THE EXTENT TO WHICH THE UNIDROIT PRINCIPLES OF INTERNATIONAL COMMERCIAL CONTRACTS CONTRIBUTE TO THE EVOLUTION OF TRANSNATIONAL TRADE LAW

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Believe me, no: I thank my fortune for
My ventures are not in one bottom trusted,
Nor to one place; not is my whole estate
Upon the fortune of this present year:
*Therefore my merchandize makes me not sad***

I. INTRODUCTION

This article will evaluate the extent to which and how the 1994 UNIDROIT Principles of International Commercial Contracts[1] ("the UNIDROIT Principles") have contributed to the evolution of transnational trade law. It will analyse the history and current operation of the *lex mercatoria* and a number of conclusions will be made. It will deal with the definition, sources and history of the *lex mercatoria*. The analysis of the sources of the *lex mercatoria* will reveal that the *lex mercatoria* itself fails to provide a completely autonomous and comprehensive legal order capable of governing transnational trade.

The article will argue that the ability of the *lex mercatoria* to become a comprehensive and independent national legal systems is impeded by the contemporary nation state, which is highly developed and interventionist. It will be shown that despite the controversy surrounding the validity and existence of the *lex mercatoria*, the emergence of the *lex mercatoria* has indicated the extent to which international traders require an autonomous and an a-national legal order to govern their transactions.

The article will examine the application of the *lex mercatoria* as a choice of law, primarily in international commercial arbitration. By referring to

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** Per Antonio in Shakespeare W, The Merchant of Venice, Act I, Scene I.

1 The Principles were accepted by the Governing Council of the International Institute for the Unification of Private Law in 1994 in Rome. They are found in the "red book".

specific cases in which the *lex mercatoria* was applied as the law governing the contract, it will be concluded that there is a definite role for a body of law that is not linked to any one national system. There is clearly a need for a body of law that draws on internationally accepted rules suitable for transnational trade. In this context the UNIDROIT Principles will be evaluated. As a non-legislative international restatement of general principles applicable to contracts, the Principles represent a valuable source of the *lex mercatoria*. Unlike many of the other sources of the *lex mercatoria*, the Principles are certain, accessible, flexible and comprehensive. In addition, they complement the other sources of the *lex mercatoria* and in this way further advance the unification and harmonisation of international trade law.

Finally, the article will examine the UNIDROIT Principles including their nature and the scope of their application.

II. WHAT IS THE MODERN DAY *LEX MERCATORIA*?

In May 1994, the Governing Council of the International Institute for the Unification of Private Law ("UNIDROIT") gave its formal imprimatur to the UNIDROIT Principles, an international restatement of general principles of contract law and the result of many years of research and discussion by a Working Group of legal experts drawn from all over the world. The project drew on the knowledge and experience of practising lawyers, judges, civil servants and academics from diverse cultural and legal backgrounds.[2]

The objective of the UNIDROIT Principles is to "establish a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied".[3] They represent an effort to unify and harmonise international trade law. This is consistent with the purpose of the International Institute, which is to examine ways of harmonising and coordinating the private law of states. The Principles are therefore part of a broader movement towards the unification and harmonisation of transnational trade law.

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2 Ibid, Foreword.

3 Ibid, Introduction, viii.

The impetus for the movement came from the realisation that international trade needed to be regulated by laws that were consistent, predictable and uniform. National legal systems were too diverse to provide this. As a result, the concept of an autonomous legal order governing international trade emerged. This concept is referred to as the *lex mercatoria*. However, the application of the *lex mercatoria* may also produce uncertainty and unpredictability because the *lex mercatoria* is not a complete legal order. In this context, the contribution of the UNIDROIT Principles to the evolution of transnational trade law is significant, providing the certainty, predictability and convenience often lacking in international trade law.

Searching for a Definition

In simplistic terms, the *lex mercatoria* is the law governing international trade. In 1957, Professor Clive Schmitthoff described the *lex mercatoria* as a "rediscovery of the international character of commercial law...[a] move away from the restrictions of national law to a universal, international conception of international trade".[4] The essence of the *lex mercatoria* is its transnational character. In 1961, Professor Aleksander Goldstajn stated: "It is time that recognition be given to the existence of an autonomous commercial law that has grown independently of the national systems of law".[5]

Since then many scholars writing on international trade law have attempted to define the *lex mercatoria* and it is clear from these attempts that there is no universally accepted definition of the *lex mercatoria*. The divergence of opinions is reflected in the continued debate over the existence, content, nature and sources of the *lex mercatoria*.[6] However, it is possible to distill

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4 Schmitthoff, "The unification of the law of international trade" (1968) Journal of Business Law 105, 108.

5 In this article the term "transnational" is used to describe international trade law. This term more accurately reflects the contemporary cross-border character of international trade law. See De Ly, International Business Law and Lex Mercatoria (1992, North-Holland, The Netherlands) 8. According to Schmitthoff, "transnational law is the uniform law developed by parallelism of action in the various national systems in an area of optional law in which the state in principle is disinterested": see Schmitthoff, "Nature and Evolution of the Transnational Law of Commercial Transactions" in Horn N and anor, The Transnational Law of International Commercial Transactions (1982, Kluwer, The Netherlands) 20. See Goldstajn note 40.

6 For example, contrast Goldman in "Lex Mercatoria" (1983) 3 Forum International; also see Highet who does not regard the lex mercatoria as a body of law: Highet, "The

a number of characteristics of the *lex mercatoria*. The customary nature of the *lex mercatoria* is a significant feature and has been highlighted by several commentators.[7] The *lex mercatoria* is a term given to the concept of independent business practices rising to the level of international private business law.[8] In this way the *lex mercatoria* is organic in nature, responding to the needs of the international merchant community.[9]

Another feature of the modern *lex mercatoria* is that it is predicated on an analysis and comparison of many legal sources and systems.[10] According to Schmitthoff, when the regulation of many legal systems is compared, national peculiarities are discounted and "the common core of these regulations [is] ascertained and embodied in the modern texts of the Law Merchant",[11] a process reflected in the UNIDROIT Principles.[12]

Thus, the *lex mercatoria* lacks a single set of principles. Unlike the Law Merchant of the Middle Ages, the modern *lex mercatoria* is no longer a uniform system because "[i]ts rules have been fragmented. Some are embodied in national jurisdictions and systems of law. Others exist in the

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enigma of the lex mercatoria" (1989) 63 Tulane Law Review 613.

7 Goldman has described the lex mercatoria as "customary transnational law": see note 6. Tita has defines the lex mercatoria as a "system of usages consolidated by the practice of international merchants governing commerce on a customary basis": see Tita, "A challenge for world trade organisations" [1995] Journal of World Trade 84. In addition, Chukwumerije has emphasised the role of trade custom and usage: see Chukwumerije, Choice of Law in International Commercial Arbitration (1994, Quorum Books, Westport) 111.

8 Draetta and ors, Breach and Adaptation of International Commercial Contracts: An introduction to Lex Mercatoria (1992, Butterworths, Sydney) 7. This description echoes that of Lew's. Lew has described it as a system of law comprising "the rules which have been developed to regulate and facilitate international trade relations and the customs and practices which have attained universal (or at least very extensive) recognition in international trade": Lew J, Applicable Law in International Commercial Arbitration: A Study in Commercial Arbitration Awards (1978, Oceana Publications, Dobbs Ferry) 436.

9 Lando, "The lex mercatoria in international commercial arbitration" [1985] International and Comparative Law Quarterly 747.

10 Schmitthoff note 4 at 111.

11 Schmitthoff considers the result of this process and concludes that "many rules of that law have a strange, synthetic character"; for example, model contract forms of the UN Economic Commission for Europe discard the French "force majeure" and English "frustration" and develop a new rule, "excuse for non-performance": ibid.

12 See discussion below.

regional or international domain...".[13] As a result, leading writers describe the character of the *lex mercatoria* as "unsystematic, complex and multiform".[14] This view of the *lex mercatoria* as a fragmented system existing within national legal structure could validly be construed as a strength, reinforcing not only the global character of the *lex mercatoria* but also global participation. On the other hand, the fragmentary nature of the *lex mercatoria* can be seen as a threat to the centrality and strength of its purpose.

One might well ask whether security of international trading interests could be substantially advanced by concentrating the *lex mercatoria* into a focused body of laws, perhaps codifying its common applications in accordance with the considered deliberations of international agencies and the agreement of states.

This view has achieved some support, and efforts towards unification have usually been in the form of international conventions. Although these have contributed to the unification of international trade law, they have not succeeded in bringing the diverse sources of the *lex mercatoria* within the purview of one overarching set of laws to constitute an autonomous legal system. Rather, the conventions reinforce the view that the *lex mercatoria* relies on a national framework for its effectiveness. A wider view of the *lex mercatoria* is that it is derived from non-national sources. Berthold Goldman asserts that the sources of the *lex mercatoria* are binding in themselves and do not rely on national law. Thus, the *lex mercatoria* is a non-national autonomous system, capable of being applied by virtue of a choice of law. This view has been seriously questioned.[15]

It has been established in the foregoing discussion that the modern *lex mercatoria* is to a large extent an embodiment of widely accepted trade usages and practices, distilled from a comparative analysis of many legal regimes. However, even these rules and principles are not located in one source and there is considerable debate as to what constitutes the sources of the *lex mercatoria.* It has been suggested that the sources of the *lex mercatoria* may include general principles of law, customs and usages,

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13 Trakman LE, The Law Merchant: The Evolution of Commercial Law (1983, B Rothman & Co, Colorado) 4.

14 Schmitthoff note 4 at 112.

15 See De Ly note 5; Wilkinson, "The new lex mercatoria: reality or academic fantasy" (1995) 12 Journal of International Arbitration 103.

uniform laws of international trade, rules of international organisations, arbitral jurisprudence and standard form contracts.[16]

Sources of the Lex Mercatoria

A brief analysis of some of the generally accepted sources of the *lex mercatoria* reveals some of their inherent limitations.

(i) Uniform Laws

The adoption of conventions reflects a specific approach to the harmonisation of the laws affecting international commercial transactions. It is based on the classical theory of international law that "nations are the only subjects of international laws" and therefore the only entities capable of making the laws.[17] This allows nations to adopt similar laws and harmonise the law. This national approach to harmonisation can take the form of international treaties whereby parties are reciprocally bound or, alternatively, through the independent adoption by States of uniform Model Laws.[18]

International legislation has been criticised on the basis that uniform laws fail to bring about complete uniformity. Uniformity is limited by the fact that States may make reservations to treaties and may modify model laws. Furthermore, it has been argued that conventions can only be regarded as the *lex mercatoria* where a majority of States are signatories to them.[19] A

16 For a discussion on the various sources of the lex mercatoria see Chukwumerije note 7 at 111-112; Stoecker, "The lex mercatoria: to what extent does it exist?" (1990) 7 Journal of International Arbitration 101, 119; Goldman note 6 at 5; Lando, "Assessing the role of the UNIDROIT Principles in the harmonization of arbitration law", a paper presented at the Easson-Weinmann Colloquium on International Comparative Law, (1995) 3 Tulane Journal of International and Comparative Law 129, 133; Lando note 9 at 749; Hill J, The Law relating to International Commercial Disputes (1994, Lloyds of London Press Ltd, England) 489; Trakman note 13 at 42; Tita note 7 at 87; Naon H and anor, Choice-of-law Problems in International Commercial Arbitration (JCB Mohr/Paul Siebeck, Tubingen) 27; Draetta note 8 at 13; Wilkinson note 15 at 107; Highet note 6 at 623.

17 Cremades and anor, "The new lex mercatoria and the harmonization of the laws of international commercial transactions" [1983] Boston University International Law Journal 321.

18 Ibid. A third national method of harmonisation is through states independently looking at international business practices.

19 Wilkinson note 15 at 109.

more fundamental issue is whether convention provisions remain part of the *lex mercatoria* once they are adopted into national legal systems.[20]

Although these criticisms validly articulate the limitations of uniform laws as a source of the *lex mercatoria*, they fail to consider that the actual drafting process of uniform laws involves an analysis and distillation of the rules of international trade. Characteristically, multilateral treaties involve compromise, concessions, tradeoffs and diplomatic solutions, and the basis of multilateral treaties is mutual agreement by the parties. Wherever common ground is reached, international trade law is advanced. In addition, the voluntary nature of international law imposes a limit on the extent to which the *lex mercatoria* can be fully uniform or universal.

(ii) General Principles of Law

General principles of law are principles that are common to the vast majority, if not all states.[21] General principles of law are therefore implicitly accepted by parties to a contract "as part of the regulatory framework of their transaction".[22] These principles are distilled through "a comparative survey of a representative selection of national laws".[23] General principles of law have been criticised on the basis that even if it is possible to distill common general principles from the diverse national systems, these principles are unlikely to have the requisite degree of substance and certainty to be useful as legal principles.[24] However, it should be noted that general principles of law have been used to resolve a number of international commercial arbitrations.[25]

(iii) Customs and Usages

Customs may be codified, such as INCOTERMS 1990, and may be in the form of standard form contracts. It has been stated that customs and usages

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20 Ibid; Stoecker note 16 at 120.
21 Wilkinson note 15 at 108.
22 Chukwumerije note 7 at 112.
23 Pacta sunt servanda, good faith and estoppel have been identified as general principles of law: ibid.
24 Chukwumerije note 7 at 112; Wilkinson note 15 at 108.
25 For example, see Pabalk Ticaret Limited (Turkey) v Norsolor SA (France) referred to in [1984] Yearbook of Commercial Arbitration 109.

only become part of the *lex mercatoria* if they are widely accepted by the international business community and that States comply with them if they consider themselves bound to do so. Accordingly, standard form contracts which are usually formulated by trade groups as a prototype have been questioned as a source of the *lex mercatoria.*[26] Trade customs such as INCOTERMS become incorporated into a contract when parties to a contract make reference to such usage and therefore apply "by virtue of the contract without any need to refer to the *lex mercatoria*".[27]

(iv) Arbitral Awards

The trends and principles in arbitral jurisprudence may be difficult to ascertain because arbitral awards are often unreported.[28] Confidentiality is a cornerstone of the arbitral process and is usually one of the reasons why parties choose arbitration in preference to court proceedings. In addition, the rules which are distilled from arbitral jurisprudence are often too general.[29] Within these limitations, international commercial arbitration provides a significant avenue for the exploration and amplification of the principles of the *lex mercatoria.* This is partly due to the "growing tendency to permit [arbitrators] to choose 'rules of law' other than national laws on which the arbitrators may base their decisions".[30] It is for this reason that parties usually combine an agreement to apply the UNIDROIT Principles to the contract with an agreement to arbitrate.[31]

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26 Chukwumerije note 7 at 113.

27 Wilkinson note 15 at 110; compare Juenger, "Listening to law professors talk about good faith: some afterthoughts" (1995) 69 Tulane Law Review 1253.

28 It has been suggested that some general principles applied by tribunals without reference to a national law include the following: party autonomy; pacta sunt servanda; performance and re-negotiation in good faith; rules of force majeure; mitigation of damages; estoppel and unenforceability of contracts contrary to international morality: Chukwumerije note 7 at 114.

29 Ibid. However, there are now thousands of International Chamber of Commerce ("ICC") awards and the ICC publishes their extracts in the Yearbook of Commercial Arbitration. There does not seem to be a reason why awards cannot be published without the names of the parties being revealed.

30 Hartkamp, "The use of the UNIDROIT Principles of International Commercial Contracts by national and supranational courts", Institute of International Business Law and Practice, UNIDROIT Principles for International Commercial Contracts: A New Lex Mercatoria? (1995, ICC Publishing) 255.

31 Ibid.

Reasons for the Emergence of the Lex Mercatoria

One of the main reasons for the emergence of the *lex mercatoria* is that parties to international commercial transactions do not want to submit transnational legal disputes to national legal systems because national laws do not adequately address the needs of international traders.[32] Thus, the *lex mercatoria* has evolved in response to a measurable need.[33] There are striking differences between contemporary *lex mercatoria* and the Medieval Law Merchant.[34] For instance, the main difference is that merchants were geographically mobile while local laws were tied to the land and isolated.[35] Today's multinational corporations, which are international in character, have been compared to the medieval merchants "whose activities were super-imposed on a patchwork of local sovereignties and were hardly amenable to local regulation".[36] It is the dimension of international trade which has "fostered the development of the new *lex mercatoria*".[37]

As a consequence of the globalisation of national economies, there has been an increase in the volume and complexity of transnational commerce, especially since the Second World War.[38] Consequently, a need arose for "a body of law governing business transactions linked to a plurality of legal systems".[39] The need to transcend idiosyncrasies and uncertainties of national legal systems provided the impetus for the unification and harmonisation of international trade law.[40] The desire to escape

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32 Stoecker note 16 at 106.

33 Hill note 16 at 489.

34 See discussion below.

35 Cremades note 17 at 318.

36 Ibid at 320.

37 Ibid.

38 Schmitthoff CM, Commercial Law in a Changing Economic Climate (1981, 2nd ed, Sweet and Maxwell, London) 18. According to Cremades, after World War II, "the disintegration of the European empires" 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": refer note 17 at 320.

39 Ferrari, "Defining the sphere of application of the 1994 UNIDROIT Principles of International Commercial Contracts" [1995] Georgia Journal of International and Comparative Law 1149, 1225.

40 Tita note 7 at 84; Ferrari note 39 at 1225; Goldstajn, "The new law merchant" (1961) Journal of Business Law 12.

complicated conflict of laws rules that apply in international disputes provided further impetus for the emergence of the *lex mercatoria*.[41]

The nature of multinational state contracts and economic development contracts have contributed to the need for an autonomous and unified transnational law governing international trade.[42] Scholarly writing has also played its part in the development of the theory of the *lex mercatoria*.[43]

The Lex Mercatoria: Historical Context

The lex mercatoria can be traced back to the customs, usages and practices of the merchant community medieval times.[44] The centrality of custom to the evolution of the Law Merchant is emphasised by Trakman, who states that "as a general rule 'merchant law' embodied respect for 'merchant' practice as a primary source of regulation and the 'law' as a secondary control over commerce."[45] Underpinning merchant practice was the concept of good faith. This was the essence of the mercantile agreement[46] and "appears as the bastion of international commerce" throughout the evolution of the Law Merchant.[47]

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41 Wilkinson note 15 at 106; Lowenfeld, "Lex Mercatoria: an arbitrator's view" (1990) 6:21 Arbitration International 138-139; De Ly note 5 at 57-8.

42 In such contracts where at least one of the parties is a state, there is an in-built inequality. If the choice of law is the law of the host state, then a risk exists that the host state may change the law to benefit itself under the contract; cf Delaume, "Comparative analysis as a basis of law in state contracts: the myth of the lex mercatoria" (1989) 63 Tulane Law Review 575, 610. De-localising the choice of law clause would eliminate this risk. Consequently, applying lex mercatoria to contracts between governments and foreigners is especially appealing: An, "The law applicable to a transnational economic development contract" (1987) 21 Journal of World Trade Law 95; Hill note 16 at 489. Also see Draetta note 8 at 5. Lex mercatoria emerged as a mechanism for redressing the imbalance in legal attributes of parties to economic development contracts. See Highet note 6 at 618 where he refers to this imbalance in legal attributes as "built-in anasynallagmaticity".

43 Professor Filip De Ly identifies the key scholars as Edouard Lambert, Clive Schmitthoff, Berthold Goldman and Philippe Kahn: see De Ly note 5 at 208.

44 Wilkinson note 15 at 105; compare De Ly note 5 at 20 where he concludes that the medieval law merchant provides little evidence as an historical precedent for a present-day lex mercatoria.

45 Trakman note 13 at 9.

46 Ibid at 10.

47 Ibid at 7. The principle of good faith is still considered today to be one of the principles of lex mercatoria, but is more generally considered as a principle of international law. It was accordingly applied in Norsolor v Pabalk. This would appear

There was, however, a definite need for commercial customs to be given legal confirmation and definition.[48] Mercantile courts provided a means of entrenching mercantile practice within uniform codes.[49] The Merchant Guilds, together with the courts of the "fairs" and the "staples", had substantial power at the height of the Merchant Era.[50] They provided commercially oriented justice according to changing commercial custom. The strict law prevailing in the ordinary courts of the land had little influence on the development of the Medieval Law Merchant.[51] It was the *laissez-faire* attitude of the local rulers towards the a-national law of the merchant that helped the development of the independent rules of conduct.[52]

From the above description of the *lex mercatoria*, the following lists a number of important features which have emerged.

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to contradict the view held by Wilkinson that general principles are not a valid source of the lex mercatoria, because they "lack the level of substance and uniformity required for useful legal principles": Wilkinson note 15 at 108. It would also tend to affirm the view of Juenger that "good faith" and other such equitable concepts invite judges to heed tenets of fundamental fairness when making their decisions: refer note 27 at 1255-1256.

48 Trakman note 13 at 10.

49 The mercantile courts were presided over by members of the merchant class, their election being dependent upon their experience and knowledge, objectivity and seniority within the community of merchants: Trakman note 13 at 15; Wilkinson note 15 at 105; Stoecker note 16 at 103.

50 According to Schmitthoff, the unifying effect of the law of the Fairs was one of the factors that contributed to the international character of the old Law Merchant: refer note 4 at 106.

51 However, as Trakman notes, "the Medieval Law Merchant failed to prevail entirely in its original form. Some of its inherent characteristics - particularly its transregional flavor wavered noticeably at times...": refer note 13 at 17. The goal of the Law Merchant was uniformity of law. As the boundaries of trade grew and encompassed a greater diversity in trade values this goal became difficult to sustain. The universality of the Law Merchant became susceptible to localised principles of law and succumbed to the "diversity in custom existing both among merchants and among merchant judges": ibid at 19. Also contributing to the fragmentation of the Law Merchant was the increased complexity associated with transregional trade, the emergence of nation states and the centralisation of power in the hands of local rulers. Therefore, "the uniformity, the consistency and the unimpeded continuity of the Law Merchant as a single system of law came into some question in post-medieval Europe": ibid at 21.

52 Ibid at 9.

(i) A-national

The first significant feature of the Law Merchant is that it was a-national. According to Trakman,[53] it "reflected the ultimate move away from local law towards a universal system of law, based upon mercantile interests." Mercantile interests were, and still are, self-serving, impelled by the motivation that drives a free enterprise system predicated on profit and unencumbered by external control. The rules and regulations governing mercantile conduct were generated by the merchant community and therefore did not have a national source.

(ii) Self-enforcing

The Law Merchant was self-enforcing in the sense that a party who refused to comply with the decision of a merchant court risked his reputation and could be barred from the fairs where the mercantile courts were located.[54] The ability of the merchant community to generate and enforce its own laws and rules "allowed it to achieve a large degree of independence from [the] local sovereigns".[55] The a-national character of the Law Merchant is attributable to the ability of the merchant community to regulate and enforce its own norms.

While the Law Merchant was self-enforcing, today arbitral awards are recognised and enforced through the courts. Accordingly, the reliance on national legal systems is inevitable and in this way, one cannot regard the modern day *lex mercatoria* as truly independent or a-national.[56]

The reliance on national legal systems is the most critical difference between the Medieval Law Merchant and the modern *lex mercatoria*. The existence of the highly developed nation state and the impact of national legal systems on the sphere of international trade shift the focus from an a-national system, to one where there is a significant interplay between the

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53 Ibid at 7.

54 Stoecker note 16 at 103; Trakman note 13 at 9; Cremades note 17 at 319.

55 Ibid.

56 The move towards greater independence is reflected in the "delocalisation" theory: see discussion below. Despite the allure of "delocalised" arbitrations, it is probably a theory that is too extreme given the existence of the modern State. Compare Paulsson, "Decolonisation of international commercial arbitrations: when and why it matters" (1983) 32 International and Comparative Law Quarterly 53.

national and transnational. In international commercial arbitration, which is an attempt to maintain the integrity of the self-regulatory nature of the *lex mercatoria*, national laws play a significant role.[57]

This historical context frames contemporary debate about the *lex mercatoria* and dictates its form and substance in many ways. Almost by definition, the *lex mercatoria* has to exist outside the scope of national jurisdiction. If it becomes part of national laws, it loses that essential a-national characteristic and can no longer represent a supranational, autonomous legal order. The reception of the *lex mercatoria* by state laws fundamentally alters its character. This was true almost five centuries ago and remains true today. From the sixteenth to the nineteenth century, the Law Merchant, which had been free of government interference, became incorporated into national law[58] and lost its character as a homogeneous and autonomous body of law.[59] While Trakman accepts that a "nationalisation" and "fragmentation" of the Law Merchant took place, he denies this led to its demise.[60] He states that the Medieval Law Merchant was "transformed in character" to blend in with local influences and procedural rules of the forum. He asserts that while the Law Merchant values became embodied in domestic legal systems, the foundation of the Law Merchant, while demonstrating "flexibility of approach and commercial orientation", remained intact.

It has been observed that when the *lex mercatoria* penetrates national law through legislation, "it loses its specific nature, because the mechanism changes it from a *formal* source of law, distinct from national law, into a mere *substantive* source of national law."[61] Stoecker, who rejects uniform

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57 National laws often determine the *lex arbitri*, that is, the law governing the procedure of the arbitration, and the challenging and enforcement of arbitral awards. The balance between the autonomy of international arbitration and judicial intervention is also reflected in the French decree of May 1981; see Craig and ors, "French codification of a legal framework for international commercial Arbitration" (1981) 13 Law and Policy in International Business 727, 728.

58 In France for example, it was Colbert, Minister of Louis XIV, who carried out the first codification in the form of two ordinances: the Ordinance sur le commerce of 1673 and the Ordinance sur de la marine 1681, which were the forerunners of Napoleon's Code de Commerce of 1807.

59 Wilkinson note 15 at 105; Stoecker note 16 at 103.

60 Trakman note 13 at 23.

61 Goldman note 6 at 13. The principles of the Law Merchant manifest themselves in many codified domestic frameworks. Trakman points to the Uniform Commercial

laws[62] as a source of the *lex mercatoria*,[63] maintains uniform laws are only part of the *lex mercatoria* as long as they are not adopted into national law. Even Trakman concedes that the very fact of nationalisation is "the central deficiency in the Law Merchant as it now operates" because Law Merchant principles may become fragmented and local needs may prevail over a universalised law.[64]

The drafters of the UNIDROIT Principles take a different view, stating in the Preamble to Comment 6 that the interpretation and supplementation of international conventions by UNIDROIT are "based on the assumption that uniform law, even after its incorporation into the various national systems, only formally becomes an integrated part of the latter, whereas from a substantive point of view it does not lose its original character of a special body of law autonomously developed at international level and intended to be applied in a uniform manner throughout the world."[65] This reinforces Trakman's comment that the fragmentation of the *lex mercatoria* was in form alone.[66]

On this analysis, the UNIDROIT Principles, which represent a non legislative attempt to restate international trade law, and which are intended to be applied globally, come closer to fulfilling the definition of the *lex mercatoria* as understood from its historical roots. Unlike conventions and model laws, the Principles are not intended to be incorporated into domestic law and they therefore operate outside any national legal system.[67] As such, the non legislative mechanism by which the Principles

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Code (UCC) in the United States as an example of national legislation which incorporates merchant ideologies: see note 13 at 35. In England, the Law Merchant was retained but it was rigidified until Lord Mansfield sought to soften the laws associated with the Law Merchant from 1856.

62 Examples of uniform laws include the 1980 United Nations Convention on Contracts for the International Sale of Goods, the UNCITRAL Model Law on International Commercial Arbitration, and the 1964 Uniform Law on the Sale of Goods.

63 Stoecker note 16 at 120.

64 Trakman note 13 at 37.

65 UNIDROIT Principles, Preamble, Comment 6.

66 See note 64.

67 This is because the Principles have application when the parties involved choose to apply them: see Parra-Aranguren, "Conflict of law aspects of the UNIDROIT Principles of International Commercial Contracts" (1995) 69 Tulane Law Review 1239-1240; UNIDROIT Principles, Introduction, ix.

attempt to unify the law supports its international purview.[68]

(iii) Spontaneity

Although the Law Merchant grew spontaneously, today the usages are often formulated by organisations such as the ICC. Unlike medieval times, the modern day *lex mercatoria* is expressed in texts and may have a "synthetic" character. Even though there may be a lack of spontaneity in the growth of the contemporary *lex mercatoria,* it does not impede efforts at unification.[69] The interventionist power of the modern nation state, the non self-enforcing nature of the *lex mercatoria* and the fact that it is often expressed in texts, are three characteristics which foster the development of a new practical reality, a *lex mercatoria* that depends for its effectiveness on a national legal framework.

Academics and practitioners are divided as to whether a legal order of the *lex mercatoria* exists and among those who suggest that it does, opinion is further divided as to the exact content of that *lex*. Underlying this debate is a deeper issue, namely, the unsatisfactory nature of the current state of international trade law. As one commentator has stated: "The inadequacy of the rules and to a certain extent, even of the institutions that govern economic relations is a key issue in the debate within the international community."[70] The impetus for a move towards a unified and universal law governing international trade comes from the hope that unification, harmonisation and codification of international trade law will overcome problems associated with conflict of law rules and the inappropriateness of national laws in international transactions.[71]

The emergence (or re-emergence) of the *lex mercatoria* is linked to the deficiencies of a purely national mechanism for the resolution of transnational trade disputes. When one considers the continuous and rapid expansion of international trade one concludes that *lex mercatoria* will feature even more prominently in the future. As we hurtle towards the twenty-first century, international traders will increasingly look towards the

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68 However, it has been suggested by Tita that as with international conventions, the UNIDROIT Principles fail to circumvent the application of national laws: refer Tita note 7 at 85.

69 Goldstajn note 40 at 17.

70 Tita note 7 at 83.

71 Conflict of law rules often produce uncertainty, unpredictability and inconvenience.

certainty and convenience of universally accepted rules and principles. However, one needs to consider the extent to which the *lex mercatoria* fulfills the need from which it emerged. Paradoxically, the responses to the deficiencies in international trade are in themselves deficient. For example, international conventions have attempted to unify and harmonise the law, but these conventions, by their very nature, may impede reform because they cannot accommodate the changes inherent in a dynamic trading system. This highlights the area of conflict between static international conventions and dynamic trading practices.[72]

To what extent do the UNIDROIT Principles better fulfill the needs of the international merchant community and overcome present deficiencies in the *lex mercatoria*? As a non-legislative vehicle for the restatement of principles of international contracts, the Principles are intended to be revised in response to changing trading practices, particularly with respect to advances in technology. In this way, they make a considerable contribution to the development of transnational trade law.[73]

However, the UNIDROIT Principles have been criticised for failing to circumvent the idiosyncrasies of national laws and meet the demands of the international community. It is therefore necessary to consider the interplay between national and international legal systems in the context of the twenty first century. What becomes apparent is that the *lex mercatoria* relies on national legal systems for its effectiveness.

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[72] Cremades note 17 at 322. Note that many conventions have not been widely ratified. Compare Schmitthoff who advocates codification: refer "The codification of the law of international trade" (1985) Journal of Business Law 34. Commentators have identified other problems associated with international conventions as a means of unifying international trade law. For example, the lex mercatoria does not quite escape conflict of law issues, mainly because there are no universally accepted conflict rules: see Bonell, "Unification of law by non-legislative means: The UNIDROIT Draft Principles for International Commercial Contracts" (1992) 40 American Journal of Comparative Law 617; Wilkinson note 15 at 109. Also see Garro, "The gap-filling role of the UNIDROIT Principles in international sales law: some comments on the interplay between the Principles and the CISG" (1995) 69 Tulane Law Rview 1149. Garro comments that one of the differences between the UNIDROIT Principles and the Vienna Convention is that the former was developed by a group of legal experts drawn from all over the world and therefore, there was no need to find diplomatic solutions: ibid at 1160.

[73] Ibid at 1163.

One example is that concerning respect for the recognition and enforcement of foreign arbitral awards.[74] The reliance of the *lex mercatoria* on national legal systems may detract from its autonomy and this brings into question its status as a law. However, the modern day nation state probably precludes the possibility of the *lex mercatoria* becoming a truly autonomous, independent legal order. If this is correct, then the question is how to strike balance between national and international legal regimes. The needs of the international merchant community should be paramount without destabilising the legal system within the national context. In practical terms this means continued efforts at harmonising procedural law and unifying substantive law, with courts being supportive and auxiliary. This balance reflects the general philosophy of the Medieval Law Merchant and at the same time recognises the role of national legal systems.

III. THE *LEX MERCATORIA* AS A CHOICE OF LAW

Notwithstanding the contention of legal positivists that contracts governed by the *lex mercatoria* are not contracts, the *lex mercatoria* has been applied by arbitral tribunals and in some cases has been recognised and enforced in national courts. Increasingly, parties are agreeing to arbitration in preference to submitting their transnational dispute to national legal systems. Underlying the trend towards arbitration is the desire on the part of international traders to transcend the uncertainties of national courts and have their disputes settled by a regime more aligned with their needs.

In relation to the *lex mercatoria* as the substantive law[75] or the proper law

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74 Other examples are the provisions in the UNCITRAL Model Law, including articles 5 and 6, which give some control to the courts. In addition, national law plays a part in arbitral proceedings in determining the lex arbitri. Refer note 75.

75 For the purposes of this article, the lex mercatoria as the law governing the arbitration (the lex arbitri) will not be examined. The law governing the procedure of the arbitration depends largely on the "seat" of the arbitration because there is no established and universally adopted practice of international commercial arbitration. The form that the arbitration takes will therefore be influenced by local laws. However, international conventions have helped to harmonise the different national laws which govern the process of international commercial arbitration. In particular, the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards, 330 United Nations Treaty Series 38 ("New York Convention") and the UNCITRAL Model Law on International Arbitration ("UNCITRAL Model Law") have played a significant role. For the text of the UNCITRAL Model Law, see Report

of the contract,[76] the extent to which the *lex mercatoria* can and does apply as the choice of law should be analysed. The centrality of the principle of party autonomy is well accepted.[77] It enshrines the idea that parties to an agreement can choose the law applicable to their contract.[78] Most international instruments dealing with international contracts or arbitration recognise and give effect to this principle.[79] It is a rule that has achieved an almost universal acceptance.[80]

Subject to two restrictions,[81] the parties to a contract are free to choose the

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of United Nations Commission on International Trade Law on the work of its 18th Session, 3-21 June 1985 and Annex thereto, 40 GAOR Supp No17, UN Doc A/40/17 1985; (1985) 24 International Legal Materials 1302.

76 The question of whether contracts can exist without a governing law has been canvassed by many authors, including Highet: see note 6. For the purposes of this article it will be assumed that contracts are not self-regulatory but are "anchored in the applicable law": see further De Ly note 5 at 61-62.

77 The doctrine of party autonomy was adopted by the courts of most developed countries in the early part of the twentieth century, and the development of the principle has "come about independently in every country and without any concerted effort by the nations of the world; it is the result of separate, contemporaneous and pragmatic evolutions within the various national systems of conflict of laws": Lew note 8 at 73-79. The development of this principle has not been without opposition, but the advantages of the principle, being "certainty, predictability and uniformity", have ensured that it is widely accepted: ibid.

78 However, as De Ly points out, the importance of a choice of law clause should not be overestimated as many contracts "contain extensive clauses regulating a wide variety of problems, [and] the role of applicable law, apart from its mandatory rules, is fairly limited": see note 5 at 60.

79 For example, the 1995 Hague Convention on the Law Applicable to International Sales of Goods Article 2; the Uniform Law on the International Sale of Goods Article 3; the Benelux Uniform Law Relating to Private International Law Article 13 (1): Lew note 5 at 85. The principle is also reflected in the objectives adopted by UNCITRAL in the preparation of the Model Law. One of these objectives was to give effect to the doctrine of "autonomy of the will", giving the parties freedom to choose the manner in which their disputes should be resolved. The policy objectives were described in the Secretary-General's Report, "Possible features of a model law on international commercial arbitration" UN Doc A/CN/9/207, cited in Redfern and anor, Law and Practice of International Commercial Arbitration (1991, 2nd edition, Sweet & Maxwell, London) 509.

80 Ibid at 98. In particular, the ICC Rules of Arbitration, UNCITRAL Model Law Article 28, UNCITRAL Arbitration Rules Article 33, Netherlands Arbitration Institute Arbitration Rules Article 46, and American Arbitration Association International Rules Article 29 have provisions which give effect to the freedom of the parties to select the law to apply to the merits of the dispute.

81 The freedom of the parties to choose the law applicable to their contract is limited

law applicable to their contract. Generally, parties choose a national law which is an autonomous system of law. However, national legal systems may be inadequate and inappropriate and the parties may choose to apply a different law to their contract.[82] Where parties fail to designate the law applicable to the dispute, then the arbitral tribunal determines the proper law of the contract. The arbitrator, who has no *lex fori*,[83] selects the most appropriate conflict of law rules to determine the proper law of the contract.[84] The arbitrator is not obliged to apply the choice of law rules of the seat of arbitration, as indicated by Article 13(3) of the ICC Arbitration Rules above.[85] Since there is no provision as to the criteria to be applied in determining the proper law, a number of solutions has emerged in ICC arbitrations.[86] Whatever approach is taken by the tribunal, it is clear that the tribunal has a great deal of latitude.[87]

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only in two respects. First, the "mandatory rules of the law of a country to which all the factual elements of a contract point cannot be avoided by the choice of another law as the proper law of the contract". Secondly, a court is not obliged to apply foreign law chosen by the parties where it is incompatible with the mandatory laws of the country in which the dispute is heard or if it is incompatible with the mandatory laws of a country with which the contract has a close connection: Redfern note 79 at 98. It should be noted that under Article V(2) of the New York Convention, an arbitral award may be refused recognition and enforcement if it is considered contrary to the public policy of that country.

82 Options available to the parties include public international law, international development law, general principles of law, concurrent laws, competing laws and equity and good conscience: Redfern note 79 at 101.

83 In national courts, the lex fori normally determines the relevant conflict rule and its scope: De Ly note 5 at 63-75.

84 This issue is highlighted in ICC Case No 1512, 1971 [1976] Yearbook of Commercial Arbitration 129; see also Redfern note 79 at 125; Craig and ors, International Chamber of Commerce Arbitration (1990, 2nd edition, Oceana, Dobbs Ferry) 286.

85 Ibid at 285.

86 These include the application of the choice of law at the seat. In ICC Case 1455, 1967 the arbitrator considered the most convenient solution in practice to be "reference to the conflict of laws rules of the forum": [1978] Yearbook of Commercial Arbitration 215; also see award made in case No 1598 1971 [1978] Yearbook of Commercial Arbitration 216. They also include the cumulative application of the choice of law system of the countries having a relation with the dispute, the application of general principles of conflict of laws, and the application of a rule of conflict chosen directly by the arbitrator. See further Craig note 57 at 288.

87 Some consider that Article 13(5) of the ICC Rules of Arbitration opens the way to a less legalistic arbitration. Article 13(5) provides that "[i]n all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages". This is echoed in Article 9 of the United Nations Convention on Contracts For the International Sale of Goods, 1980 UN Doc A/CONF97/18 Annex 1, English version

The extent to which the *lex mercatoria* may apply as a choice of substantive law has been questioned by many commentators, mainly on the ground is that it is too incomplete and too vague to apply as an autonomous legal order. Another ground is that if a contract is stateless, it is not a contract and cannot be enforced.[88] Commentators such as Delaume have argued that a conflict of laws doctrine, rather than the *lex mercatoria,* should address the deficiencies in national legal systems.[89] The deficiencies of the *lex mercatoria* as a choice of law have been articulated by Bonell: "In the absence of a sufficiently precise definition of the nature and content of such general principles or of the supposed *lex mercatoria*, such a choice risks producing even greater uncertainty and unpredictability".[90]

Nevertheless, there have been arbitral decisions in which reliance was placed on the *lex mercatoria*, as in ICC Case No 3540 between a French enterprise and a Yugoslav subcontractor in which the tribunal acknowledged that they could avoid the conflict of law rules of the forum in determining the substantive law and applied the *lex mercatoria.*[91] This case reflects the caution with which the *lex mercatoria* is embraced as the substantive law of the contract, even where the tribunal decides as *amiable compositeurs*. However, what it does reveal is that there may be cases

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reprinted in (1987) 52 Fed Reg 6264; (1980) 19 International Legal Materials 688. The Vienna Convention Article 9 provides: (1) The parties are bound by any usage to which they have agreed and by any practice which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known and which in international trade is widely known to, and regularly observed by parties to contracts of the type involved in the particular trade concerned.

88 See Wilkinson note 15; Highet note 6; Mustill, "Contemporary problems in international commercial arbitration: a response" (1989) 7 International Business Lawyer 161.

89 See Delaume note 42.

90 Bonell MJ, An International Restatement of Contract Law - the UNIDRIOT Principles of International Commercial Contracts (1994, Transnational Juris Publications) 14.

91 Award made on 3 October 1980; see [1980] Yearbook of Commercial Arbitration 124. However, it should be noted that in this case, the tribunal had the power of amiables compositeurs. Other examples of cases in which a non-national law was applied include Case No 2321, 1976 [1976] Yearbook of Commercial Arbitration 133; Case No 2291, 1978 Journal Du Droit International (Clunet) [JDI] 989; and Mechema Ltd v SA Mines, Minerais et Metaux [1982] Yearbook of Commercial Arbitration 77, cited in Medwig, "The new law merchant: legal rhetoric and commercial reality" (1993) 24 Law and Policy in International Business 589.

where it is appropriate to resolve a dispute by reference to a non-national source of law. This case reflects the attitude of a tribunal and not that of a national court. Stoecker has pointed out that the attitude of national courts towards the *lex mercatoria* is a significant indicator of the degree to which the *lex mercatoria* can be said to exist.[92]

The attitude of national courts can be gleaned from a handful of cases, including *Fougerolles v Banque du Proche Orient,*[93] *Deutsche Schachtbau- und Tiefbohrgesellschaft MBH v Shell International Petroleum Co Ltd (Trading as Shell International Trading Co),*[94] and *Norsolor v Pabalk Ticaret Ltd.*[95] The award in *Norsolor* came before the scrutiny of both the Austrian Supreme Court and the French Court of Cassation.[96] In these cases, the arbitral tribunal based the award on general principles of international law.[97] In all of them, the validity and enforcement of the award were challenged on the basis that the arbitral tribunal did not decide

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92 Stoecker note 16 at 105.

93 [1983] Dalloz-Sirey, Jurisprudence [DS Jur] 238 (Cour de Cassation 1981).

94 [1990] 1 Appeal Cases 295. This case was on appeal from Deutsche Schachtbau-und Tiefbohrgesellschaft MBH v R'AS al-Khaimah National Oil Co and Shell International Petroleum Co Ltd (N2).

95 [1983] Yearbook of Commercial Arbitration 362 (Cour d'Appel Paris 1981); Norsolor v Pabalk Ticaret Ltd [1984] Yearbook of Commercial Arbitration 159 (Oberster Gerichtshof 18 November 1982). The case arose out of a dispute between a French corporation (Norsolor) and a Turkish company (Pabalk). The parties had agreed that disputes arising in connection with the contract would be submitted to ICC arbitration, but the parties made no reference to the applicable law. Pabalk sought damages for the termination of the contract and instituted arbitral proceedings. In accordance with the ICC Arbitration Rules, a tribunal was constituted and the place of arbitration was Vienna.

96 In this case, unlike ICC Case 3540 noted above, the arbitrators were not empowered to act as amiables compositeurs: see note 91.

97 In Fougerolles v Banque du Proche Orient, the arbitral tribunal based its decision on "general principles of obligation generally applicable in international trade": Medwig note 91 at 607. In Norsolor v Pabalk Ticaret, the arbitral tribunal in the absence of any express stipulation by the parties applied "international lex mercatoria": see Delaume GR, Transnational Contracts: Applicable Law and Settlement of Disputes (A Study in Conflict Avoidance) 321.

98 See Wilkinson note 15.

99 In Fougerolles v Banque du Proche Orient, the arbitral tribunal based its decision on "general principles of obligation generally applicable in international trade": Medwig note 91 at 607. In Norsolor v Pabalk Ticaret, the arbitral tribunal in the absence of any express stipulation by the parties applied "international lex mercatoria": see Delaume note 97 at 321.

the award under a national system of law, but the awards in all three cases were upheld by courts.

However, these cases cannot support a general conclusion that the *lex mercatoria* is recognised by national courts as an independent and autonomous legal order. Nevertheless, it is clear that the *lex mercatoria* can be applied to resolve a dispute. In particular, the principle of good faith which some commentators have regarded as too broad and vague to be of any use as a legal principle,[98] did not prevent the the court in *Norsolor v Pabalk*[99] from settling the legal rights and obligations of the parties.

It may well be that the UNIDROIT Principles, as a "veritable expression" of the *lex mercatoria,* face the same problems. On the other hand, it may be that the Principles provide more certainty as a choice of law for purely practical reasons. The Principles are in a written form and so specific articles can be referred to. Furthermore, the articles are supplemented and explained by an accompanying commentary which is an "integral part of the Principles".[100] In addition, the Principles are accessible, having been translated into many different languages.[101]

IV THE UNIDROIT PRINCIPLES EXAMINED

Since the UNIDROIT Principles contribute to the evolution of international trade law in several ways, they will now be analysed.

Nature of the UNIDROIT Principles

The UNIDROIT Principles are an elaboration of an international restatement of general principles of contract law. They do not take the form of a binding legislative instrument, such as a treaty or convention. This was

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98 See Wilkinson note 15.

99 See notes 96-97.

100 Bonell note 90 at 27.

101 Evidence for this may be found in the 1994 Inter-American Convention on the Law Applicable to International Contracts ("Mexico Convention") OEA/Ser K/XXI.5 (1994); [1994] 33 International Legal Materials 72. The Mexico Convention was adopted at the Fifth Inter-American Specialised Conference on Private International Law held in Mexico City on 17 March 1994 and indirectly incorporates the terms of the UNIDROIT Principles in Article 9. See Veytia, "The requirement of justice and equity in contracts" (1995) 69 Tulane Law Review 1191, 1194.

a deliberate choice on the part of UNIDROIT, which meant that their acceptance would "depend on their persuasive authority."[102] There are cogent reasons for rejecting a uniform law or convention as a means of achieving unification. As Parra-Aranguren[103] has observed:

> Notwithstanding their undeniable success uniform conventions and uniform laws have not produced complete uniformity because some reservations must be accepted to guarantee their ratification.[104]

Similarly, Model Laws are limited in the extent to which they achieve complete uniformity because States are allowed to make modifications.

A further problem associated with conventions is their fragmentary nature. For example, validity of the contract, property of the goods and the use of standard forms are *lacunae* in the Vienna Convention. There is also the risk that conventions may become a dead letter, an example being the Agency Convention.[105] The main criticism of conventions is that they have a limited scope for growth and fail to respond to changing circumstances, becoming the "enemy of substantive reform".[106]

The UNIDROIT Principles attempt to overcome these problems and are intended to be revised in the light of changing practices and circumstances.[107] This need to revise and adapt resonates with the elasticity of the Medieval Law Merchant. It reflects the fact that *lex mercatoria* has grown out of custom, dictated by the needs of the international trading community. The Law Merchant grew out of the actual practice of trading

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102 UNIDROIT Principles, ix.

103 He is now a Judge of the International Court of Justice.

104 Parra-Aranguren note 67 at 1239.

105 Bonell note 90 at10.

106 Garro note 72; compare Schmitthoff, who in 1981 admitted that he was wrong in his 1965 conclusion that codification was inappropriate to achieve unification of trade law. Schmitthoff considered the work of international organisations, such as UNCITRAL, to be an indication that unification through codification could be achieved and that the lex mercatoria need not be "multiform" and "complex": refer note 38.

107 "With regard to substance, the UNIDROIT Principles are sufficiently flexible to take account of constantly changing circumstances brought about by the technological and economic developments affecting cross-border trade practice": UNIDROIT Principles, Introduction, viii.

and this should be the guiding principle in the unification of trade law.[108]

An Exercise in Comparative Law

As noted above, the *lex mercatoria* is the product of comparative law.[109] This is reflected in the UNIDROIT Principles. According to Perillo:

> Comparative law is a humanistic discipline. A comparison of legal systems expands the mind. Provisions within Principles regarding issues on which the common law and civil law systems have different conceptual frameworks (for example, specific performance and penalty clauses) show that the drafters were able to break out of their respective straightjackets to reach common ground. This could have only happened by a process of mutual education and the expansion of understanding.[110]

The significance of this interaction should not be underestimated. Within the framework of comparative law, the UNIDROIT Principles "have succeeded in synthesizing the common elements of the various legal cultures of the world".[111] The Principles incorporated contributions from more than 70 specialists from all major legal systems including former socialist, Latin American and Asian countries.[112] Thus, the Principles are capable of finding universal acceptance. Participation and inclusiveness are vital if unification and harmonisation of international trade law are to be achieved.[113] The development and adoption process of the Principles

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108 Trakman contends that the regulation of international trade must be based on the careful analysis of trade itself: see note 13 at 43.

109 See discussion above.

110 Perillo, "UNIDROIT Principles of International Commercial Contracts: the black letter text and a review" (1994) 63 Fordham Law Review 281, 284.

111 Veytia note 101 at 1191. This was facilitated by the fact that the work was carried out by "a large number of eminent lawyers from all five continents of the world": see UNIDROIT Principles, Foreword.

112 Bonell, "The UNIDROIT Principles in practice: the experience of the first two years", available at http://www.agora.stm.it/unidroit/pr-exper.htm (visited in 1997).

113 This is highlighted by commentators such as Sempasa: see Sempasa, "Obstacles to international commercial arbitration in African countries" [1992] International and Comparative Law Quarterly 387. Sempasa points out that until recently, the evolving body of unified law has "largely been articulated without the participation of African States": ibid at 389. He contends that the challenges of international commercial arbitration are so complex and different on the African continent that "it is

reinforces Schmitthoff's contention that the rules of the *lex mercatoria* are synthetic in character.[114] The synthesis of various legal rules and principles into a commonsense and practical rule applicable to international trade contributes significantly to the evolution of transnational trade law. In the case of the UNIDROIT Principles, the concepts that were adopted were those that the Working Group thought most appropriate and persuasive in the context of international trade. Thus, they embody "what are perceived to be the best solutions, even if still not yet generally adopted".[115]

The terminology of the UNIDROIT Principles avoids references to national laws, concepts or particular legal systems. This supports its global purview and the objective of establishing "a balanced set of rules designed for use throughout the world irrespective of the legal traditions and the economic and political conditions of the countries in which they are to be applied."[116] The drafters liberated themselves from the constraints of their particular legal milieu to find a meaningful language that was accessible to people from different legal cultures. This clearly demonstrates that the possibility of a codified and uniform set of principles governing international trade is not an unrealistic goal, and that we are moving in that direction.

Scope of Application

The Preamble of the UNIDROIT Principles delineates the scope of their application.[117] However, the contribution of the Principles goes beyond that

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meaningless for individual countries to attempt separate solutions", and concludes that "the process in Africa must proceed by a fairly representative African consensus": ibid.

114 Ibid.

115 UNIDROIT Principles, viii.

116 Ibid.

117 The Preamble provides the following:

Preamble (Purpose of the Principles)

These Principles set forth general rules for international commercial contracts.

They shall be applied when the parties have agreed that their contract be governed by them.

They may be applied when the parties have agreed that their contract be governed by "general principles of law", the "lex mercatoria" or the like.

They may provide a solution to an issue raised when it proves impossible to establish the relevant rule of the applicable law.

They may be used to interpret or supplement international uniform law instruments.

They may serve as a model for national or international legislators.

envisaged in the Preamble. For example, the Principles have been used as a teaching tool and a guide to contract negotiations.[118]

The UNIDROIT Principles Applied as the Lex Mercatoria

It is clear that the UNIDROIT Principles are intended to be applied when the parties have agreed that their contract should be governed by the *lex mercatoria*, as seen above. This indicates that the Principles are intended to be viewed as a source and expression of the *lex mercatoria*. The Principles therefore contribute directly to the evolution of transnational trade law by giving the concept of the *lex mercatoria* greater certainty and definition. The Principles embody clear and unambiguous rules that would greatly assist an arbitrator or judge who applies the *lex mercatoria*.[119] The commentary accompanying the Principles states that because they are systematic and well-defined, they avoid, or at least reduce, the uncertainty associated with the *lex mercatoria*.[120]

There have been awards, including three rendered by the ICC Court of Arbitration, in which the UNIDROIT Principles were designated as the law governing the contract. In the first award, the contracts referred to "principles of natural justice" as the law governing the contract.[121] After analysing the origin and nature of the Principles, the tribunal concluded that they were "the most genuine expression of general rules and principles enjoying wide international consensus and as such should be applicable as the law governing the contracts in question".[122]

In the second award, the contract provided that the law governing the dispute would be "Anglo-Saxon principles of law".[123] According to the tribunal, this expression was sufficient to invoke the UNIDROIT Principles as the law governing the contract.[124]

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118 Bonell note 112.

119 See Lowenfeld note 41.

120 UNIDROIT Principles, Preamble, Comment 4(b) at 4.

121 The contracts in question were for the supply of equipment between an English company and a governmental agency of a Middle Eastern country. See Bonell note 112.

122 Ibid.

123 The contract in this case was between a United States company and a governmental agency of a Middle Eastern country.

124 Bonell note 112.

In the third award, there was no express choice of law clause in the contract as the parties stipulated that their own national law would apply.[125] The tribunal held that it would base its decision on the contractual terms, supplemented by general principles of trade and as embodied in the *lex mercatoria*. The tribunal considered the Principles to be a source of the *lex mercatoria* and accordingly applied several of its Articles.[126]

The UNIDROIT Principles as the Law Governing the Contract: Express Stipulation of the Parties

Paragraph 2 of the Preamble states that the UNIDROIT Principles shall be applied when the parties agree that their contract be governed by them. It is worth noting the use of the word "shall". This clearly reinforces the concept of party autonomy and emphasises that where the parties stipulate the law applicable to their contract, the arbitrator (or judge) must give effect to that choice. The Comment to the Preamble advises parties to combine the reference to the Principles with an arbitration agreement.[127]

Additionally, the commentary emphasises that in the realm of international commercial arbitration, there is significantly more latitude to apply a non-national law. In an award rendered by the National and International Court of Arbitration of Milan,[128] the parties agreed at the start of the arbitral proceedings that the law governing the dispute would be the UNIDROIT Principles, tempered by recourse to equity.[129]

The UNIDROIT Principles as a Tool to Interpret and Supplement International Conventions

According to Craig, Park and Paulsson, there has been a long tradition in

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[125] In this case the contract was concluded between an Italian company and a governmental agency of a Middle Eastern country.

[126] Bonell note 112.

[127] The Commentary explains that the reason for this is that "the freedom of choice of the parties in designating the law governing their contract is traditionally limited to national laws. Therefore, a reference by the parties to the Principles will normally be considered to be a mere agreement to incorporate them into the contract, while the law governing the contract will still have to be determined on the basis of the private international law rules of the forum.": UNIDROIT Principles, Preamble, Comment 4(a) at 3.

[128] Award No 1795 of 1 December 1996.

[129] Bonell note 112.

international arbitration to refer to general principles of law.[130] Arbitral tribunals refer to general principles of law to fill the gaps in the applicable law. The UNIDROIT Principles can be used in this way. According to one commentator, the Principles' gap-filling role is most pertinent because of the fragmentary nature of most of the conventions which deal with international commercial transactions.[131] The Principles are particularly useful because judges and arbitrators "seek to interpret and supplement international conventions according to autonomous and internationally uniform principles".[132] This is expressly provided in the Preamble to the Principles where paragraph 5 states that "[t]hey may be used to interpret or supplement international uniform law instruments."

For example, the UNIDROIT Principles may be used to interpret and supplement the Vienna Convention.[133] The concept is embodied in Article 7(2) of the Convention, which provides that "questions concerning matters governed by this Convention which are not expressly settled in it are to be settled in conformity with the general principles on which it is based or, in

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130 Craig note 84 at 296. Trade usage is often used to supplement or substitute national law: see Lowenfeld note 41; Redfern note 79 at 120; Craig note 84 at 294. An example of supplementary reference to trade usage is ICC case 1472/1968. In ICC Case 2375/1975, extracts in [1976] JDI 973, trade usages were referred to as a substitute for national law. According to Craig, "The application of trade usages is consistent with the primacy of contractual terms": note 84 at 295. Usages may be incorporated into the contract either by express reference by the parties, or by implication. This is given expression in various international instruments. For example, Article 9 of the Vienna Convention stipulates: "(1) The parties are bound by any usage to which they have agreed and by any practices which they have established between themselves. (2) The parties are considered, unless otherwise agreed, to have impliedly made applicable to their contract or its formation a usage of which the parties knew or ought to have known to, and regularly observed by, parties to contracts of the type involved in the particular trade concerned." Article 13(5) of the ICC Arbitration Rules provides: "In all cases the arbitrator shall take account of the provisions of the contract and the relevant trade usages."

131 Garro note 72 at 1153.

132 Bonell MJ. "The UNIDROIT Principles of International Commercial Contracts", 1994 Butterworths Lectures, Process and Substance: Lectures on Comparative Law (1995) 65.

133 A distinction can be made between the use of the UNIDROIT Principles as a tool to interpret and supplement the Convention and the gap-filling role of the UNIDROIT Principles. According to Garro "it is not always easy to determine whether a given issue not expressly addressed by the CISG actually falls under its scope": see note 72 at 1156.

the absence of such principles, in conformity with the law applicable by virtue of the rules of private international law."

Another example is Article 78 of the Convention which states that a party is entitled to interest on any sum in arrears, although it fails to specify the rate of interest.[134] In two awards rendered by the International Court of Arbitration of the Vienna Federal Chamber of Commerce, reference was made to Article 7.4.9 (interest for failure to pay money) of the UNIDROIT Principles to fix the applicable interest rate.[135]

The UNIDROIT Principles may also be used to supplement the Vienna Convention on the question of "battle of the forms."[136] Both the Vienna Convention and the Principles deal with contract formation.[137] When there is a dispute as to which party's terms apply to the contract, under the Vienna Convention this has to be resolved under Articles 18-19 on offer and acceptance. An application of these Articles usually results in the "last shot principle" whereby the party who sent the last form prevails.

The result under Article 2.22 (Battle of the Forms) of the UNIDROIT Principles is different. The Article provides that "where both parties use standard terms and reach agreement except on those terms, a contract is concluded on the basis of the agreed terms and of any standard terms which are common in substance..." ("knock-out" doctrine).[138] When this situation

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134 See further Ferrari, "Uniform application and interest reates under the 1980 Vienna Sales Convention" (1995) 24 Georgia Journal of International and Comparative Law 467, 472-475.

135 Article 7.4.9(2) states that the "rate of interest shall be the average bank short-term lending rate to prime borrowers prevailing for the currency of payment at the place for payment, or where no such rate exists at that place, then the same rate in the State of the currency of payment. In the absence of such a rate at either place the rate of interest shall be the appropriate rate fixed by the law of the State of the currency of payment".

136 The "battle of the forms" refers to a common situation in international trade where neither of the party's terms clearly apply. Such a situation arises when the offeror in making the offer, refers to the offeror's standard terms, but in accepting the offer, the offeree refers to the offeree's own standard terms. A problem of the "battle of the forms" arises when each party asserts that the terms of the contract are embodied in their own standard terms. See further Perillo note 110 at 287, 290.

137 Formation of the Contract is dealt with in Part II Articles 14-24 of the Vienna Convention. The UNIDROIT Principles deal with contract formation in Chapter 2.

138 Unless one party clearly indicates in advance or later, and without undue delay informs the other party that it does not intend to be bound by such a contract: see

occurs, the Principles may be particularly useful.[139] This is because the application of an offer and acceptance analysis, under Articles 18-19 of the Vienna Convention to resolve a "battle of the forms" scenario, may lead to the finding that no contract had been concluded in the first instance. However, this will be an unsatisfactory conclusion and clearly unsuitable in a situation where the parties had referred to their own contractual terms as a matter of course and overlooked discrepancies which had existed between their respective terms.

In these situations, the parties clearly intend to enter into contractual relations and believe that there is a contract in existence. The question is really what constitutes the terms of their contract. The UNIDROIT Principles clearly attempt to restrict the circumstances in which the existence and validity of the contract may be called into question. This reflects a desire to preserve the contract and therefore meets the special needs of international trade practice (*favor contractus*).[140] This philosophy underpins many of the provisions in the Principles.[141] In this respect, it may be concluded that the Principles further transnational trade law. This is achieved by recognising that international trading practice has unique needs and by developing provisions that meet those needs.

This brings into focus the contribution of the UNIDROIT Principles to the evolution of transnational trade law. The Principles enable judges and arbitrators to resort to international, autonomous principles rather than national laws to interpret international conventions. This creates greater uniformity in the adjudication of disputes. The examples illustrate that the Vienna Convention and the Principles complement each other.[142] This further enhances the contribution the Principles have made to the development of transnational trade law.[143]

UNIDROIT Principles Article 2.22.

139 Perillo regards the UNIDROIT Principles as a "better, more mature" product in relation to such areas as "battle of the forms": see note 110.

140 Bonell note 132 at 59.

141 Ibid.

142 Perhaps this is partly due to the fact that some of the scholars and lawyers who drafted the Vienna Convention had also worked on the UNIDROIT Principles. See Perillo note 110 at 282.

143 On the interplay between the UNIDROIT Principles and the Vienna Convention, see generally Garro note 72.

V. CONCLUSIONS

Several conclusions may be drawn from the above discussion. For example, on the sources of the *lex mercatoria*, the following are the observations which can be made.

As a codified restatement of common principles applicable to international contracts, the UNIDROIT Principles may be considered a source of the *lex mercatoria*.

The *lex mercatoria* is an emerging concept and its development will be stimulated by the growth of jurisprudence in this area. Although it is difficult to define the parameters of the *lex mercatoria*, each uniform law and each arbitral award further defines the *lex mercatoria*.[144] It is true, however, that the inherent limitations in the sources of the *lex mercatoria* may well mean that "it will never reach the level of the copious and well-organised national legal systems".[145]

In light of the limitations of the sources of the *lex mercatoria* noted above, the role of the UNIDROIT Principles is brought into sharp focus. As a non legislative, easily accessible and flexible source of the *lex mercatoria*, the Principles contribute to the growth of the *lex mercatoria* and endow it with qualities that critics consider lacking.

In addition, it is reasonable to conclude that the emergence of the new *lex mercatoria* is due to the deficiencies in purely national mechanisms for the resolution of transnational disputes combined with the rapid expansion of international trade. While the new *lex mercatoria* shares some of the features of the Law Merchant of Medieval times, it has clearly grown in response to the exigencies of modern trade. We are rapidly moving towards a global marketplace shaped by advances in technology. Instantaneous communication renders geographical borders obsolete. Consequently, the diversity of local laws is hardly conducive to transnational trade. Transnational trade demands to be governed by rules and regulations that are coherent, consistent, certain, uniform and predictable. It is these qualities that produce security in international trade.

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144 Lando note 9 at 752.
145 Ibid.

The new *lex mercatoria* is an attempt to transcend the idiosyncrasies of national legal systems and meet the needs of the international merchant community. However, the extent to which the *lex mercatoria* can achieve its purpose is limited by the fact that it is not an autonomous, complete, codified or comprehensive legal order, and the fact that scholars, courts and tribunals have treated the concept with some caution. In this context, the UNIDROIT Principles represent a significant step towards giving greater definition to the concept of the *lex mercatoria*. Of more significance, the Principles have promoted uniformity, predictability and consistency in international trade.

One of the primary means by which the UNIDROIT Principles contribute to the evolution of international trade law is in the interpretation and supplementation of international conventions. This greatly enhances predictability in the adjudication and resolution of disputes relating to international commercial contracts. It also provides judges and arbitrators with a non-national legal resource to settle international disputes.

But perhaps the greatest contribution of the UNIDROIT Principles to the evolution of international trade law is the manner in which it was developed. In contrast to the Medieval Law Merchant, which comprised a set of customary rules that was spontaneous in origin, the Principles are the result of an exercise in comparative law. They represent the deliberate efforts of legal experts who sought the best solutions for international traders through an examination of various legal systems. These solutions found expression not in a convention but in a non legislative restatement of the common principles of international contract law, aimed at achieving general consistency in substantive outcomes. The Principles therefore embody the spirit of the new *lex mercatoria*: civil and common law boundaries are crossed, legal systems compared and solutions forged on the anvil of the Working Group's mandate.

The effort to transcend national laws is reflected in the neutral language in which the rules are expressed. Therefore, global participation is a hallmark of the UNIDROIT Principles and also a feature of the new *lex mercatoria*. Universality is reinforced by the large numbers of states that have become signatories to international conventions such as the United Nations Convention on Contracts for the International Sale of Goods and the Convention on the Recognition and Enforcement of Foreign Arbitral Awards. The contracting states represent a diversity of legal systems and

reflect a plurality of interests. Their participation indicates the extent to which states recognise the need for predictability, uniformity and consistency to achieve security in international trade.

Besides contributing to certainty, predictability and consistency, the UNIDROIT Principles contribute to the universality of the rules governing international trade by restating the common principles of international commercial contracts in a simple and accessible way. As Perillo observes, the Principles are "one step" towards the assurance of the international merchant community "that even-handed rules will govern their transactions".[146] However, the challenge will be to ensure that the Principles retain their flexibility and ability to adapt to changes in international trade. It is the dynamic quality of the Principles that best serves the interests of the international merchant community. Ultimately, the contribution of the Principles to the evolution of international trade law will be determined by the extent to which it is resourced, utilised and applied.

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[146] Perillo note 110 at 316.