

## Definitions of the Lex Mercatoria and the Effects of Codifications on the Lex Mercatoria's Flexibility

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### A. Introduction

The study of the Lex Mercatoria, or the mercantile law, presents a unique analytical challenge in both form and content. The concept of the Lex Mercatoria has a long history rooted in the Middle Ages. Merchants, operating within the loosely organized states of Western Europe, set up systems which adjudicated disputes within the merchant community. The ancient Lex Mercatoria lacks a defined historical identity and may be a name given by modern historians to a very diverse method of commercial dispute resolution. Additionally, the extent of the system is relatively unknown, some believe it to have been merely a procedural system and others believe it had more substantive roots. What ever the basis and content of the ancient Lex Mercatoria may have been, the current Lex Mercatoria or "New Lex Mercatoria" has many of the same characteristics. Like the ancient Lex Mercatoria, the "New Lex Mercatoria" is also highly situational in application. Though in some ways integrated into national legal systems, a resurgence of the Lex Mercatoria appeared after the Second World War as a heightened sense of global interconnectedness revealed a need for a more adaptive form of law. Scholars and practitioners have tried various means to turn it into a more manageable system for use in the realm of international commercial law, particularly in international commercial arbitrations. These codifications can be seen as attempting to remedy one of the largest complaints about the Lex Mercatoria, that of its uncertainty. Through a systemization of the Lex Mercatoria, proponents hope that it will gain acceptance, revealing the Lex Mercatoria's strengths, in particular its flexibility, universality and reliance on custom and practice.<sup>1</sup> Ironically, the flexibility inherent in the Lex Mercatoria, which makes it attractive to users, may be affected by these codifications as they seek to solidify the Lex Mercatoria's uncertain substance.

As the usefulness of the Lex Mercatoria is based, in part, on the flexibility, it becomes the basis of challengers' opposition. They view the Lex Mercatoria

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<sup>1</sup> B. Benson, *The Spontaneous Evolution of Commercial Law*, Southern Economic Journal 1989, at 644, 654: "These include 1) universal character, 2) flexibility and dynamic ability to grow, 3) informality and speed, and 4) reliance on commercial custom and practice."

as inherently ambiguous and indefinite. The substance of the Lex Mercatoria is murky and is only clarified when applied to a particular situation. This need for certainty and to respond to opponents led to various efforts to codify the rules that make up the Lex Mercatoria. The most direct efforts have been in the form of lists compiled by authors such as Mustill, Schmitthaus, Berger and others.<sup>2</sup> Even further, whether or not they have been seen and used as evidence of the content of the Lex Mercatoria, attempts on an international basis to harmonize contract and trade law have led to codifications such as the Convention on Contracts for the International Sale of Goods (CISG) and the UNIDROIT Principles (Principles). These codifications attempt to clarify the murky nature of Lex Mercatoria. A principle danger attendant with these codifications is that the Lex Mercatoria will lose the flexibility which is one of the prime bases for its use in international commercial transactions. This paper will examine whether the codifications do in fact affect the basic flexibility of the Lex Mercatoria, investigating theoretical and practical impacts.

Implicit in any discussion of the Lex Mercatoria is the actual definition that is used and justified. There are two dominant perspectives which serve as definitions for any discussion of the Lex Mercatoria. Additionally, a new third perspective is helpful in this discussion. As a Professor Goldman states that “the Lex Mercatoria comprises rules the object of which is mainly, if not exclusively, transnational, and the origin is customary and thus spontaneous, notwithstanding the possible intervention of interstate and state authorities in their elaboration and/or implementation.”<sup>3</sup> It has also been defined as a type of law which is applied to international commercial dealings and draws its substance from those dealings as well.<sup>4</sup> This position posits the Lex Mercatoria as actually a third type of law, transnational law. Transnational law is neither domestic nor international but outside of those rigid definitions. The third definition, that I have promulgated, is that of the Lex Mercatorian Pool. This is a reservoir of knowledge, rules and principles that seeks to enhance international commerce. These definitions have led to much discussion and have been applied as a means of ridding the Lex Mercatoria of its uncertainty and solidifying its place in international commercial practice. Within each, three types of codifications, international conventions (CISG), international restatements (the Principles), and academic lists, will elucidate the practical and theoretical questions of the Lex Mercatoria, revealing the affect which these codifications have on the flexibility of the Lex Mercatoria.

<sup>2</sup> C. Wasserstein Fassberg, *Lex Mercatoria: Hoist with its own Petard?*, 5 Chi. J. Int'l L. 67, 69 (2004).

<sup>3</sup> K. Highet, *The Internationalization of Law and Legal Practice: The Enigma of the Lex Mercatoria*, 63 Tul. L. Rev. 613, 628 (1989), n.11.

<sup>4</sup> G. Born, *International Commercial Arbitration in the United States* 234 (1994).

## B. Overview

### I. Definitions of the Lex Mercatoria

The three definitions described below provide a foundation for any discussion of Lex Mercatoria. These definitions include trade manner and usage, transnational legal system, and the new definition, the Lex Mercatorian pool. The trade manner and usage definition is the narrowest definition, one that dramatically restricts sources for the Lex Mercatoria. The transnational legal system definition is more encompassing. It promotes the Lex Mercatoria as a legal system on par with both the domestic and international legal systems. The new Lex Mercatorian pool definition will provide a different perspective on the Lex Mercatoria by promoting it as a means of promulgating new rules and ideas for use by practitioners without the need for any legal system. Within these particular approaches, differences become more apparent, providing the lens to examine how the Lex Mercatoria is viewed and analyzed.

The narrowest view of Lex Mercatoria confines it to “only general principles and uncodified usages.”<sup>5</sup> Proponents of the Lex Mercatoria stated that it was a “spontaneous emanation of customs and principles arising purely out of professional mercantile circles through mercantile activity and dispute resolution.”<sup>6</sup> This narrow purist view focuses on the object of a particular rule and on the origin and nature of the rule when determining if the rule may be considered part of the Lex Mercatoria. Sources of this view include informal customs, standardized trade terms and contractual forms, and the contents of arbitral awards.<sup>7</sup> Only those rules which have been accepted into the international commercial sphere through use may be included.<sup>8</sup> This view does not include anything which has not been used and accepted for use in the commercial sphere. This necessarily causes problems since determining that a rule has been accepted through use may prove difficult since there is no one group which decides such matters. Therefore rules must have a widespread use and effect before being considered as rules of the Lex Mercatoria. The Lex Mercatoria when viewed through this narrow lens precludes many potential sources which would affect its flexibility.

Another much broader and pragmatic view of the Lex Mercatoria is as a transnational legal system. This view not only encompasses the purist “custom and trade usage” but goes further to include many other sources which deal with international commerce.<sup>9</sup> The focus of this view is on its ability to use the Lex Mercatoria and to provide sufficient tools to address most if not all issues.

<sup>5</sup> A. F. M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge for International Commercial Arbitration?*, 14 Am. U. Int'l L. Rev. 657, 673 (1999).

<sup>6</sup> Fassberg, *supra* note 2, at 69.

<sup>7</sup> *Id.*

<sup>8</sup> *Id.*, at 70.

<sup>9</sup> *Id.*, at 70-71

Conventional and customary rules of public international law, uniform laws originating in international convention and adopted by national systems, principles formulated by organizations such as UNIDROIT, formulations of legal principles

However, perhaps the greatest potential of this view, as seen by its proponents, is the legitimization of the Lex Mercatoria for national audiences as a legal system where it may be used for matters other than international commerce. Proponents seek to set the Lex Mercatoria up as the third option between international and national law, as a transnational law. The autonomy of this system is its main attraction. The Lex Mercatoria when viewed through this broad lens allows in many sources and seeks the certainty of an established legal system, therefore codifications have a great potential to affect its flexibility.

Finally, a third view, which takes an even broader and more pragmatic approach to the Lex Mercatoria. This approach envisions the Lex Mercatoria as a pool. The Lex Mercatorian pool is similar to the transnational legal system view but without the need to promulgate the Lex Mercatoria as an autonomous legal system. The focus with this view is the usability of the Lex Mercatoria by practitioners, arbitrators, and businesspeople within the context of contract and arbitration. The sources are very similar to the transnational legal system view but the use is different. The parties or arbitrator, depending on what stage the parties are at, can go to the Lex Mercatoria as a resource to respond to various difficulties either in the contract or in the resolution of conflict. Potential problems with this approach are that the comparative research necessary to make the Lex Mercatoria accessible to the ordinary contracting parties would be prohibitive in terms of time and money and the lack of certainty involved in choosing specific parts of the Lex Mercatoria. However these problems can be easily overcome. First, the comparative research is already being done for the parties, by scholars and others interested in the Lex Mercatoria. There are many lists of rules making up the substance of the Lex Mercatoria. These lists may be used by parties much like how the INCOTERMS model contract is used. Second, there is a potential for more certainty when using the Lex Mercatoria. No longer do the parties have to rely on arbitrators picking and choosing what they think to be the rules of the Lex Mercatoria, now the parties can pick a list of rules and tweak that list if necessary to fit their particular needs. This view of the Lex Mercatoria allows the parties to have as much or as little certainty in their contract as they choose depending on the trade-offs made during the negotiation of that contract. Also, the pool may act as an incubator for ideas, where they may lay dormant until the need for particular solution calls for those ideas. While there the ideas may change as they are exposed to other ideas that shape how other ideas are seen. The Lex Mercatoria when viewed through this broad but very pragmatic lens allows in many sources but focuses on the usability of the ideas, rules and principles contained therein, therefore codifications have little chance of affecting its flexibility.

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common to a large number of legal systems such as the Common Core project and possibly even resolutions, recommendations, and codes of conduct emanating from international organizations, whether customary or not.

## II. Types of Codifications

The following types of codifications intersect with definitions of the Lex Mercatoria in various ways. The three examined represent the spectrum of possible codifications. The international convention is exemplified by the CISG. The CISG is the most widely accepted and has the most credibility but lacks an inherent flexibility. The international restatement is exemplified by the UNIDROIT Principles. The Principles were drafted in a semi formal manner which provides a certain modicum credibility while allowing a good deal more flexibility. The academic lists are exemplified by Lord Mustill's list.<sup>10</sup> These lists are informal compilations by academics which lack any inherent credibility outside of that imparted by the drafter but provide the maximum amount of flexibility since the only author can unilaterally update the list at anytime. By using these types of codifications, a solid basis will be provided for an analysis that encompasses the whole spectrum of codifications.

### 1. International Conventions – CISG

International conventions are binding treaties between countries. In the realm of international law, conventions are at the forefront. Countries negotiate the convention on a certain topic. Once negotiation is complete, each country must ratify the convention and once a set amount of countries have ratified the convention, it becomes active for those countries. This method of negotiation and ratification provides a premium of credibility but this same system prevents any easy changes to the convention once it has been ratified. One of the best known and most widely accepted conventions is the Convention on the International Sale of Goods.

The Convention on the International Sale of Goods or CISG is a binding treaty signed by 62 countries.<sup>11</sup> This treaty has been worked on since the end of the World War II. It is considered by many to be the greatest harmonization of commercial laws yet put into practice. The treaty became effective on January 1, 1988 and since then has gained widespread acceptance. The ratification of this convention by 62 countries which together represent over 70% of the world's trade at the present time has aided greatly in its acceptance.<sup>12</sup>

The Convention is broken into four different parts. They cover the major themes but do not cover specifics. The convention drafting method is not conducive to specific clauses within the convention and the CISG is no different.

Part One deals with the scope of application for the Convention and the general provisions. Part Two contains the rules governing the formation of contracts for the international sale of goods. Part Three deals with the substantive rights and obligations of buyer and seller arising from contract. Part Four contains the final

<sup>10</sup> Lord Justice Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, 4 Arb. Intl. 86 (1988).

<sup>11</sup> J. Lookofsky, *The 1980 United Nations Convention on Contracts for the International Sale of Goods*, available at <http://cisgw3.law.pace.edu/csg/biblio/lookofsky.html>.

<sup>12</sup> *Id.*

clauses of the Convention concerning such matters as how and when it comes into force, the reservations and declarations that are permitted and the application of the Convention to international sales where both States have the same or similar law on the subject.<sup>13</sup>

The four parts don't seek to cover all eventualities of a contract but rather seek to provide a framework within which a contract may work with certain set parameters.

Part One is particularly important to the current discussion as it provides for what transactions are included under the Convention. "The Convention applies to contracts of the sale of goods between parties whose places of business are in different States and either both of those States are Contracting States or the rules of private international law lead to the law of a Contracting State."<sup>14</sup> This places CISG directly in the choice of laws rules for the signatory countries. An example is the Rome Convention which was adopted amongst the countries of the European Union to harmonize choice of laws rules. This convention expressly precludes choice of laws rules which do not have a national law as its basis. So the CISG would be a valid choice, the Principles would not be unless they had been integrated into the national law of a European Union member.

Although this is a comprehensive convention, there are a number of problems. Questions concerning "the validity of contract, questions arising from the use by one or both of the parties of standard forms, the impact of State control over the import/export of certain goods or over the exchange of currency on the contract of sale as such or on the performance of any other parties' obligations, etc."<sup>15</sup> These problems likely relate to the Convention as a result of negotiation and compromise. Other problems may arise since the Convention is essentially a snapshot of the commercial law at the time. These problems may not come about because of the broad base of the convention which allows for wide discretion when applying the rules to a particular case.

The international convention provides the most credible base upon which the Lex Mercatoria can be based. However, it lacks a wide ranging flexibility that prevents it from quickly changing to meet the demands of the international business environment. Also, while the CISG's broad language may be construed as a weakness, it may be considered a strength as it allows the Lex Mercatoria to work within the convention without specifically allowing for that use as such.

## 2. International Restatement – UNIDROIT Principles

The international restatement is modelled on that of the United States restatements. The American restatements provide a non-binding, semi-formal method of "restating" the current law while providing guidance to judges and lawyers. These restatements have gained a place in American law as a resource

<sup>13</sup> *Explanatory Note by the UNCITRAL Secretariat on the United Nations Conventions on Contracts for the International Sale of Goods*, UN Doc. V.89-53886 (June 1989) at <http://www.cig.law.pace.edu/cisg/text/p23.html> (15 Sept. 2004).

<sup>14</sup> *Id.*

<sup>15</sup> M. J. Bonell, *An International Restatement of Contract Law* 11 (1997).

which brings together state and federal laws though not as one that is binding upon the courts. This method was adopted by UNIDROIT in Geneva as a means to harmonize the international laws. International restatements have gained in significance because of the difficulty of the convention process and the simpler method of amending the restatements. The UNIDROIT Principles are a primary example of an international restatement.

The UNIDROIT Principles were published in 1994 as a “collection of “principles” intended to govern international commercial contracts.”<sup>16</sup> These Principles were drafted with “clear and simple language so as to permit any educated person, even if not a trained lawyer, [easily] to understand them.”<sup>17</sup> This reflected the purposes of the Principles, to make a set of rules which are accessible to those who would most likely use them.

The drafters sought to emulate the American Restatements which have gained an invaluable presence in American law. They took it a step further and sought to do an international restatement which would harmonize international trade laws. This looked to be a massive project but as one of the participants put it,

[...] at the thought of drafting principles for the entire world [...] [w]e do not tremble for at least four reasons. One, we are drafting mere principles and not a uniform law, so that whatever rules we write are only likely to be applied if they find favor with someone concerned with a particular transaction or dispute [...] Two, most of our principles are unlikely to miscarry because they are framed with evident generality (e.g., ‘good faith and fair dealing’) or they have built-in safety valves (e.g., ‘unless the circumstances indicate otherwise’), giving them enough flexibility to permit a judge or arbitrator to use common sense in applying them so as to avoid an arbitrary or unfair result. Three, in some instances we have declined to deal with tough questions, as in the area [...] of invalidity on a variety of grounds under the applicable domestic law. And four, [...] UNIDROIT is free to amend the Principles [...] from time to time to take care of problems that later surface.<sup>18</sup>

They felt that the Principles were sufficiently general to allow flexibility but allowed parties to actually use them in an international commercial setting. Berger disagrees as to the extent of this flexibility stating that, “[The UNIDROIT Principles] do not present the flexible codification method that takes into account the peculiar character of the *Lex Mercatoria* which being an open legal system, requires a similar, open codification technique.”<sup>19</sup> The flexibility will still be unable to respond quickly to changes in the business community because of the semi formal institutional approach to the codification.

In the Preamble to the UNIDROIT Principles, the drafters provided the options for use. These Principles may be “applied where the parties have agreed that their contract be governed by general principles of law, the *Lex Mercatoria* or

<sup>16</sup> S. Guillemand, A Comparative Study of the UNIDROIT Principles and the Principles of European Contracts and Some Dispositions of the CISG Applicable to the Formation of International Contracts From the Perspective of Harmonisation of Law 83-113 (2000-2001), at <http://www.cisg.law.pace.edu/cisg/biblio/guillemand1.html>. (1 Dec. 2004).

<sup>17</sup> Bonell, *supra* note 15, at 16.

<sup>18</sup> Bonell, *supra* note 15, at 17 quoting E. A. Farnsworth, *Closing Remarks*, 40 *The American Journal of Comparative Law* 669, at 699-700 (1992).

<sup>19</sup> K. P. Berger, *The Creeping Codification of the Lex Mercatoria* 232-233 (1999).

the like.”<sup>20</sup> This explicitly allows the use of the Lex Mercatoria. Whereas in the Rome Convention, mentioned briefly above, there must be a national law behind the rules used, which prevents the Lex Mercatoria from being used except when integrated into national legal systems. The Principles can allow such use because the drafting process is not subject to the desires of nations. Also, in keeping with the restatement theme, the Principles seek to push the international community towards acceptance of Lex Mercatoria, at least in part.

International restatements provide a middle ground where credibility and flexibility may come together. The UNIDROIT is a very credible organization who assisted in the drafting of the CISG. Likewise, the semi formal drafting mechanism allows the UNIDROIT to revisit the Principles and update the rules and principles.

### 3. Academic Lists

Lists outlining the contents of the Lex Mercatoria have been a favorite medium for academics since the onset of the current discussion on the Lex Mercatoria. These lists have been used to show either support or opposition to the Lex Mercatoria. Some lists are used to show that the Lex Mercatoria is superfluous because the rules and principles said to be included therein are already part of the national legal systems.<sup>21</sup> Other lists are used as evidence to show that the Lex Mercatoria does exist and does have a place in international commerce.<sup>22</sup> However, regardless of their purpose, these lists expressly speak to the Lex Mercatoria and provide a basis of comparative research for further study.

Necessary to any list is its credibility. The credibility of a list is often based on the author. Lord Mustill’s list is such an example. This author is well respected in arbitration and international commerce circles and as such has a great deal of credibility when constructing a list of the rules and principles of the Lex Mercatoria. This is evidenced by the extensive use of his list in articles regarding the Lex Mercatoria.<sup>23</sup> Other lists are mentioned only as evidence that there is

<sup>20</sup> UNIDROIT, *Principles of International Commercial Contracts*, Rome, International Institute for the Unification of Private Law, 2004, 1. Preamble

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 be applied when the parties have not chosen any law to govern their contract.

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

They may be used to interpret or supplement domestic law.

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

<sup>21</sup> See Lord Justice Michael Mustill, *The New Lex Mercatoria: The First Twenty-five Years*, 4 Arb. Intl. 86 (1988).

<sup>22</sup> See Berger, *supra* note 19, at 232-233.

<sup>23</sup> See Lord Mustill, *supra* note 21. Lord Mustill’s list has been cited in many if not all articles and



much argument on the extent of the Lex Mercatoria such as the list set forth by a Harvard student note.<sup>24</sup>

What the academic list lacks in credibility, it makes up for in flexibility. The flexibility of an academic list is unencumbered by even the semi formal process of UNIDROIT, much less the rigorous process needed to amend an international convention. If it is felt that a particular list does not accurately portray the true extent of the Lex Mercatoria, a new list may be made or the old list may be unilaterally amended. This seemingly infinite flexibility provides academics with a playground to determine the true extent of the Lex Mercatoria or at least their ideas on the true extent.

These lists provide a source for arbitrators who are trying to justify the use of a particular rule or principle. To this end “international arbitrators may refer to a collection of the Lex Mercatoria developed by ‘neutral’ scientists and practitioners instead of having to base their decision on a single arbitral award which may suffer from an ideological or economic bias.”<sup>25</sup> These lists can be used to reinforce the substance of the Lex Mercatoria. This is a reciprocal relationship wherein both the lists and their users gain. The lists gain from the reinforcement of the Lex Mercatoria provided by arbitral awards. The arbitrators gain from the support provided by these lists for their judgments.

The academic list has provided a great source of basic research as to the content of the Lex Mercatoria. Additionally, it can be a source that rapidly changes with respect to the international business community. The academic list can be seen as a testing ground to determine which rules and principles are actually included in the Lex Mercatoria not just ones which the author wishes to be included. Therefore any list must be compared with the current business climate not just the academic world.

### **C. Analysis**

Having established an overview of various concepts and models, the following analysis will go deeper into how a particular definition of the Lex Mercatoria used determines how and to what extent the aforementioned codifications affect the perceived flexibility of the Lex Mercatoria. This analysis utilizes the three definitions as comparative tools in which the Lex Mercatoria can be evaluated in both theory and practice. Again, using dominant definitions reveals the extent in which the fundamental flexibility of the Lex Mercatoria is compromised or encouraged. Additionally, the Lex Mercatorian Pool provides an alternative broader lens which reveals new insights and meanings to an old discussion.

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sources used to prepare this paper, despite the difficulty in actually getting a copy of the original article.

<sup>24</sup> Note, *General Principles of Law in International Commercial Arbitration*, 101 Harv. L. Rev. 1816 (1988). An unsigned Harvard student note set forth seven rules and principles for the Lex Mercatoria.

<sup>25</sup> Berger, *supra* note 19, at 143.

## I. Trade Usages and Meaning

The lens of Trade Usage and Manner allows a narrow view of the Lex Mercatoria. This in turn prevents codifications from having their full potential impact on the Lex Mercatoria's flexibility. All of the codifications mentioned above lack the potential to affect the flexibility of the Lex Mercatoria because of narrowness inherent in this view. This view restricts the Lex Mercatoria to trade usages and meaning and arbitral awards.<sup>26</sup> The various codifications have been viewed as evidence of the Lex Mercatoria and evidence of trade usages and meaning, but only as evidence.<sup>27</sup> Until the rules and principles in the codifications are translated into trade usage and meaning, they will have little to no effect on the Lex Mercatoria's flexibility. It must be recognized that there are a number of rules and principles that are considered to be the Lex Mercatoria, such as 'good faith' and 'pacta sunt servanda.'<sup>28</sup> These codifications can be seen to inform and be informed by the Lex Mercatoria. Although many proponents of this definition see the codifications as the substance of the Lex Mercatoria, the codifications in fact only point to the potential substance of the Lex Mercatoria. This means that the codifications will have a negligible affect on the flexibility of the Lex Mercatoria.

Viewed through the lens of Trade Usage and Meaning, the CISG will not have a direct impact on the Lex Mercatoria. Rather its effects will likely be felt second hand. This view of the Lex Mercatoria precludes the inclusion of conventions such as CISG. However, it does permit the inclusion of rules which have been accepted as commonly used by the international business community. The method of how the Lex Mercatoria changes may reflect the acceptance of the CISG on an international level in the rules included.

The CISG was developed as a pragmatic way to facilitate trade between the peoples of the Signatory States. The Signatory States as such approved the Convention, meaning that not only are there reservations but that Convention itself is a result of compromise and negotiation because of national policies. As a result the Convention may not fully represent the needs and desires of the international business community. This may translate to its effect on the flexibility of the Lex Mercatoria. Since this view of the Lex Mercatoria is particularly restrictive, the CISG, as a compromise, may not be able to truly inform the business community.

The CISG has been viewed as evidence of what trade usage is. An ICC arbitral panel stated that "there is no better source to determine the prevailing trade usage than the terms of the CISG."<sup>29</sup> As such international arbitrators have come to rely on the CISG to determine trade usages. One writer noted that "Arbitrators can draw comfort from the fact that their understanding of international commercial

<sup>26</sup> Maniruzzaman, *supra* note 5, at 673.

<sup>27</sup> L. A. DiMatteo, *Resolving International Contract Disputes*, 1998 (Nov) Disp. Resol. J. 75, 77.

<sup>28</sup> *Id.*

<sup>29</sup> *Id.* quoting *Seller v. Buyer, Int'l Comm. Arb. No. 5713* (1989), reprinted in *Yearbook of Commercial Arbitration* 15 (1990), at 70.

law and practice is consistent with the United Nations Convention designed to reflect international consensus.”<sup>30</sup> The application of the CISG to interpret trade usages can be traced to the Convention itself. Article 7(1) of the CISG requires that interpretation is “to be settled in conformity with the general principles” of the CISG and international law.<sup>31</sup> The use of the CISG by arbitral panels provides a mode for the entrance of CISG into actual trade usage not just in its interpretation. The more that the CISG is used by these arbitral panels and cited within their awards, the more accepted the component parts of the CISG may become and the more effect the CISG may have on the Lex Mercatoria’s flexibility and flexibility.

Statute of limitations provisions have been used by arbitral panels to provide a more equitable judgment. In ICC Arbitration Case No. 5713 of 1989, the panel applied the CISG provision for a two year statute of limitations instead of the domestic law’s much shorter statute of limitations. The panel stated that: “as the applicable provisions of the law of the country where the seller had his place of business appeared to deviate from the generally accepted trade usage reflecting in the CISG in that it imposed extremely short and specific requirements in respect of the buyer giving notice to the seller in case of defects, the tribunal applied the CISG.”<sup>32</sup> This may be an area where the CISG provisions on statute of limitations for international sales contracts may begin to be accepted as part of the Lex Mercatoria because of the certainty provided to the contracting parties.

While the CISG is viewed as a snapshot of what the international trade practices are at a certain point, the Principles seek to melt that snapshot view with ‘gentle’ pushes in a particular direction.<sup>33</sup> Though this builds in a forward thinking component that the CISG may lack, it also means that those particular components would take much longer to be accepted as a trade usage or practice. A rule or principle that has already been established and codified will gain more recognition through that codification than a newly promulgated rule that has little or no history in the international commercial area.

The CISG is viewed as “an obligatory point of reference in the preparation of the UNIDROIT Principles.”<sup>34</sup> The CISG is also said to have codified “a substantial part of the Lex Mercatoria.”<sup>35</sup> Therefore it can be assumed that while the Principles reference the CISG they do not follow it explicitly. Rather the Principles go into greater depth in certain areas such as the rules of formation of contracts.<sup>36</sup> When the Principles go into greater depth on what is arguable the Lex Mercatoria,

<sup>30</sup> A. Lowenfeld, *Lex Mercatoria: An Arbitrator’s View*, 6 *Arbitration* 133, at 138 (1990).

<sup>31</sup> Dimatteo, *supra* note 27, at 78.

<sup>32</sup> ICC Case No. 5713, as reported in UN Commission on International Trade, “Cases on UNCITRAL Texts,” A/CN.9/SER.C/Abstracts/3 (1994).

<sup>33</sup> Berger, *supra* note 19, at 154.

<sup>34</sup> M. J. Bonell, *The UNIDROIT Principle of International Commercial Contracts and CISG – Alternatives or Complementary Instruments?*, at <http://www.cisg.law.pace.edu/cisg/bibile/ulr96.html>.

<sup>35</sup> B. Fauvarque-Carron, *Les contrats du commerce international, une approche nouvelle: Les Principes d’UNIDROIT relatifs aux contrats du commerce international*, 2 *R.I.D.C.* 463, at 482 (1998); as quoted in Guillemard, *supra* note 16.

<sup>36</sup> Guillemard, *supra* note 16.

the chance that what they are attempting to promulgate goes down. The trade usages and meanings view requires that the rule and principles included in the Lex Mercatoria are generally accepted by the international business community. If the more detailed Principles can be shown to reflect the business community's practices then they may add more substance to the Lex Mercatoria and show how the Lex Mercatoria adapts to the changing business climate.

Not only can the Principles affect the flexibility of the Lex Mercatoria via the business community but also through arbitral awards. The Principles allow for their application when the Lex Mercatoria is chosen by the parties of a contract.<sup>37</sup> Klaus Peter Berger states that “[i]nternational courts and arbitral tribunals should realize that the Principles, even though not being enacted by domestic legislatures or assuming the quality of customary law, still claim a higher degree of prestige than a simple collection of principles and rules based on a comparative survey of legal systems and laws.”<sup>38</sup> The Principles are given greater weight because of the systematic approach and the international recognition of its drafting body, UNIDROIT. Part of the acceptance of arbitral awards and the rules used to support them is that the awards are assumed to be legitimate and thoughtfully prepared.<sup>39</sup> Without the international business community's respect for the process, the awards will lose their persuasive authority to inform the community about the substance of the Lex Mercatoria. With regards to the Lex Mercatoria, the business community is the final arbiter on what is considered a rule of the Lex Mercatoria.

In the end it comes down to the Principles not automatically ascending to the status of the Lex Mercatoria.<sup>40</sup> Instead, “the rules and principles which are contained in the text of [the UNIDROIT Principles] have to stand the test of international commercial practice and international arbitration in order to become acknowledged as part of the Lex Mercatoria.”<sup>41</sup> That said, the Principles affect on the Lex Mercatoria's flexibility is likely to be minimal since they are not automatically accepted by business or arbitration panels. They do possess a higher degree of legitimacy because of their drafting body but family will only get them so far. The Principles will not likely affect the flexibility of the Lex Mercatoria within this view because the very nature of the Principles is flexible and adaptable and the rules and principles within the Principles must still be accepted into the Lex Mercatoria through the business community.

The impact of the academic lists on the flexibility of the Lex Mercatoria when viewed as trade usage and practice will likely be minimal. The great aspect of the academic lists is that a comparative analysis of all the lists may shed light on the substance of the Lex Mercatoria. Each individually formulated list presents the rules and principles ‘discovered’ by each author. These rules and principles can then be compared with others to yield the commonly held rules and principles.

<sup>37</sup> See *supra* note 20 UNIDROIT Principles Preamble.

<sup>38</sup> K. P. Berger, *The Lex Mercatoria Doctrine and the UNIDROIT Principles of International Commercial Contracts*, 28 *Law & Po'y Int'l Bus.* 943 (1997).

<sup>39</sup> Manirazzuman, *supra* note 5, at 693-994.

<sup>40</sup> See Berger, *supra* note 38, at 68.

<sup>41</sup> *Id.*, at 68-69.

The problem with academic lists is that they are formulated by academics as a result of studies done as academics. Though many of those who formulate these lists may be arbitrators or the like, the basic fact remains that these lists are prepared by a comparative analysis of national and international laws, arbitral awards, and trade usages and practice. This comparative analysis may not yield what is actually the prevailing Lex Mercatorian rules and principles. This is a basic problem of researching the Lex Mercatoria. By the time the list is prepared the Lex Mercatoria may have changed. Only by thinking ahead of the Lex Mercatoria can the rules and principles presented be assured of a place.<sup>42</sup> This lead to its own problem within the trade usage and practice view, if the rules and principles presented are to forward thinking then they may not be accepted into the Lex Mercatoria through the business community or through arbitration. For academic lists to have the greatest impact there must be a balance between the comparative research of past and present rules and principles and the forward thinking formulation of new rules and principles. Without this balance, the effect on the Lex Mercatoria's adaptability and flexibility will be minimal.

The trade usage and practice view of the Lex Mercatoria is a very narrow and restrictive one. This results in codifications taking much longer to be accepted as rules and principles of the Lex Mercatoria. Although many believe the CISG, UNIDROIT Principles, and academic lists to be the embodiment of the Lex Mercatoria, with this narrow view, they merely point out the potential substance of the Lex Mercatoria and therefore have a negligible effect on the Lex Mercatoria's flexibility.

## II. Transnational Legal System

The view of the Lex Mercatoria as a transnational legal system presents a broad range of potential sources and could allow any of them to affect its flexibility. A prominent aspect of this view is the desire to be considered on par with the international and national legal systems. The following codifications may gain or lose from this aspect because of their acceptance or lack of acceptance by these other two legal systems.

Viewed through the lens of a transnational legal system, the CISG will potentially have a great effect on the flexibility of the Lex Mercatoria. The sources used to inform this view are many. This multitude of sources may overwhelm any contribution the CISG will make to the Lex Mercatoria. But the desire inherent in this view, to be recognized on par with both national and international legal systems, may push such an internationally accepted convention to the top of the list of Lex Mercatoria sources.

The CISG is viewed by many as 'the' codification of the Lex Mercatoria which not only represents the "statutory framework of law created by states" but also seeks to recognize the "rules born of commercial practice."<sup>43</sup> The very purpose

<sup>42</sup> *Id.*, at 147.

<sup>43</sup> B. Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in Th. E. Carbonneau (Ed.), *Lex Mercatoria and Arbitration* 173-194, 172 (1990).

of the CISG is to supplement the rules and principles already in place and to recognize them.<sup>44</sup> This being the case, the CISG may represent the first code of the Lex Mercatoria, albeit an unfinished one.

However that is a most optimistic view of the CISG. This ignores that method of drafting the Convention itself. The CISG is a binding instrument negotiated by nations and ratified by their legislatures. Though it is held out as a pragmatic instrument to be used for the benefit of international trade, it may have been drafted in too broad a manner to allow for sufficient certainty in application by parties to contracts and arbitrators. Also, a convention that has been ratified cannot be updated easily. To update it would require the consent of the signatory nations which would be difficult to say the least.

Although the CISG does represent a big step forward for proponents of the Lex Mercatoria, it also presents the greatest danger to the flexibility of the Lex Mercatoria as a transnational legal system. The prominence of the CISG in international trade will likely give it prominence within the Lex Mercatoria. Though this gives Lex Mercatoria a boost, the nature of the CISG as a convention may take away the flexibility of the Lex Mercatoria. Since the CISG cannot be changed easily, it must be shown that the CISG can change with the climate of international commerce.<sup>45</sup> With Article 7 provides for interpretation, in that “consideration must be given to the “international character” of the Convention and “to the need to promote uniformity in its application and the observance of good faith in international trade.<sup>46</sup> Also, Article 7(2) provides for gap-filling using the Convention’s “general principles.<sup>47</sup> Together these two examples of the potential flexibility of the CISG may prevent the solidification of the Lex Mercatoria.

The UNIDROIT Principles, when viewing the Lex Mercatoria as a transnational legal system, may provide the Lex Mercatoria with substance without affecting its flexibility. The Principles were drafted in an informal manner and as Berger stated “[i]nformal, not formalized codification of transnational commercial law is the order of the day.”<sup>48</sup>

One drawback of this codification with a view to Lex Mercatoria as transnational law is that it is informal. The more formal a codification gets the wider acceptance it receives. In national and international courts, the CISG is cited and applied as law whereas the Principles are not. This lack of acceptance may prevent its acceptance as a part of the Lex Mercatoria as transnational law. The Principles may gain support because they represent “the unconditional commitment and consensus of scholars of international repute from all over the world.”<sup>49</sup>

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<sup>44</sup> *Id.*, at 174.

<sup>45</sup> *Id.*, at 186.

<sup>46</sup> *Id.*

<sup>47</sup> *Id.*, at 189.

<sup>48</sup> Berger, *supra* note 38, at 154.

<sup>49</sup> R. Goode, *International Restatements of Contract and Internatioanl Contract Law*, 15 Unif. L. Rev. 231, at 234 (1997); as quoted by Berger, *supra* note 19, at 154.

The Principles do gain much in that they exist and can be referred to in court or an arbitral tribunal.<sup>50</sup> The referencing lends a lot to an argument that the Principles will affect the Lex Mercatoria as a transnational law. The more the Lex Mercatoria appears to have codes and case law, the more it will gain towards recognition as a transnational legal system.

The Principles may affect the flexibility but their construction is adequately flexible to gain recognition as a part of the Lex Mercatoria as transnational law and to respond to the needs of international commerce. As the Lex Mercatoria is a living system that cannot be confined, the Principles allow more leeway with codification than does the CISG. In Article 1 of the Principles, the freedom of contract is expressly endorsed.<sup>51</sup> Freedom of contract is a cornerstone of the Lex Mercatoria.<sup>52</sup> It allows the parties to contract as they wish and leaves the Principles open to interpretation on a case-by-case basis. This combination of freedom and structure can provide a way for the Principles to affect the Lex Mercatoria without adversely affecting its flexibility.

Academic lists, when examined through the lens of a transnational legal system, allow the maximum amount of flexibility but the least amount of structure. The lists are the result of comparative research done by academic, who may or may not be practitioners or arbitrators. These academics range from Lord Mustill, who is a Law Lord in the United Kingdom to a student from Harvard School of Law and those in between. These academics' ideas on the role of the Lex Mercatoria in international commercial law run the entire spectrum from Mustill's list which consists of a list that simply repeats the rules that others have "found" to Klaus Peter Berger who seeks to form a proactive list which will be continually changing, the creeping codification of the Lex Mercatoria. When viewed through the lens of transnational legal system, the most important aspects of the academic lists are the author, the rules and the basis for the rules.

A legal system places a premium on name recognition which is why the UNIDROIT Principles and the American U.C.C. and Restatements have such great followings. The list by Lord Mustill is quoted in nearly every article dealing with the Lex Mercatoria whereas the list in an unsigned student note from Harvard receives only a cursory mention as a list. Proponents of the Lex Mercatoria as a transnational legal system want to know that the information that will potentially make up its substance is well researched and backed with a well known name attached for added weight. This need for a well known author substantially restricts the use of academic lists to solidify the Lex Mercatoria. This is evidenced by the relatively short supply of lists of the rules and principles of the Lex Mercatoria.

The rules also play a role in the acceptance of the lists into the transnational legal system. As these rules are assimilated into the system, they grow in their ability to solidify the Lex Mercatoria and reduce its flexibility. A few rules have gained almost complete acceptance into the Lex Mercatoria, the rule that a contract

<sup>50</sup> Berger, *supra* note 19, at 232.

<sup>51</sup> UNIDROIT Principles Article 1.

<sup>52</sup> Guillemand, *supra* note 16, at 8 of 20.

should be performed in good faith<sup>53</sup> and *pacta sunt servanda*.<sup>54</sup> Both of these principles have gained acceptance through virtual universal acknowledgment. *Pacta sunt servanda* has been traced back to the Chaldeans, Egyptians and the Chinese.<sup>55</sup> Originally this concept had religious roots but gradually became “a basic norm for all international law.”<sup>56</sup> Also, the idea of good faith performance of a contract has been integrated into many national legal systems and arbitral judgments as well as uniform international law.<sup>57</sup> This provision seems to be most prevalent in the civil law countries and the US. These two rules form the pillars of what is considered the *Lex Mercatoria*.<sup>58</sup> However, their broad and vague nature may prevent their use as a solidifying agent in the *Lex Mercatoria*. Additionally, the other rules listed in the various lists would need to be sufficiently clear and precise to allow for certainty of application. As it is now, the rules and principles set out in the lists are generally vague and the more specific rules lack the widespread acceptance that principles like good faith performance and *pacta sunt servanda* have.

As such the rules and principles contained in the academic lists, as viewed through the lens of a transnational legal system, will not substantially affect the flexibility of the *Lex Mercatoria*. For the lists to be accepted, the author needs to be well known and respected and the rules used must be present and widespread in the international commercial community, and the basis of the rules must be sufficiently clear to allow arbitrators to apply them without fear of being accused of acting as an *amiable compositeur*.<sup>59</sup> The flexibility of the *Lex Mercatoria* as a transnational legal system should not be affected at this point. The authors of “definitive” lists are few. However their lists do provide guidance to those seeking to gain insight in the *Lex Mercatoria* and this may lead to some solidification but only in areas that are vague by their very nature.

### III. *Lex Mercatorian Pool*

The *Lex Mercatorian Pool* is a new concept among the various perspectives on the *Lex Mercatoria*. It can be viewed as a modified transnational legal system

<sup>53</sup> See Lord Michael Mustill, *supra* note 21, at 111, Rule number 5.

<sup>54</sup> *Id.*, at 110. “A general principle that contracts should *prima facie* be enforced according to their terms.” Rule number 1.

<sup>55</sup> H. Wehberg, *Pacta Sunt Servanda*, at 775, at [http://tldb.uni-koeln.de/php/pub\\_show\\_document.php?pubdocid=129500](http://tldb.uni-koeln.de/php/pub_show_document.php?pubdocid=129500) (1 Dec. 2004).

<sup>56</sup> *Id.*, at 781.

<sup>57</sup> See Berger, *supra* note 19, at 278, National laws include Art. 6.112 Dutch NBW; Art. 1134 French Code Civil; Sec. 242 German BGB; Art. 1366 Italian Codice Civile; Art. 1375 Code Civil Quebec; Art. 1258 Spanish Código Civil; §1-203 U.S. UCC.

<sup>58</sup> *Id.*, at 56.

<sup>59</sup> *Id.*, at 57.

To act as an *amiable compositeur* is to allow the arbitrator to be “guided in his decision-making only by his conception of what is fair and just in the case before him, *without having to ascertain and to verify the general validity of the principles applied by him.*”



with regard to its sources. However the largest difference is in the view on its use as a kind of pool or toolbox of ideas from which practitioners, arbitrators and businesspeople can draw when negotiating contracts or resolving disputes regarding those contracts. The various codifications serve as options. The CISG is often a mandatory option since the signatory countries have decided to apply it when the parties to a dispute are from two signatory countries or the parties chose to apply this. The UNIDROIT Principles are a non-mandatory option which allows the application of its rules and principles upon the consent of the parties or the need of the arbitrator, though it is phrased in a much broader manner. The academic lists provide parties, practitioners and arbitrators a source of pre-researched rules and principles ready for application in the manner they choose. This view seeks to maximize the inherent flexibility of the Lex Mercatoria by giving the parties as many options as they wish. The various codifications may serve as a prepackaged options or the parties may mix and match to their own specifications. One problem is that if “a Lex Mercatoria choice were made with greater specificity – say, by nominating the UNIDROIT Principles as the law of the contract – potential problems present themselves in the lack of precedential material.”<sup>60</sup> The preservation of the Lex Mercatoria’s inherent flexibility provided by this view allows all persons related to the contract to work for the best interests of the parties instead of being restrained by a denial of sources or a desire for a rigid vertical structure of law rather than a flexible horizontal construct.

The CISG provides an ideal framework for parties to work with. First, the parties may not have to choose if their places of business are in two different Contracting states or the choice of laws in their country leads to CISG.<sup>61</sup> Parties gain a sense of certainty from this process. However, the Pool view does not worry about any mandatory provisions of national or international law. The purpose is to provide a solution to vague areas when applying the CISG which serves to assist in dispute resolution while maintaining the flexibility of the Lex Mercatoria.

Second, arbitrators have held that the CISG can be used as evidence of trade usage.<sup>62</sup> This situation is where the Pool view will be of the most use. When arbitrators seek to determine what the appropriate trade usage is, they may not only refer to the CISG but to any other source which may help them make their decision. In negotiation, parties may decide to use the CISG for the sale of goods portion of a contract and another source for the rest of the contract. Depending on how large and complex the contract is and how specific the parties want the contract to be, the parties may use many different sources to help arbitrators clarify the contract and to render an appropriate decision for both sides. By applying the Lex Mercatoria as a pool of comparative trade usages and knowledge, the participants in international commercial trade can fashion a more fitting decision on the appropriate remedy.

<sup>60</sup> M. T. Davidson, *The Lex Mercatoria in Transnational Arbitration: An Analytical Survey of the 2001 Kluwer International Arbitration Database*, at <http://www.cisg.law.pace.edu/cisg/biblio/davidson.html> (1 Dec. 2004).

<sup>61</sup> See CISG Art. 1(1)(a,b).

<sup>62</sup> DiMatteo, *supra* note 27, at 77.

The CISG is a unique part of the Lex Mercatoria. It represents the first cohesive, comprehensive codification of the Lex Mercatoria at this time. The CISG provides stability to the Pool and provides an accepted construct for other ideas to come in contact with in order to change and grow. Its use as an international convention adds weight to its inclusion in the Lex Mercatoria. This weight does not necessarily burden the Lex Mercatoria's flexibility but rather it provides opponents with an example of a concrete portion of the Lex Mercatoria. Additionally, the CISG does not cover all of the Lex Mercatoria but only the portion that concerns the international sale of goods, officially.<sup>63</sup> However, the use of the CISG as evidence of trade usage allows its application outside of those defined parameters. By looking at the Lex Mercatoria as a pool of comparative ideas and research, the CISG can add to the flexibility of the Lex Mercatoria while providing it with a substantial source of rules, principles and certainty.

The UNIDROIT Principles also offer a unique opportunity for the Lex Mercatorian Pool. The Lex Mercatoria's flexibility is the flip-side of uncertainty, a characteristic which many of its opponents tout as to why it does not exist and even if it did exist why it would not work. This uncertainty can be allayed in part through the use of the Principles. The Principles bring a broader base of rules and principles to the Lex Mercatoria than the CISG. Broader because the Principles are intended to apply to all contracts whereas the CISG applies only to contracts relating to the international sale of goods. Also, the Principles were designed to be flexible and change which stems in part from their status as a non-binding document created under the auspices of UNIDROIT, the original architects of the CISG. The broad base and inherent flexibility of the Principles prevent this codification from solidifying the Lex Mercatoria.

Where the CISG covers only international contracts concerning sales of goods, the Principles "are designed to govern commercial contracts."<sup>64</sup> Parties can apply the Principles in any commercial contract. This gives another option to the users of the Lex Mercatorian Pool. The Principles can supplement the CISG or any other rule, principles or set of rules and principles. Where the CISG does not speak much on the rules for the formation of a contract, the Principles do.<sup>65</sup> These articles cover offer and acceptance<sup>66</sup> from the ordinary clauses to merger clauses<sup>67</sup> and "surprising" terms.<sup>68</sup> The broad base of the Principles allows them to be used in conjunction with other codifications even with national laws.<sup>69</sup> The flexibility will be enhanced when using the Principles as a part of the Lex Mercatorian Pool.

In addition to their broad base, the Principles also bring an inherent flexibility in its construction. "[T]he fact that the UNIDROIT Principles are not intended to become a binding instrument permitted not only a wider discretion in their

<sup>63</sup> CISG Article 2.

<sup>64</sup> Guillemard, *supra* note 16, at 14 of 20.

<sup>65</sup> UNIDROIT Principles Article 2.1.2 -2.1.20.

<sup>66</sup> Article 2.1 UNIDROIT Principles.

<sup>67</sup> Article 2.1.17 UNIDROIT Principles.

<sup>68</sup> Article 2.1.20 UNIDROIT Principles

<sup>69</sup> See ICC Award No. 8486, YCA 1999, at 162 *et seq.*

preparation, but also renders them more flexible and capable of rapid adaptation to the changing conditions in international trade practice in the future.”<sup>70</sup> Therefore the Principles not only add a codification which has gained an international following but it also adds flexibility which will enable it to adapt and change as it comes in contact with other rules and principles of the Lex Mercatoria.

Academic lists can have the most positive effect. The authors of these lists engage in a comparative search for rules and principles which clearly enunciate the substance of the Lex Mercatoria. When these studies are added to Lex Mercatorian Pool, the result should be that they interact with the other rules and principles present. This is a type of survival of the fittest. The rules and principles must adapt and change within the international commercial environment. The academic lists may be the best at adapting and changing. They possess infinite adaptability and lack the constraints of the drafting process which plagues the CISG and the UNIDROIT Principles.

The very characteristic that makes the academic lists, perhaps a less effective codification, their individual approach, is what adds the most to the Lex Mercatorian Pool. By examining the individually compiled lists, the international commercial community can gain a better understanding of what the rules and principles of the Lex Mercatoria are. Also, a list that is drafted in one area of the world may not reflect another area but that in itself does not invalidate the proposed rule or principle.

Codifications formulated by agencies or through diplomatic means may potentially lose the creative aspect because it is submerged by compromise. Though the major codifications emphasize their pragmatic approaches, they likely don't maintain the level of creativity that can be found outside of a negotiating table. This is what the academic lists bring to the Lex Mercatorian Pool.

By emphasizing the adaptability and creativity of the academic lists, the Lex Mercatoria can maintain its adaptability and flexibility. With the Lex Mercatoria functioning as a pool of comparative research, the academic lists act as springs of new ideas which can invigorate and inform the rest of the rules and principles of the Lex Mercatoria. These lists can give the Lex Mercatoria a more worldwide feel if academics choose to take part in the comparative research.

## **D. Conclusion**

The history of the Lex Mercatoria is a cloudy and enigmatic affair. Claims as to its historical roots have been challenged almost as soon as they are made. But whether the present Lex Mercatoria is a rebirth of the Lex Mercatoria of the Middle Ages or if it is a new creature which sprang into being in the current age, the Lex Mercatoria does have a part to play in the international commercial relations of today.

The Lex Mercatoria presents a flexibility which cannot be found in national or international laws. And the definition of the Lex Mercatoria used determines

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<sup>70</sup> Bonell, *supra* note 34, at 17.

how and to what extent codifications affect the flexibility of the Lex Mercatoria. The definitions used in this paper cover the spectrum of needs from the narrow traditionalist view which seeks to keep the Lex Mercatoria pure of certain outside influences, to the broad view which seeks to establish the Lex Mercatoria as a transnational legal system and answer opponents' calls for more certainty, to the view that seeks practical applications in the international commerce through the accumulating pool of research and knowledge of the Lex Mercatoria. The types of codifications used in this paper run the gamut from international convention, to international restatement, to academic lists. These definitions are useful in analyzing the various codifications and how and to what extent they affect the flexibility of the Lex Mercatoria.

When the first definition, trade usage and meaning, is used to examine the codifications, there appears to be little or no effect on the flexibility of the Lex Mercatoria. The very definition prevents the direct applicability of the codifications to the Lex Mercatoria. Only where the codifications have influenced the business community enough to be held out as trade usage and meaning and where it has been used by arbitrators to inform their decisions can the rules and principles within the codifications be said to be Lex Mercatoria. This leads to individual rules and principles being incorporated into the Lex Mercatoria rather than the entire codification or even a majority of it. The use of codifications merely informs about the potential substance of the Lex Mercatoria rather than providing a definitive source for the actual substance.

When the second definition, a transnational legal system, is used, there is a large range of potential sources available for use. The effect on the flexibility of the Lex Mercatoria varies according to the codification used. A primary goal of this definition is to provide a transnational legal system. The codifications which provide certainty in the furtherance of a transnational legal system would be seen as having a larger potential effect on the flexibility of the Lex Mercatoria. However the codification with the largest such potential, the CISG, is drafted in very broad terms yet with a narrow scope which precludes it from forming a large part of the Lex Mercatoria. The Principles could also affect the Lex Mercatoria but they have been drafted with flexibility in mind in order to change with international commerce. The academic lists provide a good resource but lack the numbers and the certainty through use to affect the flexibility of the Lex Mercatoria. The transnational legal system definition seeks certainty which is at odds with the flexibility of the Lex Mercatoria. Proponents of this view must find a way to integrate certainty and flexibility and this may be found in the manner of how codifications are drafted.

When the third definition, the Lex Mercatorian pool, is used, the focus is on the practical use of the Lex Mercatoria. This new definition provides the same broad acceptance of sources as that of the second definition but applies those sources in pursuit of another goal. That goal is to facilitate contract formation and the commerce. This construction allows for a maximum of flexibility. The codifications can be implemented wholesale or as individual rules. The extent of the use is left to those constructing the contract or arbitrating the dispute. Instead of the focus being on the Lex Mercatoria, the focus is on the contract and

the business community. In this way the Lex Mercatoria can attain maximum effectiveness. The codifications are essential parts of this definition. Without codifications the pool is too 'muddy.' This means that the sheer volume of accumulated knowledge, rules and principles would be overwhelming for those seeking to use the Lex Mercatoria. Rather the codifications package rules and principles together which should be working together. The various codifications are tools to be used within the contracting process and as such help to maximize the effective use of the Lex Mercatoria within that context.

The Lex Mercatoria has been the subject of much discussion over the past fifty or so years. What has hopefully been shown here is that though codifications seek to be representations of the extent and substance of the Lex Mercatoria, in actuality they only represent what is potentially the Lex Mercatoria if the business community so desires it. The definitions used determine how and to what extent codifications affect the flexibility of the Lex Mercatoria. However the effects on the flexibility are not sufficient to totally remove it, rather the codifications will likely solidify the most well known rules and provide for flexibility with regard to other rules and principles. However, this may change in the future. The various codifications have had little time to effect change within the rapidly shrinking international commercial world. With time will come more distinct answers about how and to what extent codifications will affect the flexibility of the Lex Mercatoria.