THE NEW LEX MERCATORIA AND THE HARMONIZATION OF THE LAWS OF INTERNATIONAL COMMERCIAL TRANSACTIONS

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I. INTRODUCTION

International business occurs within a myriad of independent national legal systems. Each system reflects a unique set of historical and cultural circumstances which result in regulatory variation and contradiction thereby discouraging the growth of international commerce. In an effort to encourage trade, nations and the international business community have worked toward developing a consistent international regulatory framework.

This Article analyzes, in four stages, the development of what is commonly referred to as the New Lex Mercatoria. First, the Article examines the Lex Mercatoria, the body of customs and practices followed by European medieval merchants which is the historical predecessor of the New Lex Mercatoria. Second, the Article compares two approaches to developing the New Lex Mercatoria: the national approach, largely dependent upon national legislation, and the non-national approach, dependent upon commercial self-regulation. Third, the Article addresses the importance of freedom of contract to commercial self-regulation, demonstrating that both the self-regulatory contract and international commercial arbitration, founded on an expansive freedom of contract, are critical to the development of the New Lex Mercatoria.

Finally, the authors explore the role of arbitral decision making in the determination and application of the customary law of the New Lex Mercatoria. By scrutinizing a number of arbitraton awards published by the International Chamber of Commerce[1] (which decide issues of *force majeure*

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[1] The International Chamber of Commerce (ICC) is a private association formed under French law with its headquarters in Paris. It represents the interests of international business in general and is composed of numerous National Committees which are located in their respective countries. The major goal of the ICC is to assist in the unification of international commercial law. To this end it has established uniform rules and standard contract terms which are used extensively in the contracts of the international business community. *See generally* INTERNATIONAL CHAMBER OF COMMERCE, WHAT THE ICC IS; WHAT IT DOES; HOW IT WORKS (1970).

The ICC has also established its own Court of Arbitration. The Court has created and the validity of currency stabilization clauses) certain broad principles of arbitral decison making begin to emerge. These principles demonstrate that arbitrators, when released from the dictates of national law, are mainly concerned with giving effect to clearly expressed contracts, but that the demands of commerce and the norms of a particular trade will also play an important interpretive role in the arbitration process. Though the contours of these decision making principles still remain quite vague, it is hoped that with increased publication of arbitral awards, arbitral decision making will develop as an important source of the New Lex Mercatoria.

II. HISTORICAL BASIS OF THE NEW LEX MERCATORIA

The inchoate nation-state system which characterized Western European medieval society was conducive to the development of an autonomous merchant law.[2] Feudal society was tightly-knit, tied to the land and isolated. The medieval merchant, however, was geographically dynamic, and encountered a host of different and conflicting lawmaking authorities.[3]

Sovereigns throughout the European continent and England adopted a laissez-faire approach toward the merchant class because of the increased tax revenues and access to foreign goods provided by the merchant class. Merchants were permitted to regulate their own affairs provided they did not infringe upon local concerns.[4] In addition, sovereigns established special

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its own rules of procedure and plays a key role in the administration of international arbitrations. Although the ICC Court of Arbitration is by no means the only arbitration institution which administers international arbitrations, it has proved to be the most successful in terms of overall prestige and number of arbitrations carried out under its auspices. *See generally* INTERNATIONAL CHAMBER OF COMMERCE, GUIDE TO ICC ARBITRATION (1972).

[2] For a discussion of the medieval Law Merchant, see generally Trakman, *The Evolution of the Law Merchant: Our Commercial Heritage* (pts. 1 & 2), 12 J. MAR. L. & COM. 1, 153 (1980); Honnold, *The Influence of the Law of International Trade on the Development and Character of English and American Commercial Law*, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 70 (C. Schmitthoff ed. 1964); Berman and Kaufman, *The Law of International Commercial Transactions (Lex Mercatoria)*, 19 HARV. INT'L L. J. 221 (1978) [hereinafter cited as Berman]; von Caemmerer, *The Influence of the Law of International Trade on the Development and Character of the Commercial Law in the Civil Law Countries*, in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 88 (C. Schmitthoff ed. 1964); A. KIRAFLY, POTTER'S HISTORICAL INTRODUCTION TO ENGLISH LAW AND ITS INSTITUTIONS 183-210 (4th ed. 1958); Scrutton, *General Survey of the History of the Law Merchant*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 7 (1909); Burdick, *Contributions of the Law Merchant to the Common Law*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 34 (1909); Brodhurst, *The Merchants of the Staple*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 16 (1909); T. PLUCKNETT, A CONCISE HISTORY OF THE COMMON LAW 657 (5th ed. 1956).

[3] A. KIRAFLY, *supra* note 2, at 183.

[4] *Id.* at 184-88

commercial courts for merchants to settle their disputes.[5] The merchant judges presiding at these courts acted much like modern arbitrators; they relied on norms of commercial behavior and their familiarity with the needs of commerce to resolve conflicts.[6] These norms reflected the need for flexibility and trust within a dynamic environment. Because of their familiarity with the needs of commerce, these merchants applied a law differing from that applied by local adjudicators who were bound by regional needs and a static feudal society.[7] In the merchant courts the crucial principles of good faith dealing and the binding nature of agreements[8] helped to produce more specific rules and determine the growth of new commercial instruments. This evolution of rules and instruments facilitating trade is exemplified by the abandonment of contractual formalities,[9] the legal recognition given to bearer bills of exchange,[10] and the protection of good faith purchasers from the claims of original owners.[11] The law evolving from the merchant courts is what we now call the Lex Mercatoria.[12]

The Lex Mercatoria was largely self-enforcing; a party who refused to comply with a merchant court's decision risked his reputation[13] and could be excluded from trading at the all-important fairs where the merchant courts were located. Parties to a dispute rarely needed the aid of the local sovereign to enforce a merchant court's decision. The ability of the merchant class to both generate and enforce its own norms of behavior allowed it to achieve a large degree of independence from these local sovereigns.

As the modern nation-state developed during the sixteenth century, rulers of sovereign states began to regard the autonomous Lex Mercatoria as an external threat to internal cohesiveness. In an attempt to subject all citizens

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[5] In England, for example, the sovereign granted individuals franchises to hold fairs and merchant courts. Both the steward of the franchise owner and merchants presided at these courts. In additon, the Statue of the Staple of 1353 created "Staple Towns" which held monopolies in certain articles of trade, and special courts to settle merchant disputes. *Id.* at 189-90. Similar merchant courts were established on the European continent. Thayer, *Comparative Law and the Law Merchant*, 6 BROOKLYN L. REV. 139, 143-44 (1936).

[6] *See* Trakman, *supra* note 2, at 15.

[7] *Id.*

[8] *See id.* at 7.

[9] *See* Berman, *supra* note 2, at 225-26.

[10] *Id.; see also* Jenks, *The Early History of Negotiable Instruments*, in 3 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 51 (1902) (discussing the early history of negotiable instruments).

[11] Berman, *supra* note 2, at 225-26.

[12] The importance of this law was evident throughout Europe. For instance, the English Statute of the Staple of 1353 delared that merchants "shall be ruled by the law merchant as to all things touching the Staple and not by the common law of the land." A. KIRALFY, *supra* note 2, at 184. Similar edicts were promulgated in Paris in 1563 and Nuremburg in 1508. Thayer, *supra* note 5, at 143.

[13] Trakman, *supra* note 2, at 2, 7.

to a single national law,[14] the privileged status afforded merchants during the medieval era was terminated. Merchant courts were merged into national court systems at the same time.[15] However, the innovations of the Lex Mercatoria were not ignored; rather, they were assimilated into national law to the extent that they were compatible with national policies.[16] Unfortunately, the assimilation of the Lex Mercatoria into separate legal systems rendered it subject to the idiosyncracies of each nation-state.[17] The Lex Mercatoria ceased to exist as a homogeneous and autonomous body of law.

Centuries later, the disintegration of the European empires after World War II produced a plethora of independent nations with unique laws, courts, and procedures for regulating commercial transactions. The post-war global fragmentation contrasts sharply with the increasingly international character of the world's economy. Multinational enterprises, the vehicles of much of the world's commerce, are normally associated with particular countries, but are essentially international in character.[18] They are analagous to the medieval merchants whose activities were superimposed on a patchwork of local sovereignties and were hardly amenable to local regulation. Not surprisingly, this environment has fostered the development of a New Lex Mercatoria.

Like the feudal lords of the medieval period, today's nations realize that piecemeal regulation of international commerce through the application of independent national laws impedes the growth of global trade. The growth of international commerce and a New Lex Mercatoria is not necessarily advantageous to all nations; if a nation perceives this growth to be contrary to its interests it will continue to operate independently.[19] Nevertheless, as long as their self-interests are aligned with those of other nations, nations are likely to cooperate in creating a harmonious international regulatory framework.

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[14] *See id.* at 154.

[15] Lord Coke drastically cut back the authority of the admiralty court and other courts which had looked to the Lex Mercatoria as a source of law. *See* T. PLUCKNETT, *supra* note 2, at 663; Thayer, *supra* note 5, at 142-44.

[16] The Lex Mercatoria was absorbed into English common law through Lord Mansfield's use of special verdicts rendered by merchant juries. *See* Honnold, *supra* note 2, at 72. In France, large portions of the Lex Mercatoria were incorporated into Colbert's Ordonnance sur le commerce. *See* von Caemmerer, *supra* note 2, at 90.

[17] Because of their common source, national commercial laws necessarily shared certain fundamental similarities. *See* Berman, *supra* note 2, at 221. However, these similarities were limited. *See* Thayer, *supra* note 5, at 146. For example, the French bill of exchange remained a simple substitute for cash transfers, whereas its English counterpart developed into more of a credit device. *Id.* at 149-50.

[18] *See generally* S. ROBOCK, K. SIMMONDS & J. ZWICK, INTERNATIONAL BUSINESS AND MULTINATIONAL ENTERPRISES (rev. ed. 1977).

[19] For an interesting discussion of the tension between the creation of a New Lex Mercatoria and the development goals of third world countries see Note, *A Modern Lex Mercatoria: Political Rhetoric or Substantive Progress?*, 3 BROOKLYN J. INT'L L. 210 (1977).

III. Approaches to Harmonization

There are two basic approaches to the harmonization of the laws affecting international commercial transactions. The first, the national approach, is aimed at establishing similar or identical national commercial laws.[20] The second, the non-national approach, focuses on the development of a single commercial law which is largely autonomous from national laws. It is this autonomous commercial law which is generally referred to as the New Lex Mercatoria.

A. *The National Approach*

The national approach is based on the classical theory of international law. Under this theory nations are the only subjects of international laws and are similarly the only entities capable of making law.[21] When the national approach is used, nations adopt similar commercial laws, thereby harmonizing national laws. This result may be effected in three ways: 1) Nations can, by way of international treaty, reciprocally bind themselves to uniform commercial laws; 2) Nations can individually adopt model laws drawn up by international organizations; and 3) Nations can independently look to international business practices as common substantive guidelines in implementing their commercial laws.

1. Treaties

Of these three methods, international treaties are, undoubtedly, the most effective. According to international law, the provisions of a treaty are binding on all of the parties.[22] In addition, in many nations, the ratification of a treaty automatically incorporates all of its provisions into national law.[23] These provisions therefore become binding at both the international and

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[20] For authorities who adopt a national approach see Trammer, *The Law of Foreign Trade in the Legal Systems of the Countries of Planned Economy,* in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 41 (C. Schmittoff ed. 1964); Tallon, *The Law Applied by Arbitration Tribunals—II,* in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 154 (C. Schmitthoff ed. 1964).

[21] "So long . . . as the international community is composed of states, it is only through an exercise of their will, as expressed through treaty or agreement or as laid down by an international authority deriving its power from states, that a rule of law becomes binding upon an individual." P. JESSUP, A MODERN LAW OF NATIONS 17 (1956). *See* G. SCHWARZENBERGER & E.D. BROWN, A MANUAL OF INTERNATIONAL LAW 8 (1976) [hereinafter cited as SCHWARZENBERGER].

[22] G. SCHWARZENBERGER, *supra* note 16, at 24-25; *see generally* D. GREIG, *International Law* 450-69 (2nd ed. 1976) (discussing the international law of treaties).

[23] Such is the case, for example, in the German Federal Republic and in the United States (in the event of so-called self-executing treaties). In England, on the other hand, specific enabling legislation is necessary to give treaties internal effect. *See* D. GREIG, *supra* note 22, at 60, 68-70, 79.

national levels. Uniformity is assured by a single agreement and effectuation is made reasonably certain by the force of international law and, in most cases, national law.[24]

Unfortunately, few treaties regulating international commerce have been widely ratified.[25] Countries in different stages of development and with divergent economic policies are rarely able to agree on the content of proposed treaties. Those treaties that have been ratified are often between countries that lack such differences.[26]

2. Model Laws

The model law process involves the writing of draft laws considered both suitable for international commerce and acceptable to individual nations. Once drafted, these laws may be adopted in whole or in part by any nation. A model law is usually drafted by working groups composed of legal and commercial experts from all over the world. These groups, drawing on both their knowledge of their own individual national legal systems and the requirements of international commerce, are best suited to drafting model laws capable of widespread national adoption.

A number of permanent institutions have focused their attention on the drafting of model laws. Among the most influential is the United Nations Commission on International Trade Law (UNCITRAL)[27],which is dedicated to the harmonization of international commercial law, and has focused

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[24] This uniformity, however, may be strictly textual and short-lived. Uniform textual content is likely to be subject to different judicial interpretation in different countries. Moreover, on a national level the treaty may be subject to subsequent and contradictory national legislation.

[25] As Professor Schmitthoff indicates, "[t]he establishment of an international convention on some aspects of international trade law is usually a slow and arduous process and, even if the convention is eventually signed, it is by no means certain that it will find favour with the international business community." Schmitthoff, *Nature and Evolution of the Transnational Law of Commercial Transactions*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 25 (N. Horn & C. Schmitthoff eds. 1982).

An exception to this trend is the 1958 New York Convention on the Recognition and Enforcement of Arbitration Awards of 1958, June 10, 1958, 21 U.S.T. 2517, T.I.A.S. 6997 [hereinafter cited as the New York Arbitration Convention], one of the most successful treaties regulating international commerce. As of 1983, 62 countries were parties to the convention.

[26] For example, the Eastern European countries with state-planned economies forming part of the Council for Mutual Economic Assistance (CMEA) have achieved a high degree of uniformity in their commercial regulation by way of agreement. *See* Schmitthoff, *supra* note 25, at 25.

[27] The United Nations Commission on International Trade Law (UNCITRAL), The International Institute for the Unification of Private Law (UNIDROIT), The Hague Conference on Private International Law and The Council for Mutual Economic Assistance (CMEA) are the best known of these institutions.

particularly on the areas of international payments, sales, shipping and arbitration.[28]

The model law process represents a compromise between the treaty process and purely unilateral action by nations. Unlike the treaty process, no international obligation is entered into by a nation which participates in the model law process. Nonetheless, participation with other nations in the drafting of a model law is more likely to produce a draft that is widely acceptable. Although the model law process lacks the force of a treaty, its flexible approach is more likely to produce similar, if not identical, national commercial laws.

3. Independent Examination of International Business Practices

The implementation of national commercial law based on an independent examination, by each nation, of international business practices is the least effective means of harmonizing commercial law. Cooperation with other nations, in an attempt to produce similar laws, is abandoned. Instead, nations independently combine international business practices and domestic policies when enacting commercial legislation. Undoubtedly the fact that countries look to a common source of international business practices is responsible for numerous similarities among national commercial legislation.[29] However, their failure to work together to establish other common rules of law has resulted in regulatory inconsistency. Therefore, independent examination of international business practices by each nation cannot be relied on as a means to harmonize the laws regulating international commercial transactions.

B. *The Non-National Approach: New Lex Mercatoria*

Commercial self-regulation based on expansion of the businessman's freedom to regulate his affairs by contract is another avenue by which the laws affecting international business transactions could be harmonized. National paternalism embodied in the mandatory application of national laws to international commerce transacted within national boundaries would be limited. Instead, businessmen engaging in international commerce would, in most cases, be able to avoid national laws and courts by detailed contracting and submitting to arbitration. National law would intercede only to the extent necessary to ensure that enforcement of arbitration awards does not contradict fundamental principles of public policy.[30]

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[28] *See* Herrmann, *The Contribution of UNCITRAL to the Development of International Trade Law*, in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 35 (N. Horn & C. Schmitthoff eds. 1982) (discussing UNCITRAL's activities in various substantive areas). For examples of other such international organizations see *supra* note 27.

[29] *See* Berman, *supra* note 2, at 221-23.

[30] Public policy will vary from country to country. Generally, national courts will

A non-national New Lex Mercatoria[31] would be encouraged if businessmen submit their disputes to arbitration to be decided on the basis of the prevailing standards of the international business community and not national law. These standards would reflect customs as well as general principles of law.[32] The non-national New Lex Mercatoria would be a single autonomous body of law created by the international business community.

The non-national approach toward the harmonization of international commercial law is less dependent on national action than is the national approach.[33] However, given the world's present political structure, in particular the overwhelming power of the nation state, any so-called non-national legal system can only exist with the sponsorship, or at least tolerance, of nations. Such a legal system is therefore best described as autonomous[34] from, rather than independent of, national control.

Non-national harmonization is a two step process: first, nations must permit businessmen to avoid the application of national law; and second, a coherent body of law (the New Lex Mercatoria) must be established as an alternative.

Parties can avoid the application of supplementary national law to the

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refuse the enforcement of arbitration awards when such enforcement would contradict national notions of morality and justice. Such notions are usually embodied in national criminal laws, family law, laws that protect weaker parties, and so forth. For a discussion of national court interpretation of public policy within the framework of the New York Arbitration Convention, see A. JAN VAN DEN BERG, THE NEW YORK ARBITRATION CONVENTION OF 1958, at 359-82 (1982).

[31] The term "non-national" is employed to indicate that the source of this body of law is neither national (*e.g.*, national legislation) nor international (*e.g.*, based on treaty); rather it is a *sui generis* third category of law. Nonetheless, at its present stage of development, the New Lex Mercatoria is ultimately linked to national law which still controls the ability of parties to contract. Hence the authors refer to it as an autonomous, not independent, legal system. *See infra* text accompanying note 34.

[32] For the purposes of this paper, the authors' use of "custom" is similar to the American Uniform Commercial Code's definition of "usage of trade": "any practice or method of dealing having such regularity of observance in a place, vocation or trade as to justify an expectation that it will be observed with respect to the transaction in question." U.C.C. § 1-205(2) (1977). Custom here refers to the actual practices and dealings of international businessmen. Formulation and codification of these practices and usages by international organizations and trade groups may reflect such custom, but are not necessary to give it that status. "General principles of law" refer to those legal principles and rules that are common to the world's major legal systems.

[33] For examples of the non-national approach, see Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives,* 106 JOURNAL DU DROIT INTERNATIONAL [CLUNET] 475, 497-505 (1979); Trakman, *supra* note 2, at 173; B. Cremades, Arbitration and Business 11 (March 1978) (paper presented at the Sixth International Arbitration Congress, Mexico City).

[34] Autonomy has been defined as "the power or right of self-government, esp. partial self-government." CHAMBERS 20TH CENTURY DICTIONARY 83 (1983).

extent that they are free to contract.[35] So long as they do not infringe upon national public policy[36] parties may contractually establish their own arbitration tribunals, procedures and applicable non-national substantive rules of law. Greater contractual freedom and less restrictive national public policy will allow further avoidance of national law.[37]

Businessmen can also avoid the application of national law by concerted action in the form of trade and professional associatons. These associations, which facilitate market transactions, play key roles in particular industries. For example, they often bring together buyer and seller, establish quality standards, and provide arbitration services.[38] Such associations rarely need to rely on national courts to encourage compliance with their internal norms of behavior and arbitral awards. Rather, they can exclude recalcitrant parties from the association or blacklist them, thereby causing them substantial economic harm.[39] Nonetheless, if these actions do not conform to national

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[35] *See* Réczei, *The Autonomy of the Contracting Parties in International Trade Relations*, in 1 UNIDROIT, NEW DIRECTIONS IN INTERNATIONAL TRADE LAW 65 (1977).

[36] A distinction between a strictly national public policy and a nation's international public policy has recently gained wide acceptance. According to this distinction, a strictly national public policy will apply when predominantly national interests are involved. Such would be the case, for example, in a contract between two parties of the same nationality or where the transaction takes place in and affects only the domestic economy. International public policy comes into play when national interests are less salient and the demands of international commerce are implicated either because of the nature of the transaction or the different nationalities of the parties. International public policy is generally less restrictive of the parties' freedom of contract. For a discussion of this distinction as regards application of the New York Convention see A. JAN VAN DEN BERG, *supra* note 30, at 359-82 (1981). *See generally* J. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 531-82 (1978).

[37] Contractual freedom and national public policy as embodied in mandatory national laws are different sides of the same coin; one begins where the other one ends. For example, because public policy is more broadly defined in a state-run economy than in a free market state, the parties' ability to regulate their affairs by contract is more limited in the state-run economy. Where a market economy nation is involved, public policy and mandatory laws are less extensive and the parties' freedom of contract is greater. *See generally* Réczei, *supra* note 35.

[38] *See* Bonnell, *The Relevance of Courses of Dealing, Usages and Customs in the Interpretation of International Commercial Contracts*, in 1 UNIDROIT, NEW DIRECTIONS IN INTERNATIONAL TRADE LAW 114-15 (1977).

[39] Apart from the economic harm caused by loss of reputation, recalcitrant parties might be excluded from an organized market essential to the carrying on of their business. Bonnel, *supra* note 38, at 115. Daniel Schaetzle stated that the world's largest insurance companies resort almost exclusively to arbitration in settling disputes arising under reinsurance contracts. Arbitration clauses usually provide that insurance experts will act as the arbitrators. Enforcement of these awards by national courts is rarely necessary because failure to comply with the terms of an award will

public policy, the particular association may risk intervention by the state.[40]

Once released from the application of national law the international business community must create a coherent body of non-national law. This non-national law is the New Lex Mercatoria. Like its medieval predecessor the New Lex Mercatoria will be composed of the customs and practices of the international business community. These customs and practices may take a number of forms. They may, for example, be the usages employed within a given commercial sector that, although unwritten, are common practice among the great majority of participants. Such customs and practices, on the other hand, may actually be codified, as is the case in the International Chamber of Commerce's Incoterms.[41] An arbitrator may apply custom and practice when contractually authorized, as a means of contractual interpretation or even as independent sources of law applicable regardless of the parties' express or implicit consent.[42]

A non-national approach to a New Lex Mercatoria has a number of advantages over a national approach.[43] First, a non-national approach can more easily provide needed uniformity to the regulation of international transactions; a single, homogeneous law would be created by the business community. By contrast, under a national approach, model laws, and often treaties, are subject to alteration prior to adoption by individual political systems.[44] Moreover, national courts may interpret the same provisions in different ways.[45]

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result in an economically damaging loss of reputation. Interview with Daniel Schaetzle, Zurich Insurance Group.

[40] It must be remembered that these associations are themselves creations of national law. They obtain their corporate charters from particular nations and work within its legal framework. Therefore they can hardly ignore the dictates of national law. Were such an association to abuse a position of economic or organizational strength it might, for example, run afoul of national laws regulating illegal competition.

[41] *See* F. EISEMANN, USAGES DE LA VENTE (1980). *See generally* Ramberg, *Incoterms 1980,* in 2 THE TRANSNATIONAL LAW OF INTERNATIONAL COMMERCIAL TRANSACTIONS 137 (N. Horn & C. Schmitthoff eds. 1982) (discussing the Incoterms treaty and its backround).

[42] *See generally* Bonnel, *supra* note 38, at 110-16.

[43] Most authorities, however, recognize the need for the intervention of national legal systems in certain areas, such as the protection of parties without adequate bargaining power and the need to guarantee procedural fairness. *See* T. Varady, On the Development of an Autonomous Law of International Trade Through International Commercial Arbitration (1969) (unpublished S.J.D. dissertation in Harvard Law School International Legal Studies Library); W.W. Park, *The Influence of National Legal Systems on International Arbitration: The Paradigm of English Arbitration Law* 30 (March 1982) (paper presented at the Sokol Colloquium on Private International Law, Charlottesville, Virginia).

[44] *See* Kopelmanas, *International Conventions and Standard Contracts as Means of Escaping From the Application of Municipal Law—II,* in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 118, 120-21 (C. Schmitthoff ed. 1964).

[45] *See* O. GILES, UNIFORM COMMERCIAL LAW, 27-50 (1970).

Second, because of its reliance on custom, a non-national approach is far more flexible than a national approach. The reliance of the national approach on national legislation or international conventions creates a more rigid and static law.[46] For instance, amending national legislation requires compliance with the domestic political process. Localized interests, incompatible with international commercial requirements, may therefore affect the amendment.[47] Furthermore, amendments would have to be coordinated on a world-wide basis to maintain uniformity of national laws. The process of writing and ratifying a treaty is similarly cumbersome.[48]

However, the non-national approach, which involves extensive self-regulation within the international community, has certain flaws. The non-national approach is particularly weak when contracting parties deal with matters that fall within the scope of national public policy. Where contractual provisions do not correspond with a particular national public policy, a party will be unable to rely on that nation's courts to enforce the contract. Nor can the parties count on arbitration to give effect to such provisions, because the arbitration award itself will be subject to national court examination at the time of attempted enforcement. Even more disconcerting is the lack of consistency likely to be found when national public policies are not harmonized by treaty. Contracting parties may well find that their rights vary depending on the national jurisdiction.

By contrast, the national approach, as embodied in the international treaty or model law process, is particularly amenable to dealing with matters of public policy.[49] Rather than deal with public policy on a case-by-case basis, nations may negotiate treaties or model laws that comprehend national policies and create uniform rules of conduct for the international business community. Nonetheless, such a procedure is likely to be difficult and is still subject to the inflexibility noted earlier.

Because of the practical limitations imposed on the non-national approach by national public policy, the former must necessarily be complemented by international treaties, model laws and national legislation. The national approach will be critical in defining, in a uniform manner, those areas in which a non-national New Lex Mercatoria can develop. The two approaches are best seen as complementary rather than mutually exclusive.

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[46] Trakman, *supra* note 2, at 174

[47] *Cf.* Kopelmanas, *supra* note 44, at 120-21 (noting the difficulty in altering internal laws to comply with a uniform international standard).

[48] Professor Schmitthoff notes, for example, that the Geneva Conventions on the Unification of the Law relating to Bills of Exchange (1930) and the Geneva Conventions on the Unification of the Law relating to Cheques (1931) took almost 50 years each to prepare. Schmitthoff, *supra* note 25, at 25.

[49] *See generally* Kopelmanas, *supra* note 44. Note how Article V of the New York Arbitration Convention, *supra* note 25, leaves the criteria for enforcement somewhat open-ended by allowing signatories to deny enforcement to arbitration awards that contradict public policy. *See infra* note 96. However, what constitutes public policy is not defined.

IV. Freedom of Contract: Cornerstone of a Non-National New Lex Mercatoria

Freedom of contract is a delegation by the state to individuals of the power to enter into binding contracts.[50] In exercising this power, parties are free to define their contractual relationships subject to certain limits and procedures.[51] An expanded use of this power in international transactions is essential to the development of a non-national New Lex Mercatoria because it permits parties to enter into self-regulatory contracts and determine their disputes by arbitration.

A. *The Self-Regulatory Contract*

Expanded party autonomy allows a broader range of contractual relations and flexible self-regulation by the business community. Parties may establish their own adjudicatory bodies to both interpret contracts and apply a commercial customary law of non-national origin.[52] Detailed contractual provisions minimize the need for supplementary national law.

Contracting parties enjoying extensive authority to regulate their own relationships may resort to the use of comprehensive "self-regulatory contracts." These contracts anticipate a wide variety of future events, minimizing the need to go beyond the law of the contract in order to determine future legal relationships. Besides being useful tools in avoiding the application of supplementary national law, self-regulating contracts permit parties to create the legal framework most suitable to their particular trade and to international business in general.

Standardized self-regulatory contracts have been drafted by international organizations, such as the United Nations Economic Commission for Europe (ECE), Federation International des Ingenieurs Conseils (FIDIC), and the Grain and Feed Trade Association (GAFTA).[53] In drafting these documents, these organizations have sought to crystallize the customs and practices of particular trades and commerical sectors. Where these contracts are repeatedly used within a given commercial sector, they take on a permanence and stability that goes far beyond any particular transaction.[54]

Standardized contracts often contain arbitration clauses governing the settlement of subsequent disputes. To promote uniform interpretation, these clauses frequently appoint the institution that wrote the standardized con-

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[50] On freedom of contract, see generally J. Calamari & J. Perillo, The Law of Contracts 4-6 (2d ed. 1977).

[51] H.L.A. Hart, The Concept of Law 28 (1961).

[52] *See generally* J. Lew, *supra* note 36, at 116-20.

[53] *See generally* C. Schmitthoff, Schmitthoff's Export Trade: The Law and Practice of International Trade 51-53 (7th ed. 1980).

[54] In a series of interviews conducted by author Steven Plehn, French and German corporate counsel noted the strong tendency of parties to use such standardized contracts and the difficulties present in negotiating their alteration.

tract to administer the settlement of subsequent disputes.[55] Failure to abide by an arbitration award in these circumstances may lead to blacklisting and virtual exclusion from the trade.[56]

Accordingly, expanded party autonomy contributes to international businessmen's ability to create some of the fundamental elements of an autonomous legal system: uniform law, adjudicatory bodies, and sanctions for non-compliance with law. Nevertheless, self-regulatory contracts and party autonomy have certain limits.

B. *The Limitations of the Self-Regulatory Contract*

Even the most detailed of self-regulatory contracts must rely to some extent on national law. For instance, when considering self-regulatory contracts, judges and arbitrators often must refer to national law to answer fundamental contractual issues of capacity, formality and validity.[57] In addition, it may become necessary for contracting parties to resort to national court systems to enforce a contract or an arbitration award. Arbitrators may also have to go beyond the four corners of the self-regulatory contract when parties have neither anticipated future events nor provided for changes in their legal relationship.[58] For example, if a contract is silent as to the circumstances under which parties will be excused from their contractual obligations, adjudicators may need to look beyond the contract to find supplementary law. When the contract is silent on a particular issue and the parties have failed to choose a supplementary national law, an adjudicator may have to apply conflict of law analysis to determine applicable law.

Generally, nations permit contracting parties to determine, in a choice of law clause, the law applicable to their contract.[59] Most nations permit

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[55] For example, GAFTA's standard contract provides for GAFTA administered arbitration. For a discussion of a similar "closed circuit" arbitration clause in the Japan Shipping Exchange standard contract, see Tanimoto, *Necessity of Establishment of Custom and of Arbitration Materials* (Moscow, 1972) (colloquim sponsored and published by USSR Chamber of Commerce and Industry) (on file at the Boston University International Law Journal).

[56] T. Varady, *supra* note 43, at 41-42. The United Nations ECE Model Contract for the Sale of Cereals, No. 5A, authorized an arbitration institution to publish the names of parties who failed to comply with awards. In addition, should a non-complying party to an earlier arbitration later demand that another come to arbitration, that respondent may refuse. Goldstajn, *International Conventions and Standard Contracts as Means of Escaping from the Application of Municipal Law—I,* in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 103, 113 & n.39 (C. Schmitthoff ed. 1964). On the use of blacklisting see Cremadas, *supra* note 33, at 22.

[57] Goldman, *supra* note 33, at 483.

[58] *See* Kopelmanas, *supra* note 44, at 124-25.

[59] *See* Schmitthoff, *The Law of International Trade, its Growth, Formulation and Operation,* in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 3, 29-30 (C. Schmitthoff ed. 1964).

contracting parties to make any good faith choice of law unless its application conflicts with the public policy of the forum.[60] Still other countries require the parties to choose a law that has a substantial relationship to the transaction in question.[61]

A minority of nations provide parties far less contractual freedom to choose an applicable national law. The Latin American countries are most restrictive, and consider application of another nation's law to transactions involving their national interests to be an affront to national sovereignty.[62] This view is codified in Latin American statutes, constitutions and treaties, and often precludes the application of foreign law in both private contracts[63] and state contracts.[64] Latin American countries are noticeably absent from the list of countries ratifying the 1958 New York Convention for the Recognition and Execution of Foreign Arbitral Awards (New York Arbitration Convention), which permits contracting parties extensive freedom concerning choice of law.[65]

Obviously, contractual choice of law is difficult when parties are unable to agree on one national law. Even if agreement is reached, nations may not always accept the choice of law. If nations accept the choice, the national law may not be suited to the particular transaction. Rather, it may have been chosen because it was considered neutral. This last difficulty may be resolved if the New Lex Mercatoria is chosen by the contracting parties as the applicable law of the transaction.

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[60] *Id.* at 32

[61] *Id.* at 30-31.

[62] For a discussion of the effects of this policy and the "Calvo Doctrine," see Abbott, *Latin America and International Arbitration Conventions: The Quandary of Non-Ratification*, 17 HARV. INT'L L.J. 131 (1976); Wesley, *The Procedural Malaise of Foreign Investment Disputes in Latin America: From Local Tribunals to Factfinding*, 7 LAW & POL. INT'L BUS. 813 (1975). Latin Amercian insularity extends not only to the applicable law, but also to the tribunal. The Interamerican Juridical Committee opined in 1976 that "American states should refrain from adhering to conventions which in some ways grant such transitional companies or the component companies thereof direct access to international tribunals, including arbitration tribunals, since this would unjustifiably place transnational firms at an advantage to national firms." *See* B. Cremadas, *supra* note 33.

[63] C. SCHMITTHOFF, *supra* note 53, at 29-30.

[64] *See* Abbott, *supra* note 62, at 137.

[65] *See* New York Arbitration Convention, *supra* note 25. Article V(1)(a) provides that recognition and enforcement of an award may be refused if it is proved that "the . . . agreement is not valid under the law to which the parties have subjected it . . . ." Thus, the Convention gives the parties the right to choose applicable law not by express grant, but by implication.

The 1961 European Convention on International Commercial Arbitration, 484 U.N.T.S. 349, also grants parties extensive freedom concerning choice of law. Article VII, in part, states:

> The parties shall be free to determine, by agreement, the law applied by the arbitrators to the substance of the dispute.

C. *Contractual Authorization to Apply the New Lex Mercatoria*

Because of its relative autonomy from national legal systems and the ability of the parties to choose an arbitrator familiar with commercial practices, international commercial arbitration is well-suited to discerning the contours of a New Lex Mercatoria and applying its rules. Parties may contractually provide for such arbitration as a means for settling contractual disputes.[66] However, an arbitrator's power is limited to that which is contractually granted.[67] The parties may specify the regulatory framework arbitrators are to apply in settling disputes.

Few contracting parties expressly provide for the application of the New Lex Mercatoria in their dispute settlement clauses.[68] Arbitrators come to apply the New Lex Mercatoria by means of clauses authorizing them to act as *amiable compositeurs*,[69] apply general principles of law,[70] or apply equi-

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[66] Parties will often prefer arbitration to litigation in a national court for several reasons. First, parties may choose their adjudicator in arbitration. Second, an arbitrator familiar with the practices and technical aspects of a particular commercial setting is probably more capable than a judge of determining applicable customs. *See* Berman, *supra* note 2, at 276. Finally, parties may prefer an arbitrator because he is not constrained by national law; arbitrators have a distinctly non-national perspective and are more capable of weighing general principles of law and the equities of the situation. This is particluarly important since parties to arbitration are often from a number of countries. T. Varady, *supra* note 43, at 32. This non-national perspective was stressed by French and German counsel interviewed by the author; preference for arbitration, as opposed to litigation in a national court, increased as the cultural, political and legal systems of the parties to a contract diverged. S. Plehn, International Commercial Arbitration: A Continental Viewpoint 4 (Sept. 21, 1981) (unpublished report for the London Court of Arbitration) (on file at the Boston University International Law Journal).

[67] The elements of authorization are not entirely clear. Submission to international arbitration without express provision for applicable national law may constitute implied authorization for the arbitrator to apply the New Lex Mercatoria. *See infra* text accompanying notes 75-79.

[68] At present it appears that the term "New Lex Mercatoria" is largely a term employed by academic commentators to describe an actual phenomenon occurring among international businessmen.

[69] *Amiable compositeur* is a French term which is used extensively in international contracting. In English the word is "amicable compounder" and because of its French linguistic and legal roots it appears to be embodied only in Louisiana law within the United States. BLACK'S LAW DICTIONARY 75 (5th ed. 1979) defines it as follows: "In Louisiana law and practice amicable compounders are arbitrators authorized to abate something of the strictness of the law in favor of natural equity." This definition is considerably narrower than the meaning generally understood in international trade. *See infra* text accompanying notes 72-75. For a complete examination of *amiable composition*, see E. LOQUIN, L'AMIABLE COMPOSITION EN DROIT COMPARE ET INTERNATIONAL (1980).

[70] *See infra* text accompanying note 76.

table considerations.[71]

Dispute resolution clauses which grant an arbitrator the power to act as an *amiable compositeur* permit him to base decisions on his own notions of fairness.[72] Such a clause gives arbitrators maximum flexibility, which is limited only by conflicts with national public policy. The arbitrator might therefore seek compromise without considering basic legal principles or trade practices; instead of awarding the whole loaf of bread to one of the disputing parties, he may give half to each.

This undefined standard of justice could vary dramatically depending on the arbitrator. As a general rule, however, *amiable compositeurs* base their decisions on similar criteria.[73] While analyzing the factual details more thoroughly than mechanical rules might allow, *amiable compositeurs* also refer to general legal principles and international commercial practice. Further, equitable considerations permit *amiable compositeurs* to move toward a "unified philosophy of law"[74] and a "new ethic in international business."[75] Therefore, appointment as an *amiable compositeur* permits and arguably requires the arbitrator to apply the New Lex Mercatoria.

When contract clauses require consideration of general principles of law in dispute resolution, it is generally understood that the arbitrator should consider the legal principles common to the world's major legal systems.[76] Arbitrators do not attempt to derive precise rules of law; rather, they refer to broad principles such as requirements of good faith dealing and mitigation of damages. These principles may eventually become the foundation for more precise rules.[77]

Studies of arbitration awards indicate that similar decision making techniques are employed whether the arbitrator has the powers of *amiable compositeur* or applies general legal principles.[78] The arbitrator combines broad legal and equitable principles implied by non-national law clauses with the perceived needs and actual practices of international commerce. The primary purpose of the clauses discussed above is to permit the arbitrator to ignore national law and give overriding consideration to the needs of commerce.[79] It is this emphasis on the needs of international commerce, a hallmark of international arbitration awards, that indicates that a New Lex Mercatoria is being forged.

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[71] For a discussion of the means of authorization, see Goldman, *supra* note 33, at 479-85; T. Varady, *supra* note 43, at 91.

[72] T. Varady, *supra* note 43, at 98.

[73] *Id.*

[74] *Id.*

[75] Cremades, The Impact of International Arbitration on the Development of Business Law, 31 AM. J. COMP. L. 526 (1983).

[76] Goldman, *supra* note 33, at 479-81.

[77] T. Varady, *supra* note 43, at 117.

[78] Goldman, *supra* note 20; Cremades, supra note 75; *see generally* J. LEW, *supra* note 36.

[79] *See infra* note 85.

D. *Enforcement of the New Lex Mercatoria Through Arbitration Awards.*

Enforcement of an arbitration award poses no difficulty when a losing party complies voluntarily. Even if a party is recalcitrant, the international business community is, at times, capable of encouraging compliance through a variety of methods.[80] Notwithstanding these methods, the business community is largely dependent on national courts for enforcement of arbitration awards.

Judicial supervision may be exercised in a variety of circumstances.[81] A national court is most likely to review an arbitration award if it is rendered or sought to be enforced in its jurisdiction. If the country of its jurisdiction is a signatory to a treaty regulating enforcement of arbitration awards, a national court must deny or grant enforcement according to the criteria of the particular treaty.[82] When there is no controlling treaty, enforcement is an issue of private international law.[83]

Nevertheless, some courts have been hesitant to enforce arbitration awards based upon the New Lex Mercatoria because the right of contracting parties to employ choice of law clauses has been traditionally limited to the choice of national law.[84] Were this the modern rule, the application of the New Lex Mercatoria in arbitration awards and subsequent enforcement by national courts would be virtually precluded.

National laws have loosened the constraints on parties' freedom to choose the substantive law applicable to their contracts. Not only do most nations recognize the parties' right to choose the national law that will regulate their contract, but parties are also given the freedom to have their disputes settled based on non-national legal principles. Laws that limit judicial review of the legal merits of an arbitration award, for example by permitting *amiable composition* or unreasoned awards, have this effect.[85] When parties have

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[80] *See supra* notes 32, 56, 74.

[81] For a comparative analysis of judical supervison of commercial arbitration awards with particular emphasis on English law, see W.W. Park, *Judicial Supervision of Transnational Commercial Arbitration: The English Arbitration Act of 1979,* 21 HARV. INT'L L.J. 87 (1980).

[82] C. SCHMITTHOFF, *supra* note 53, at 433.

[83] *Id.*

[84] Tallon, *The Law Applied by Arbitration Tribunals—II* in THE SOURCES OF THE LAW OF INTERNATIONAL TRADE 156 (Schmitthoff ed. 1964).

[85] Professor Loquin describes the English law's failure to require arbitrators to give reasoned awards as allowing "clandestine" *amiable composition* and therefore an opportunity to avoid the application of national law. An unreasoned award is one that requires a final decision by the arbitrator but no *ratio decidendi.* Without a *ratio decidendi,* an award, supposedly rendered according to national law, can rarely be subjected to judicial scrutiny. The only exception is when the arbitrator's decision is manifestly contrary to the applicable national law. E. LOQUIN, *supra* note 69.

Avoidance of national law by itself does not necessarily lead to the development of a New Lex Mercatoria. The development of a New Lex Mercatoria through arbitracontractually provided for this limited judicial review, the fact that an award is based on the New Lex Mercatoria will not interfere with enforcement. Moreover, such resort to non-national legal principles has been specifically authorized by treaty[86] and specific legal systems.[87]

Recent events indicate that submission to international arbitration may result in an award based upon the New Lex Mercatoria even without express party authorization.[88] For example, a 1981 arbitration award based on the New Lex Mercatoria was upheld by the French Tribunal de Grand Instance[89] even though the parties did not expressly authorize its application.[90] The contract did not contain a choice of law clause.[91] Nor did it indicate that the arbitrators were to act as *amiable compositeurs* or decide according to general principles of law. Avoiding a national conflict of law rule, the arbitration tribunal decided that the New Lex Mercatoria was applicable to the contract.[92]

At present, it is unclear how many national courts will follow this example. Authority for the application of the New Lex Mercatoria may be found in Article VII of the 1961 European Convention on International Commercial Arbitration[93] which permits an arbitrator to apply the most appropriate

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tion is a two-step process. First, arbitrators must be released from the application of national law. Second, arbitrators must substitute a body of unified and coherent rules and principles for national law. Valid awards that lack a *ratio decidendi* and awards based on *amiable composition* permit the first step but do not ensure the second.

[86] *See, e.g.*, Article 7, § 1 of the European Convention on International Commercial Arbitration, 21 April 1961, 484 U.N.T.S. 364:

> The parties shall be free to determine, by agreement, the law to be applied by the arbitrators to the substance of the dispute. Failing any indication by the parties as to the applicable law, the arbitrators shall apply the proper law under the rule of conflict that the arbitrators deem applicable. In both cases the arbitrators shall take account of the terms of the contract and trade usages.

Id. art. 7, § 1

[87] For a discussion of French case law recognizing the validity of an arbitrator's application of trade usage even when not expressly authorized by the parties see P. Fouchard, *Les usages, l'arbitre et le juge in le droit des relations economiques internationales* (1982). Note also that the American Uniform Commercial Code in paragraph 3 of Section 1-205 states:

> A course of dealing between parties and any usage of trade in the vocation or trade in which they are engaged or of which they are or should be aware give particular meaning to and supplement or qualify terms of an agreement.

U.C.C. § 1-205(3) (1977).

[88] *See supra* notes 86 and 87.

[89] France's Tribunal de Grande Instance has subject matter jurisdiction with regard to the enforcement of foreign arbitration awards.

[90] CLUNET 1981, 836.

[91] *Id.* at 837.

[92] *Id.* at 838.

[93] *See supra* note 86.

conflict of laws rule when the parties have not provided otherwise.[94] This may indicate that the arbitrator is released from national conflict of laws rules.[95] The narrow grounds for attack provided in Article V of the New York Arbitration Convention could be interpreted similarly.[96]

Even if national courts do not interpret these multilateral conventions broadly, nations have extended the scope of contractual freedom to the point where a New Lex Mercatoria can develop. If the parties authorize the arbitrator to apply these non-national legal principles, and the decision is consistent with national public policies, the majority of the world's courts will enforce the New Lex Mercatoria.

V. Empirical Evidence of the New Lex Mercatoria

Recent arbitration awards indicate that arbitrators are aware of general commercial principles and practices and utilize them in rendering their decisions. Like its medieval predecessor, the New Lex Mercatoria finds its substance in these principles and practices. Arbitration awards may therefore be regarded as empirical evidence of the development of a New Lex Mercatoria.

This section examines a limited number of arbitration awards involving questions of *force majeure* and the validity of currency stabilization clauses. These questions are of particular interest because they help to elucidate the manner in which arbitrators approach the freedom of contract so essential to the development of a New Lex Mercatoria. Without attempting to discern precise rules, the authors indicate certain broad trends in contractual interpretation and problems encountered when searching for a coherent body of arbitral case law.[97] However, before examining these trends, it is useful to

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[94] *See* T. Varady, *supra* note 43, at 24.

[95] *Id. See* B. Cremades, *supra* note 33, at 11.

[96] According to Article V of the 1958 New York Arbitration Convention, a court of a signatory state may refuse enforcement on the following grounds:

1) The award fails to comply with formal requirements of the Convention. Art. V(1)(a).

2) The award fails to comply with the forum's due process requirements. Art. V(1)(b).

3) The arbitrators exceeded the powers given to them by the parties. Art. V(1)(c).

4) The compostion of the arbitration tribunal or the procedure it used was not in accordance with the agreement of the parties. Art. V(1)(d).

5) The award is not binding under the law of the country where the award was rendered or according to the substantive law applied.

6) The subject matter of the difference is not capable of settlement by arbitration under the law of the enforcing state. Art. V(2)(a).

7) The recognition or enforcement of the award would be contrary to the public policy of the enforcing state. *See* New York Arbitration Convention, *supra* note 25, art. V.

[97] For an in-depth examination of arbitral decision making, see J. Lew, *supra* note 36.

point out a number of limitations and pitfalls such an examination is likely to encounter. These are due largely to the nature of arbitration itself.

A. *Limitations of a New Lex Mercatoria Based on Arbitral Decision Making*

The development of a New Lex Mercatoria is restricted by the confidential nature of international commercial arbitration. Confidentiality permits parties to minimize consideration of public opinion when settling business disputes.[98] Confidentiality is also useful to protect trade secrets and more delicate matters from the scrutiny of competitors.[99] Removing the veil of confidentiality would undermine one of arbitration's more widely touted advantages.

The development of a consistent body of legal principles, however, requires disclosure of the facts and reasons underlying arbitral decision making. Without such disclosure, businessmen and arbitrators are unable to look to precedent for guidance, and arbitrators cannot be expected to apply commercial customary law principles consistently.

Another problem which impedes the development of a New Lex Mercatoria based on arbitral decision making is the lack of binding precedent. Because arbitration awards are confidential, arbitrators are unable to examine prior awards for guidance in their own decisions. Even if these awards were made available to arbitrators, they are under no obligation to use them for guidance. Arbitrators therefore apply their own interpretation of commercial custom and practice to the disputes before them. The great number of arbitrators used in commercial arbitration is unlikely to produce a uniform interpretation of custom and practice. The decision making criteria applied in arbitration will, at times, be inconsistent, if not contradictory.

The solution to this problem may lie in the formation of institutions which

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[98] Privacy is a particularly important advantage of arbitration for the larger oil companies. The fact that many of these companies' agreements are long-term, large-scale contracts with foreign government agencies means that disputes are likely to have considerable political ramifications. Privacy affords greater maneuverability, especially on the part of the government agency, since public opinion is less likely to be a constraining factor. S. Plehn, *supra* note 66, at 6. *See* B. Cremades, *supra* note 33, at 4.

[99] Interviews with European counsel, however, indicate that this sentiment is not as strong as is generally supposed. A significant minority of those interviewed felt that reliance on privacy was misguided because of the possibility of judicial scrutiny. Dr. Ohlgart of the West German firm of Droste, Pietzkser, Sprick, Ohlgart, *et al.* pointed out that raising issues not susceptible to arbitration often undermines privacy. A common example is that of antitrust raised by the respondent. S. Plehn, *supra* note 66, at 6. Professor Park points out that reliance on arbitration's ability to exclude judicial supervision may be precarious, because of the fine distinction that national courts are often required to make between an error of law and an excess of arbitral authority. W.W. Park, *supra* note 43.

give arbitrators access to prior arbitration awards and require them to follow a more or less strict rule of *stare decisis*. Arbitration awards would be subject to an appeal within the institution to insure some degree of binding precedent.

Parties subjecting their disputes to such an institution would be shifting a great deal of the decision making power from the arbitrator to the institution. No longer would arbitration institutions serve a purely administrative function. Instead they would constitute a largely autonomous judicial system capable of developing a coherent New Lex Mercatoria.

The International Chamber of Commerce (ICC)[100] has recently begun to publish arbitration awards.[101] This is an example that should be followed by other arbitration institutions. Awards are subject to considerable prepublication editing by the ICC to protect party confidentiality. Particular awards have been selected by the ICC because they represent decisions independent of national law.[102] Because of the recency and limited scope of publication as well as extensive editing, immediate development of a New Lex Mercatoria based on ICC arbitration awards is unlikely. Its growth depends on the continued use and publication of arbitration awards as well as certain changes, as mentioned above, in institutionalized arbitration.

In any case, an overly systematized and detailed New Lex Mercatoria will never be useful to the international business community. The business community is subject to constantly changing circumstances and goals. Specific rules initially providing certainty soon become obsolete. A New Lex Mercatoria must achieve clarity and coherence without sacrificing adaptability. These goals are best reconciled by applying clearly defined funda-

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[100] *See supra* note 1.

[101] The ICC began publication of arbitration awards in 1974. Apart from the ICC, a number of the arbitration commissions of the Eastern European countries have published their awards. *See generally* J. LEW, *supra* note 36.

[102] Yves Derains, ex-Secretary General of the ICC Court of Arbitration makes the following points in his introduction to the first awards:

1) Only those awards in which arbitrators have felt least constrained to apply national laws are published.

2) No awards are published without permission of the parties to the dispute. When permission is granted, these parties determine the extent of editing to be done.

3) The ICC has neither the power nor the desire to impose an obligation on arbitrators to look to prior awards in rendering their decisions.

4) ICC Arbitrators are generally unaware of the content of prior arbitration awards. CLUNET 1974, 876.

The reader of these published awards must therefore realize that they represent only a small percentage of all the ICC awards rendered annually. As Derains indicates, these awards are not necessarily representative of the extent to which arbitrators choose to apply national law. The fact that the awards are edited also presents a number of problems. The variety of interpretations that can be given to a single award are numerous; however, one is often forced to rely exclusively on the editor's interpretation of the awards.

mental principles which, though broad, take on the greater specificity of a rule when applied to a particular factual situation. An example of the application of these principles can be seen through review of arbitration awards involving issues of *force majeure*[103] and currency stabilization clauses.

B. *The Issue of* Force Majeure[104]

Force majeure is one of the most common issues considered by ICC arbitrators in published awards.[105] A review of these awards suggests that a relatively consistent analytical framework based on the needs of international commerce has been applied.[106] A situation of *force majeure* exists where performance is impossible because of circumstances unforeseeable by the parties at the time of contracting.

1. Impossibility

An arbitrator must make an initial determination of impossiblity of performance before finding a situation of *force majeure*. Such findings are infrequent since impossibility is measured in a strict sense, and does not include situations of mere impracticality and excessive onerousness. This strict standard has a firm and consistent basis apart from national law; it has been applied to international transactions when the arbitrator has the power of *amiable compositeur* as well as when his decision is guided by general principles of law.

In applying this absolute standard, arbitrators tend towards objective criteria. For example, in Award No. 1782,[107] Jewish employees of a German company, unable to obtain visas to enter an Arab country, were consequently unable to perform services pursuant to their company's contract

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[103] In most national legal systems, a situation of *force majeure* exists "when unforeseen occurences, subsequent to the date of the contract, render performance either legally or physically impossible, or excessively difficult, impracticable or expensive, or destroy the known utility which the stipulated performance had to either party." Smit, *Frustration of Contract: A Comparative Attempt at Consolidation*, 58 COLUM. L. REV. 287 (1958).

[104] On *force majeure* in international transactions, see *generally* Rapsomanikis, *Frustration of Contract in International Trade Law and Comparative Law*, 18 DUQ. L. REV. 551 (1980); Berman, *Excuse for Nonperformance in the Light of Contract Practices in International Trade*, 63 COLUM. L. REV. 1413 (1963) [hereinafter cited as Berman, *Excuse for Non-Performance*].

[105] The authors discuss nine out of these ten published awards, namely Award Nos. 1512, 1703, 1782, 2139, 2142, 2216, 2478, 2708 and 3093/3100. The tenth award, No. 2104, is only mentioned in the notes. This award has been edited to the point where it is no longer useful for analysis.

[106] For a comparative analysis of *force majeure* in French, German, American, English, Italian and Greek law, see Rapsomanikis, *supra* note 104.

[107] C.C.I. aff. 1782/73, CLUNET 1975, 923 (the authors use the French citation form with regard to awards discussed in the text).

with a Yugoslavian company. The arbitrator found that the subjective impossibility on the part of the Jewish employees did not extend to their employer, and held that the German company was under a duty to provide the services. Moreover, the arbitrator indicated that even if the company had been under Jewish control and was unable to perform the contract, it would still have been obligated to fulfill its duties by engaging another company.[108]

There are strong indications that objective impossibility is determined through comparative factual analysis; if other parties could perform the contractual duties of the obligor, *force majeure* will not apply. A comparative factual approach was used by the arbitrators in Awards No. 2139[109] and No. 2142.[110] In both cases the government nationalized a foreign corporation's (X's) source of raw materials. Another foreign corporation (Y) contracted to purchase some of these materials from the government. Subsequently X threatened to seize the materials sold by the obligee government on the international market. Y claimed that such threats constituted *force majeure*. The arbitrator found that performance was not impossible, noting that other purchasers had taken delivery from the government.[111] Similarly, in Award No. 1703[112] the contractor was unable to show, among other things, that danger to its operations stemming from hostilities in the host state made the contract impossible to perform. The arbitrator pointed out that these dangers did not make the contractor's performance impossible because the contractor's government maintained consular activities in the host state during the period the contractor claimed it was unable to perform.

2. Unforeseeability

ICC arbitrators also appear to use objective criteria for determining foreseeability and presume that the obligor intended to assume the risks not otherwise contractually allocated. Because foreseeable events, according to the standard applied, are many and varied, businessmen engaging in interna-

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[108] This interpretation does not necessarily follow from the published parts of the arbitrator's decision, but rather is expressed in the accompanying commentary. Because of extensive editing, all of the ICC awards are followed by commentary which supplies greater detail about the circumstances of the award, interprets the award, and comments on the award's significance. In this case, it is not clear whether the commentary is based upon unpublished parts of the award or whether it is an extrapolation from the arbitrator's reasoning in the award.

[109] C.C.I. aff. 2139/74, CLUNET 1975, 929.

[110] C.C.I. aff. 2142/74, CLUNET 1974, 892.

[111] Though the arbitrators in both Award No. 2139 and No. 2142 apply the criteria of unforeseeability and impossibility, the derivation of these criteria is unclear. They are, however, entirely consistent with French law as well as the New Lex Mercatoria. For a discussion of *force majeure* in French law, see Rapsomanikis, *supra* note 104, at 554.

[112] C.C.I. aff. 1703/71, CLUNET 1974, 894.

tional commerce are cautioned by arbitrators to anticipate the consequences of future events by inserting detailed *force majeure*, hardship and currency stabilization clauses in their contracts.

Although ICC arbitrators seem to resort to objective criteria when determining the parties' intent, they have done so with some flexibility. A willingness on the part of arbitrators to avoid so-called "irrebuttable presumptions" and search for actual intent and knowledge is inherent to arbitration.[113] Such flexibility may permit justice in the particular case, but interferes with the establishment of clear rules of law. Concerning the question of unforeseeability, arbitrators presume that international businessmen are sophisticated and experienced. This presumption, however, may be rebutted with adequate proof.

For example, in Award No. 2216,[114] the purchaser raised the issue of his own lack of sophistication by claiming that he had not contemplated substantial price fluctuations when entering into an oil purchase contract, and argued that subsequent price changes therefore constituted an excuse for failure to perform.[115] Even though the dispute was resolved against the purchaser, the arbitrator nevertheless considered evidence concerning the purchaser's scope of contemplation.[116] Until the time of contracting, the purchaser had kept abreast of proceedings at the Teheran Conference, and was aware of future oil price determinations; the arbitrator found that a presumption of sophistication was not rebutted under these circumstances.[117]

Arbitrators rarely consider even drastic price changes to be unforeseeable events. In fact, price speculation is a major motivation behind the purchase and sale of goods. For example, the arbitrator in Award No. 2708[118] found that the increase in a product's market value did not excuse performance of a contract for sale. Referring to the price fluctuations, the arbitrator remarked that, "[e]specially in the field of international commerce, circumstantial changes constitute one of the most important incentives for contracting, each party expecting to profit from changes in the market and at the same time implicitly accepting the risk that the change may be unfavorable."[119]

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[113] Julian Lew states that "[t]he extra informality and flexibility inherent in arbitration proceedings, enables arbitrators to take account in their award of the attitude and behaviour of the parties." J. LEW, *supra* note 36, at 509.

[114] C.C.I. aff. 2216/74, CLUNET 1975, 917. In No. 2216, a Norwegian purchaser of oil products refused to take delivery from the state agency of an oil producing country. The Norwegian purchaser, apart from the argument mentioned in the text, claimed that the Norwegian government's threatened refusal to permit the purchase (based on loss of foreign currency) constituted *force majeure*. The arbitrator noted that existing legislation in Norway at the time of the contract put the purchaser on notice of possible refusal, thereby rendering the refusal foreseeable.

[115] *Id.* at 918.

[116] *Id.*

[117] *Id.*

[118] C.C.I. aff. 2708/76, CLUNET 1977, 943.

[119] *Id.* at 943 (translation by the authors).

International businessmen are required to anticipate certain variables not present in the domestic market. For example, international contracts are particularly vulnerable to national legislation and foreign trade regulation. Consequently, government regulation is generally considered to be foreseeable. In Award No. 3093/3100,[120] the purchaser claimed *force majeure* based on the central bank's refusal to grant the foreign exchange necessary to pay the seller for certain purchases. At the time of contracting, legislation existed authorizing the central bank to withhold foreign exchange in times of scarcity.[121] The subsequent refusal of foreign exchange was held foreseeable because of the unfavorable economic conditions present at the time of contracting.[122] Thus, the obligor assumes the risk that general legislation will become applicable to him.[123]

A seemingly stricter standard of foreseeability was applied in Award No. 1512.[124] In that case, a Pakistani bank guaranteed payment to an Indian company. War broke out between India and Pakistan. Pakistan enacted emergency legislation preventing the Pakistani bank from complying with the guarantee. While avoiding the express application of a particular national law, the arbitrator analyzed the question of excuse from contractual obligation within the framework of the common law concept of frustration.[125] Using this framework, the arbitrator determined that the Pakistani bank had failed to show that the circumstances in which performance was called for were radically different from those undertaken in the contract.[126] Implicitly the arbitrator found that the risk of war and resulting emergency legislation were within the scope of contemplation of the parties at the time of contracting; these events were therefore foreseeable.

Award No. 2478[127] makes it unclear whether this standard of foreseeability will always extend to subsequent government regulation. The contract at issue enumerated various conditions excusing the seller's performance, including subsequent regulatory change. The contract required prompt notification of the buyer in the event of one of these conditions. The arbitrator decided that, according to the contract, cancellation of the seller's export license by the Rumanian government would have excused the seller's performance but that the seller failed to notify the buyer promptly.[128] Although basing his decision on the specific contractual provisions, the arbitrator

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[120] C.C.I. aff. 3093/3100/79, CLUNET 1980, 951.

[121] *Id.*

[122] *Id.* at 953.

[123] *Accord* C.C.I. aff. 2216/74, CLUNET 1975, 917.

[124] C.C.I. aff. 1512/71, CLUNET 1974, 905.

[125] *Id.* at 906. The criterion of unforeseeability is also critical in a determination of common law frustration. *See* Rapsomanikis, *supra* note 104, at 551, 560. Rapsomanikis indicates that unforeseeability is common to virtually all national jurisdictions. *Id.*

[126] CLUNET, *supra* note 124, at 906-07.

[127] C.C.I. aff. 2478/74, CLUNET 1975, 925.

[128] *Id.* at 926.

declared that, barring contractual provisions to the contrary, cancellation of export licences would constitute *force majeure* if prompt notification were given.[129]

These awards indicate that arbitrators are not necessarily applying a consistent standard of foreseeabilty. For example, it is doubtful whether the cancellation of an export license in Award No. 2478 is less foreseeable than the outbreak of war and emergency legislation directly affecting the contract in Award No. 1512.[130] This apparent inconsistency may result from the slightly different analyses applied by the arbitrators: one applying the criteria of *force majeure* and the other the criteria of frustration.[131] One might also imagine factual scenarios not mentioned in the texts of the two cases that would eliminate any questions of inconsistency. These awards suggest the need not only for more extensive publication of arbitration awards, but also for more detailed descriptions of the facts and decision making criteria of the arbitrators. Without such detail arbitration awards can only serve to indicate very broad contours of a New Lex Mercatoria.

Regardless of whether government legislation or regulation is enacted before or after contracting, parties will be responsible for knowledge of many circumstances that may precipitate *force majeure*. The reasonably diligent international businessman will be informed of a host of political, commercial and economic developments that might conceivably interfere with his contractual performance.

A number of authorities have called for a standard of *force majeure* that requires careful scrutiny of the nature of the transaction and the customs within a particular trade.[132] This avoids application of a uniform, mechanical standard of presumed intent. Accordingly, transactions involving short-term contracts for sale of fungible items in a developed market require much stricter standards of *force majeure*, because potential losses are relatively small and the parties approach the transaction with speculative intent. Any damages a defaulting seller is forced to pay are likely to be minimized by the purchaser's duty to mitigate damages by covering. Parties to long-term economic development contracts, on the other hand, can reasonably be presumed not to have the same speculative intent. These contracts are performed over long time periods, involve large investments and are unique in character. The parties' dominant concern in such a long-term contract is its eventual completion; in a short-term contract, the parties are concerned with meeting the immediate demands of a changing market.

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[129] *Id.*

[130] The commentary indicates only that the cancellation of the seller's export license was claimed by the seller to constitute *force majeure*. *Id.* No indication of the circumstances surrounding the cancellation is given.

[131] Note that the criterion of unforeseeability is employed in both civil law *force majeure* and common law frustration. *See supra* note 125.

[132] *See, e.g.*, Berman, *Excuse for Non-Performance*, *supra* note 104; Delaume, *Excuse for Non-performance and Force Majeure in Economic Development Agreements*, 10 COLUM. J. TRANSNAT'L L. 243 (1971).

Award No. 1703 deals with the question of *force majeure* in a long-term development contract.[133] This award indicates that arbitrators may in fact take a considerably different approach in long-term contracts than in short term fungible goods contracts. The arbitrator in Award No. 1703, while applying the standards of impossibility and unforeseeability of other ICC awards, nevertheless excused delay due to temporary hostilities, characterizing the hostilites as a condition of *force majeure*. However, termination of the contract was not permitted. Thus, the arbitrator presumed that the parties intended that the standard of performance allow for delay rather than the perfect tender usually required in short-term sales contracts.[134]

3. Summary

When *force majeure* is found to preclude performance of a short-term sales contract, it excuses a party from complying with further contractual obligations. The finding of a situation of *force majeure* in a long-term development contract may produce a different result; the primary concern of the parties in this type of contract is the ultimate completion of the contract despite temporary interferences. Consequently, a party is only temporarily relieved of his contractual duties and must complete these duties once the interfering circumstances end. In both long- and short-term contracts, arbitrators apply the criteria of impossibility and unforeseeability. Unfortunately, the limited number of published awards and their extensive editing make it difficult to discern whether arbitrators apply these criteria in an entirely consistent manner.

C. *The Validity of Currency Stabilization Clauses*

Currency stabilization clauses index the currency to an accepted price index at the time of contracting to prevent change in the real value of a contractual obligation when relative currency values fluctuate.[135] Absent such clauses, ICC arbitrators consider parties to have assumed the risk of currency fluctuations. However, where a currency stabilization clause is

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[133] C.I.I. aff. 1703/71, CLUNET 1974, 894.

[134] *Id.* at 894-95.

[135] This clause is only one of a group of clauses that provides a mechanism for adapting the contract to future circumstances. The currency stabilization clause only adapts the contract to currency fluctuations and generally provides for some means of indexation which causes the contract to adapt automatically. The more complex "hardship clause" calls for contractual adaptation in the face of a wide variety of changed circumstances that may cause the contract to become exceedingly onerous for one of the parties. The adaptation mechanism generally requires negotiation followed by arbitration, and is a long, drawn-out process more suitable for long-term development contracts than for sales contracts. *See* Oppetit, *L'adaptation des contrats internationaux aux changements de circonstances: la clause de "hardship,"* CLUNET 1974, 794; Silard, *Clauses de maintien de la valeur dans les transactions internationales,* CLUNET 1972, 213.

included in the contract, it will be held valid without consulting the provisions of national law.

Awards dealing with currency fluctuations, like the *force majeure* cases discussed earlier, clearly demonstrate a rule of strict contractual interpretation. Payments denominated in a particular currency must be paid as provided for in the contract even though the currency's true value has changed.[136]

In Award No. 1990, the Spanish respondent had been granted a license to import and sell the Italian claimant's products in Spain.[137] The contract provided that if importation became "difficult," the license to sell would convert to a license permitting respondent to produce claimant's products within Spain.[138] The contract also provided that damages be paid to the claimant if the respondent failed to meet certain minimum sales levels.[139] After a 10% devaluation of the Spanish peseta, the arbitrator found that the conditions for conversion were present, but that respondent was still liable to the claimant for the damages as provided in the contract.[140] The arbitrator ordered the respondent to pay the damages in current pesetas, not with-

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[136] As a general rule the New Lex Mercatoria appears to require international businessmen to insert currency stabilization clauses in their contracts to avoid the risks of devaluation. However, the Ripert-Panchaud award of 1956 (while printed in CLUNET 1959, 1074, this is not an ICC award) provides authority for the proposition that, like *force majeure* cases, this rule may be applied somewhat differently to long-term contracts. In Ripert-Panchaud, arbitrators found an implied currency stabilization clause in a 1932 contract between the French Société Europeené d'Etudes et d'Entreprises and the Yugoslavian government.

The contract required a French company to build a railroad between Veles and Prilep in return for Yugoslavian government bonds denominated in francs. The railroad was completed in 1937. However, due to lack of foreign exchange, the Yugoslavian government did not complete payment until 1953. During this period the gold value of the French franc dropped to approximately four percent of its 1932 value. The total amount paid in 1953 was the amount originally called for in the 1932 contract.

Ripert and Panchaud, *amiables compositeurs*, found an implied currency stablization clause. The rationale behind the award was the non-speculative nature of the long term contract.

The implied currency stabilization clause found in the Ripert-Panchaud award is analogous to the implied suspensory *force majeure* clause found in award no. 1703. *See supra* text accompanying note 134. In both cases the arbitrators distinguished the intent characteristic of these contracts from that of a sales contract, the former productive and latter speculative.

The Ripert-Panchaud award indicates that contractual silence regarding currency fluctuations in long-term development contracts may receive different treatment than such omissions in short-term sales contracts.

[137] C.C.I. aff. 1990/72, CLUNET 1974, 897.

[138] *Id.*

[139] *Id.* at 898.

[140] *Id.* at 899.

standing the 10% devaluation.[141] Without a clear indication otherwise, the arbitrator found that the parties had not intended to make adjustments for devaluations.[142]

Ambiguous adaptation clauses are construed narrowly. The contract at issue in Award No. 2478 contained a clause requiring the parties to discuss and agree on new price terms if currency fluctuation caused an imbalance in the parties' obligations.[143] When the U.S. dollar was devalued the parties began negotiations.[144] Once negotiations failed, the seller claimed that the contract had been terminated, because the continuation of the contract was contingent on agreement as to new price terms.[145] The arbitrator, however, found that the clause only required that the parties undertake good faith negotiations.[146] Since negotiations failed, the arbitrator held that the prices in the original contract were binding.[147] Because the parties had failed to provide an automatic price change index, the seller's only remedy was to resort to arbitration for determination of claimant's good faith in negotiating.[148] This decision indicates that parties attempting to protect against currency fluctuations must do so by providing a clear currency stabilization clause in their contract.[149]

Award No. 2520 is another example of a narrowly interpreted currency stabilization clause.[150] In this case, an Italian manufacturer contracted with two Czechoslovakian companies.[151] One contract granted the Italian company a license to manufacture certain machinery.[152] The other contract required the supply of minimum quantities of materials each year for use in this manufacturing.[153] Both contracts contained clauses indicating that they were inseparable and interdependent.[154] The licensing contract contained a currency stabilization clause which the supply contract lacked.[155] After the Italian manufacturer failed to take the minimum deliveries, the Czechoslovakian supplier was awarded liquidated damages pursuant to the contract.[156] The arbitrator, however, refused to adjust these damages according

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[141] *Id.* at 900.
[142] *Id.*
[143] C.C.I. aff. 2478/74, CLUNET 1975, 925.
[144] *Id.* at 926.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *See supra* note 135.
[150] C.C.I. aff. 2520/75, CLUNET 1976, 992.
[151] *Id.*
[152] *Id.* at 993.
[153] *Id.*
[154] *Id.*
[155] *Id.*
[156] *Id.*

to their original gold value.[157] Despite the operational interdependence of the two contracts, the arbitrator held that such clauses must be clearly expressed in each contract.[158]

Despite failure to find implied currency stabilization clauses and narrow interpretation of ambiguous clauses, clearly expressed clauses are strictly enforced by ICC arbitrators. International commerce demands that businessmen be permitted to shield themselves from occurrences which could change a mutually beneficial contract into one that is detrimental to one of the parties. The consistent application of express currency stabilization clauses by arbitrators without consulting the otherwise applicable national law is a specific manifestation of how arbitrators give priority to the parties' contracts, thereby developing an increasingly non-national New Lex Mercatoria.

The non-national nature of the acceptance and enforcement of currency stabilization clauses is evidenced in Award No. 1717.[159] In that award, after finding Iranian law applicable, arbitrators awarded an Iranian purchaser damages for a breach of contract by a Yugoslavian seller.[160] In determining damages, the arbitrator relied upon a currency stabilization clause in the contract.[161] The clause was upheld without any reference to otherwise applicable Iranian law.[162]

D. *Summary*

ICC awards indicate that arbitrators are guided by the fundamental principle that contracting parties in international business transactions should be free to structure their relationships as they see fit. This freedom is considered necessary so that parties are able to adapt their contracts to the vicissitudes of international commerce. The currency stabilization clause is a typical adaptation mechanism: it permits contracting parties to maintain real economic equilibrium in a contractual relationship otherwise subject to currency fluctuations. Recognizing the importance of a currency stabilization clause, arbitrators will enforce clearly expressed ones without consulting the provisions of otherwise applicable national laws.

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[157] The arbitrator reasoned that because both parties' countries required that currency stablization clauses be explicit, the parties had not intended to be governed by the currency stablization clause of the licensing contract when performing the supply contract. Though this analysis does not actually apply national law, it nevertheless indicates how arbitrators may look to national law to determine the parties' contractual intent. *Id.*

[158] *Id.*

[159] C.C.I. aff. 1717/72, CLUNET 1974, 890.

[160] *Id.* at 891.

[161] *Id.* at 892.

[162] See Award No. 2291, C.C.I. aff. 2291/75, CLUNET 1976, 989, for a similar validation of a currency stabilization clause.

VI. Conclusion

Due to the increasingly international nature of commerce, nations and the business community have taken steps to give commercial regulation a more global and consistent character. This has been accomplished by national legislation, the international treaty process and commercial self-regulation. Commercial self-regulation is perhaps most appropriate to international commercial transactions in those areas which do not impinge upon national public policy.

History demonstrates that international commercial self-regulation is not a revolutionary concept. A relatively sophisticated and efficient form of commercial self-regulation, the medieval Lex Mercatoria, thrived in Europe prior to the emergence of the modern nation-state. The New Lex Mercatoria bears certain similarities to its medieval predecessor. Its reemergence may be due in large part to certain similarities of today's commercial environment to that of the medieval period. The medieval period was characterized by a geographically mobile commercial class operating within numerous polities whose laws rarely agreed. Because of the complexity and contradictory nature of this legal environment, medieval commerce thrived because it was given a degree of regulatory autonomy. Feudal rulers granted this autonomy because, like many of today's governments, they realized that the benefits of increased commerce are often worth the loss of regulatory control.

Today, the New Lex Mercatoria is dependent upon cooperation among nations. Fortunately, by expanding the limits of freedom of contract, nations have increased the scope of commercial self-regulation, which in turn aids the development of the New Lex Mercatoria. Moreover, multilateral conventions have raised the principle of party autonomy to the level of international law.[163] Widespread compliance by national courts with these conventions gives parties to international contracts the power of extensive self-regulation and the right to submit to arbitration in order to settle their disputes.

The New Lex Mercatoria has taken shape primarily through the use of these powers. Detailed self-regulatory contracts minimize the need to resort to supplementary national law. When these contracts are standardized and used extensively within a particular trade, they take on a permanence and mandatory nature that approximates law. International commercial arbitration complements this process. Disputes arising from self-regulatory contracts are usually submitted to arbitrators whose familiarity with commercial trade aids them in determining parties' intentions and in applying commercial norms.

Because arbitral awards are not generally subject to public scrutiny, as are national court decisions, it is difficult to examine and compare their contents. Based on the limited amount of empirical data, one must be cautious when searching for unified principles of arbitral decision making. Generally,

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163 *See, e.g.*, The New York Arbitration Convention, *supra* note 25.

such principles appear to be limited to interpretation of contractual provisions. Clearly expressed contractual provisions allocating risks such as currency stabilization clauses will be followed. On the other hand, contractual silence is usually interpreted as an acceptance of risk by the obligor. However, an arbitrator, based upon his knowledge of the type of transaction and the likely expectations of the parties, may scrutinize that silence more closely. This situation may be presented when parties enter into a long-term contract of a non-speculative nature. In such a case, arbitrators may impose a degree of economic balance on the contract despite the parties' silence. Strict adherence to the written contract will give way to the requirement of good faith cooperation according to the contract's overall purpose and tenor.

Arbitrators who decide international commercial disputes closely follow the terms of a given contract. Nonetheless, silence or ambiguity often requires them to resort to extra-contractual considerations, such as the customs and usages of a particular trade and the overall needs of international commerce. These considerations, or decision making criteria, form the developing substance of a New Lex Mercatoria. Yet their development into a coherent, defined and essentially non-national normative structure has not been achieved so far. Such development is dependent upon broad national recognition of the freedom of contract as well as greater organization in the international business community's contracting and arbitration practices.