves conflicting decisions and a loss of confidence in "the system." *Lex mercatoria* and *amiable composition* are not static systems requiring a specific result in a certain situation; indeed, no consensus exists on either the scope or effects of these rules, and this deficiency thus adds substantial uncertainty to international transactions.[158] By abandoning the established rational and fair standard of the applicable law for the subjective standards of fairness of the arbitrator, the dangers of discrimination and bias are allowed to flourish.

According to one author, "it is infinitely more dangerous to allow discretion to arbitrators than to compel parties to accept the law.... The law

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[152] Perhaps most notably, the system of laws in the United States, where concepts such as "good faith" and "fair dealing" abound.

[153] Highet, *supra* note 6, at 628.

[154] *Id.*

[155] Kerr, *supra* note 19, at 377.

[156] ICC ARBITRATION, *supra* note 17, at 310.

[157] *Id.*

[158] PETER, *supra* note 23, at 178. Professor Pierre Lalive disagrees, stating that "the difficulties of determination or application of the general principles [of *lex mercatoria*] are greatly exaggerated," but he is in the minority in holding this position. *Id.*

is rarely an instrument of oppression . . . ."[159] Indeed, the value of uniform application of the law is strongest where the privacy of arbitration might allow the strong to oppress the weak or the interests of third parties to be ignored.[160] Some commentators go so far as to say that *lex mercatoria* "does not provide a sufficiently substantial and solid system. It cannot be called a legal order and it is therefore not fit as a basis for settlement of legal disputes."[161]

This is true even aside from the effect such systems have on the parties in a particular dispute, because arbitration by *lex mercatoria* or *amiable composition* cannot provide a sufficient basis for community behavior. One of the functions of adjudication is the delineation of acceptable goals, values, and norms for business conduct. In contrast, a system which does not always require a reasoning for the result, and which, even when it does, does not often publish the reasoning, leaves the community without any guidance and encourages inconsistent application. Consequently, arbitration under such systems neither meets the needs of international business practitioners nor protects vital community interests.[162]

Even if *lex mercatoria* and *amiable composition* arguably function as mere conduits by which the law is enriched and expanded to allow greater room for concepts not encompassed by one particular domestic law, one must question whether arbitration is the proper forum for such change. Besides the loss of predictability and certainty for the parties and for the community at large, the lack of precedential value created by the arbitral tribunal makes it an unlikely place for the creation and elaboration of the "general principles" involved in *lex mercatoria* or *amiable composition*. Particularly in common law countries, where precedent is the foundation upon which growth in the law depends, the relative imprecision of such abstract systems provides insufficient support for this growth.[163] In fact, the absence of precedential momentum is not surprising, since arbitrators, and perhaps the parties as well, are much more concerned with finding a solution appropriate for the particular circumstances of their case than with the consequences of the award on the evolution of the law.[164]

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[159] *Id.* at 173 (quoting F.A. Mann, *Lex Facit Arbitrum*, *in* INTERNATIONAL ARBITRATION: LIBER AMICORUM FOR MARTIN DOMKE (Martinus Nijhoff, The Hague, 1967)).

[160] RESOLVING DISPUTES, *supra* note 30, at 87. This problem may be even more significant in a system where *amiable composition* truly does approach mediation. See discussion on mediation in GOLDBERG ET AL., *supra* note 118, at 160.

[161] Lando, *supra* note 2, at 752.

[162] *See, e.g.*, Park, *supra* note 140, at 118.

[163] At least one author contests this view, stating that "arbitration [in general] will in all probability gradually assume the same features as the justice administered by the courts." DAVID, *supra* note 18, at 106.

[164] *Id.* at 352. Nevertheless, one scholar argues that because arbitrators do not risk being overruled for errors in their legal reasoning, they "can be expected to give

C. *Regulation by Review*

If the parties to an arbitration truly seek individual rather than community justice, it must be noted that arbitration, particularly by *lex mercatoria* or *amiable composition*, is a vastly uncontrolled and unchecked institution. As noted in Part II above, the parties to an international arbitration (or the country involved) generally exclude the jurisdiction of the national courts to review the arbitrator's decision on matters of law.[165] As a consequence, an arbitrator has the ability to abuse, misconstrue, or improperly invoke the powers of *lex mercatoria* or *amiable composition* without risking judicial review or reprimand. This result bears "[t]he specter of an arbitrator masking infidelity to his mission with a catch-all phrase of uncertain content."[166]

This desire to free international arbitrations from second-guessing or *de novo* review by the courts is understandable[167] and must be satisfied to some extent. However, total freedom from control may lead to greater unfairness than the solution seeks to remedy.[168] The losing party in an arbitration where the arbitrator has exceeded the granted authority, either by incorrectly applying *lex mercatoria* or *amiable composition* or by applying these systems without the permission of the parties, has no recourse in the country where or at the time that the award is entered. Instead, the party must raise the matter in each country where the award is sought to be enforced,[169] and even there the party may have enforcement problems in a jurisdiction which requires the arbitrator to follow

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reasoned awards more frequently, thereby contributing to the development of a modern 'law merchant,' or *lex mercatoria*." RESOLVING DISPUTES, *supra* note 30, at 88.

[165] *See* discussion *supra* Part IIA, specifically text accompanying notes 50, 65, 69-72, 83-91, 99-105.

[166] Park, *supra* note 140, at 111.

[167] For example, the line between mere error of law and excess of authority is unclear, even for a judge, and the judge who attempts to correct the latter problem rather than the former may in fact be imposing his own conclusions on the merits of the dispute. *Id.* at 119. In addition, long delays in collection of an award, erosion in the original value of the award due to high inflation and interest rate accumulation over that delay, and increased legal fees have all been cited as reasons to avoid judicial review. Pointon & Brown, *supra* note 70. Some commentators say even preventing appeal on the merits is too great a sacrifice of the parties' rights and is too risky in terms of excess of an arbitrator's authority. *See, e.g.*, Lowenfeld, *supra* note 4, at 133 ("[l]ack of appeal on the merits of arbitral awards in the United States makes arbitration seem to some like a 'black hole' to which rights are sent and never heard from again"). Denial of review for international arbitrations seeks to avoid these risks.

[168] Total freedom may also ignore the interests national courts have in "ensuring the integrity of proceedings conducted within their national borders" and in avoiding devaluation of these awards abroad. Park, *supra* note 3, at 1795.

[169] Park, *supra* note 140, at 112-13.

substantive national law in deciding the dispute.[170] Moreover, the losing party as claimant will have no enforcement forum at all in which to contest the award, because there will be no award to enforce; the party instead will be forced to resort to litigation or a second arbitration.[171]

IV. CONCLUSIONS

Clearly, the strongest argument for the application of *lex mercatoria* or *amiable composition* in international arbitration is the need of the international business community for systems which allow departure from national rules. This need arises, some practitioners assert, because (1) a national rule may have an unexpected impact on a long-term contract; (2) national legal systems are necessarily one-sided; and (3) national laws are generally meant for domestic "consumption" rather than application in the international context.[172]

Nevertheless, one must recognize that "the law tends to respond to social realities,"[173] so that the need for explicit "equitable" systems is greatly diminished. In fact, one scholar argues that references to such systems are already implicit in the general agreement to submit to international arbitration.[174] Further, even the disreputed legal rules do not establish any certainty of result, and courts often adjust rules to the facts in order to reach a more equitable result.[175] From this perspective, there is no need to look to *lex mercatoria* or *amiable composition* to provide flexibility within the boundaries of the law.

Indeed, if the international business community seeks a set of rules better suited to the parties' needs, then parties should not stop half-way at arbitration, and should move to the mediation or conciliation context. With those processes, the parties can ensure a focus on their own sense of justice rather than on that of the arbitrator. This restriction is necessary for two reasons: first, equitable principles arguably "cannot be interpreted in the abstract; [they] refer back to the principles and rules which may be appropriate in order to achieve an equitable result;"[176] second, the achievement of true justice cannot be accomplished through a method by which the arbitrator is allowed to impose a personal sense of

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[170] Stein & Wotman, *supra* note 50, at 1714.

[171] Park, *supra* note 140, at 113.

[172] *Cf.* Kerr, *supra* note 19; Park, *supra* note 140; Lando, *supra* note 2; ICC ARBITRATION, *supra* note 17.

[173] Juenger, *supra* note 15, at 219.

[174] Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny, in* LEX MERCATORIA AND ARBITRATION 13 (Thomas E. Carbonneau ed., 1990).

[175] *Id.*; Park, *supra* note 140, at 117.

[176] Highet, *supra* note 6, at 625 (citing Case Concerning the Continental Shelf (Tunis. v. Libya), 1982 I.C.J. 18, 59 (Feb. 24)).

equity, for the security of legal relations would thereby be reduced, and arbitrary decisions would abound.[177]

One may question whether such decision-making in fact approaches interference with a contractual relationship.[178] Indeed, Professor Highet suggests that in the effort to avoid nationalization, the negative choice of law clause "has resulted in a general state of confusion."[179] The protections afforded by the fact that the parties themselves choose the arbitrators and by the (unlikely) refusal to enforce the award are insufficient in the face of a system which does not always require the arbitrator to reveal his reasoning. Essentially, the supposed "self-regulation of international traders"[180] exercised in arbitration cannot be trusted.

Another justification for permitting resort to *lex mercatoria* or *amiable composition* is party autonomy and expectations; that is, parties to international contracts are generally relational rather than adversarial, thus desiring autonomy and fairness rather than a strict legal interpretation of their rights and duties. Why shouldn't courts give effect to the parties' choice to empower the arbitral tribunal to disregard the law and resolve the dispute according to its own sense of fairness and good conscience?[181] Party autonomy is certainly not an evil to be avoided. Yet, if the parties seek to exclude any contact with the laws ordinarily governing arbitration or adjudication, and if they seek a decision which serves only to bind them contractually,[182] then again mediation or conciliation is the proper forum.

The viability of international arbitration presupposes that the systems which make the process effective also ensure its integrity. Nevertheless, the apparent trend toward transnational norms and equity beyond the law, arising out of the effort to maintain the effectiveness of arbitration, paradoxically hurts both the parties and the community interests it seeks to protect. A loss in confidence in the arbitration process itself cannot be far behind. In attempting to design an alternative dispute resolution system that is both international and neutral, the advocates of *lex mercatoria* and *amiable composition* have effectively carved predictability and uniformity out of existence, replacing them with subjective systems that serve only the interests of the arbitrator and are inconsistent both in application and effect. Professor Park, though perhaps unduly extreme in his suggestion, makes this point bluntly, stating that the unconstrained subjectivity of *lex mercatoria* and *amiable composition* "calls to mind the

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177 DAVID, *supra* note 18, at 353.

178 *Id.* at 69.

179 Highet, *supra* note 6, at 628.

180 DE LY, *supra* note 8, at 216.

181 Kerr, *supra* note 19, at 400.

182 As Professor Highet states, "[t]he only way in which a contract can exist independently of a legal system is to consider it as a voluntary compact operating by virtue of the collective will of the parties." Highet, *supra* note 6, at 614.

1935 National Socialist legislation in Germany, which permitted judges to punish violations of 'sound popular instinct'. . . . This empty expression allowed courts to reflect the Fuhrer's will, setting an extreme example of *adjudication without rules*."[183]

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[183] Park, *supra* note 140, at 117 (emphasis added).