Defence and Illustration of *Lex Mercatoria* in Maritime Arbitration

The Case Study of "Extra-Contractual Detention" in Voyage Charter-party Disputes

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I. INTRODUCTION

It is beyond the scope of this article to analyse whether or not *lex mercatoria* is a legal order. Indeed, the purpose of this article is to demonstrate the existence of a corpus of customs and usages agreed upon by the shipping community and constitutive of the law that governs the substance of maritime-related contracts or the merits of maritime disputes. This is *lex mercatoria*, which is neither an academic fantasy nor the "law of Mickey Mouse", but a commercial reality.

Recently it was written that "it cannot be denied that the content of that which the proponents are labelling the new *lex mercatoria* exists. However, the label is inappropriate for its role in international commercial arbitration."[1] Conversely, this article will show that the label of *lex mercatoria* is appropriate to designate customs and usages developed through practice over years by the merchant community and which arbitrators will apply efficiently; this is the case in maritime arbitration.

To that end this article will discuss, through the case law of the Chambre Arbitrale Maritime de Paris (CAMP), the elaboration of a usage known as "extra-contractual detention" of the vessel in voyage charter party disputes. As a comparative approach, it will also analyse an award rendered by the London Court of Appeal regarding the same usage. However, first it will attempt to contribute to the doctrinal debate on *lex mercatoria*.

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[1] Vanessa L.D. Wilkinson, *The New Lex Mercatoria: Reality or Academic Fantasy*, 12 J. Int. Arb. 2, June 1995, at p. 103.

II. CONTRIBUTION TO THE DOCTRINAL DEBATE ON *LEX MERCATORIA*[2]

For centuries there has been a great body of law called "general maritime law", based on the shared legal understandings of the international community, composed of shipping, insurance and banking enterprises of all countries. These shared legal understandings are reflected in contract practices such as charter parties and they continually find their way into arbitration decisions.[3]

It is the author's opinion that this great body of law or *lex mercatoria* should be considered as autonomous, as it is created by the international mercantile community, which transcends nation States. Recently, this autonomous approach has been strongly contested by anti-mercatorists such as Lord Justice Mustill, who considers that there cannot be a contract which is not governed by any law.[4] According to this view, "law" means national law, law made by nation States. However, as pointed out by pro-mercatorist authors:

> "If it is assumed that law can only be made by nation States, then of course it follows that law cannot be made by communities that transcend nation States. The law of the international mercantile community ante-dates the emergence of a system of nation States by some centuries; its origins in the West date from the time of the Crusades."[5]

Indeed, the *lex mercatoria*, of which maritime law or *lex maritima* was a major part, extended beyond the boundaries of individual nations.[6] In that respect, we learn from Graveson that, for example, in the period of edicts such as Rôles of Oleron or Consulato del Mar, there was no conflict of laws because, in cases to which law merchant applied, there was only one law.[7] Indisputably, therefore, the primary source of such law is usage, which stems from the power of merchants to regulate many aspects of their own affairs,

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[2] On the notion of *lex mercatoria*, see: B. Goldman, *Frontières du droit et lex mercatoria*, Arch. philo. du droit, 1964, p. 177; Clunet, *Lex mercatoria dans les contrats et l'arbitrage internationaux; réalités et perspectives*, 1979, p. 475; *L'arbitrage commercial international*, 1965; Y. Derains, *Le statut des usages du commerce international devant les juridictions arbitrales*, Rev. arb. 1973, p. 122; Lando, *The lex mercatoria in international commercial arbitration*, 34 Int'l and Comp. L.Q. 747, 1985; Berman, *The law of international commercial transactions (lex mercatoria)*, 2 Emory J. Int'l, Disp. Res. 235–310, 1988; E. Langen, *Transnational Commercial Law*, 1973; L. Trakman, *The Law merchant: the evolution of commercial law*, 1983; T. Carbonneau, *Arbitration adjudication: a comparative assessment of its remedial and substantive status in transnational commerce*, 19. T. Int'l L.J. 33, 53, 77 1984; E. Gaillard, *Trente ans de lex mercatoria*, J.D.I., 1995, p. 5; Irineu Strenger, *La notion de* lex mercatoria *en droit du commerce international*, Academie de la Haye, 1992, p. 217; Filil de Ly, *International Business Law and* Lex Mercatoria, North Holland, 1992; Andreas F. Lowenfeld, *Lex mercatoria: an arbitrator's view*, in T.E. Carbonneau (Ed.) *Lex Mercatoria and Arbitration*, Transnational and Juris Publications, Inc., 1990; Hans Smit, *Proper Choice of Law and the Lex Mercatoria Arbitralis*", op. cit. idem. pp. 59–76. Eric Loquin, *La Lex Mercatoria est-elle un ordre juridique?*, ICC Institute, Paris, 1989; Filali Osman, *Les principes généraux de la lex mercatoria*, Thesis, Dijon 1992; Eric Loquin, *L'application des règles a nationales dans l'arbitrage commercial international*, in *L'apport de jurisprudence arbitrale*, Publication C.C.I., 1986, p. 67. See also *La réalité des usages du commerce international*, in *Revue Générale de Droit Economique*, 1989, p. 163; J. Paulson, *La lex mercatoria dans l'arbitrage C.C.I.*, in Craig, Park and J. Paulson (Eds.) *International Chamber of Commercial Arbitration*, I.C.C. Publishing, S.A., 1990.

[3] Harold J. Berman and Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content and Legitimacy*, T.E. Carbonneau (Ed.) Transnational Juris. Publications, Inc. (*Lex Mercatoria* and Arbitration), 1990.

[4] Mustill, *Contemporary Problems in International Commercial Arbitration: A Response*, 17 Int'l Bus. Law, 161, 1989; *The New Lex Mercatoria*, in M. Bos and I. Brownlie (Eds.) *Liber Amicorum for Lord Wilberforce*, 1987, p. 149. See also note 1, above.

[5] See Berman, *Law and Revolution: the Formation of Western Legal Tradition*, 1983, pp. 333–356. See also L. Trakman, *The Evolution of Maritime Liens*, 1983.

[6] William Tetley (Ed.) *Maritime Liens*, 1993, Chap. 29, p. 522.

[7] R.H. Graveson, *Conflict of Laws* (7th edn.), 1974, pp. 33–34.

and to be judged by their own laws. In this respect, history teaches us that the "*lex mercatoria* was largely self-enforcing; a party who refused to comply with a merchant court's decision risked his reputation and could be excluded from trading at the all-important fairs where the merchant courts were located."[8]

It is a fact that nowadays most national legal systems recognize freedom of contract and, in so doing, they accept the interpretation of contract clauses in the light of commercial understandings as reflected in contract practices. In that respect, one cannot deny that trade usages are often taken into account by arbitrators when they decide upon the legal consequences of acts and dealings of the parties. That is the case in maritime arbitration, as arbitrators are familiar with the shipping trade and, thus, know its usages themselves. Furthermore, they apply the most suitable trade usage in relation to the law applicable to the substance of the dispute. This process is direct, without the need to look for a conflict of rule, as is illustrated by the following awards.

III. Some Illustrations

1. *The Elias Angelakos Award, Rendered by the Chambre Arbitrale Maritime de Paris, 14 October 1983—Not Published*

This vessel was voyage chartered for the transport of a cargo of rice from a port in Vietnam to one or two ports on the West Coast of Africa, according to a Synacomex charter party.[9] The second port was to be named once the vessel had arrived at its first port of call. Having named the port of Lome (Togo), the charterer changed its mind and appointed Abidjan, where the vessel remained on the roads for nearly a month. Then the port of Dakar was appointed to unload the cargo for which the charterer had just found a purchaser.

The dispute concerned the principle of an indemnity for having delayed naming the second unloading port. According to the Arbitration Court, the charterer had breached the terms of the charter party by delaying naming a second port, and concluded that Abidjan was the only unloading port.

Thus, the wait on the roads at Abidjan was characterized as follows:

> "Indeed, a voyage charterer accepts and must assume the hazards of an unloading operation, as well as the risk of the long detention they might cause, and if demurrage is supposed to cover this risk, it does not have to bear all the consequences of a detention of which the cause is independent of the loading itself."

Consequently, the arbitrators considered that it was right that the vessel's wait in

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[8] Cremades and Plehn, *The New Lex Mercatoria and the Harmonization of the Laws of International Commercial Transaction*, 2 Boston University Law Journal, 1984, pp. 317–348.

[9] Synacomex is a "Continent Grain Charter Party" adopted in Paris 1960. Amended first in 1974 and then in 1990 by Syndicat National du Commerce Extérieur des Céréales in agreement with Comité Central des Armateurs de France and in co-operation with the French Chartering and S & P Brokers' Association. It was adopted by the Documentary Committee of the Baltic and International Maritime Council, and includes a jurisdiction clause, nominating the Camp as the arbitration forum.

Abidjan be the subject of a higher compensation than that brought by the demurrage, if the contractual amount was shown as considerably less than the income, on the time the charter basis, than that which the charterer could expect from employing its vessel in the market at the time.

This solution, which is only a legal solution of an international trade usage in chartering, can also be found in a decision from the Court in London deciding on an appeal of an arbitration award rendered in London.

2. *The "Saronikos"*[10] *Decision Rendered by the London Queen's Bench Division (Commercial Court), 10 April 1986—Published* LLR *1986, Vol. 2, p. 277*

The vessel *Saronikos* was voyage chartered for the carriage of a cargo of bagged sugar from Antwerp (Belgium) to Aqaba (Jordan). At the request of charterer, the vessel waited off Aqaba for nine days, so as to enable the charterer to resolve problems that had arisen over the sale of the cargo.

The issue in litigation was the amount of remuneration to which the owner was entitled for this delay. In the arbitration proceedings, the arbitrators took the view that the owner had to be put in the same net position as if the charterer had performed that contract without being in breach of it. On that basis, the arbitrators considered that although the delay occurred before the vessel had given, or could have been given, notice of readiness, they should bring into account the laytime provisions of the charter party.

The vessel had waited outside Aqaba (Jordan) as a result of the charterer's request, between 7 and 17 May 1983, and had then proceeded into port and eventually completed discharge on 26 May 1983. If the vessel had not waited, but had gone straight away to Aqaba and given notice of readiness on 7 May, the full laytime allowed under the charter party would have lasted until about 31 May. As the charterer was entitled to use all the laytime given to it by the charter party, it followed that even without the request to wait, it could have kept the vessel for longer than it did. Therefore, according to the arbitrators' approach, there was no loss of time for which the owner could seek compensation.

However, as the vessel had not been able to anchor when waiting off Aqaba, the arbitrators awarded the owner the cost of the fuel consumed while steaming up and down (less the fuel costs that would have been incurred over the equivalent time spent in port), together with the additional running costs incurred while steaming over those that would have been incurred in port.

In addition, as the arbitrators' approach was to treat the delay as if it had occurred during the laytime, the owner was awarded a further sum representing that part of the dispatch money that the charterer had earned and had been paid, but which would not

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[10] *Greenmast Shipping Co. S.A. v. Jean Lion et Cie S.A. V/S* "Saronikos", Lloyd's Law Reports, 1986, Vol. 2, p. 277. See also BIMCO Bulletin 3/86, June, p. 8439.

have been earned had the vessel been asked to wait after, rather than before, tendering the notice of readiness.

The owner appealed to the High Court. The State court took another view, which is more consistent with common law precedents,[11] based on usages in the shipping industry. Justice Saville held that:

> "The position is that the Charterers requested the owner to perform services outside the term of the Charter Party (that is to say, services which the owners were not obliged to perform under the Charter Party), and the owners acceded to his request in circumstances in which both parties recognized that for such services the owners should be remunerated .... Having performed the services, the owners were, in the circumstances, entitled to recover reasonable remuneration for them, on the basis of an implied contract to pay such remuneration for such services."

For the court, reasonable remuneration for services performed extra-contractually was not to be measured by looking at what might or could have happened if the services had not been requested at all. In a business context, such as this, the question of remuneration was to be approached by asking what would be a fair commercial rate for the services provided outside the charter party (i.e. for the owner's agreement to use the vessel as, in effect, a mobile floating warehouse off Aqaba for nine days).

The court considered that whether or not those nine days would have been or might have been or could have been employed by the charterer during laytime had it not made the request, was wholly beside the point. Therefore, to assess the amount of the remuneration, it had to be taken into account that during the wait, the vessel was not in a profit-earning situation, and could have attracted a rate on the market which would have given the vessel's owner a daily profit.

The notion of extra-contractual detention, as defined by the English judges was later specified in an award from the CAMP dated 7 February 1988.

3. *The "Paphos" Award, Rendered by the Chambre Arbitrale Maritime de Paris, 7 February 1988—Not Published*

Further to a Synacomex charter party, the owner of the *Paphos* chartered its vessel for the carriage of a cargo of bagged rice from Saigon (Vietnam) to one of three ports on the West Coast of Africa, between Dakar (Senegal) and Douala (Cameroon). According to the charter party, the discharging ports had to be announced seven days before the arrival of the vessel at the coast of Africa.

On 29 July 1986, the charterer appointed the port of Conakry (Guinea) as "first and only port of discharge". Before the vessel arrived in this port, the owner asked for confirmation that all the cargo would be unloaded at Conakry, without receiving a reply and despite several reminders. He then considered that the charterer had waived its right

[11] London Court of Appeal in *Steven v. Bromley & Son* (1919) 2 KB 722 and *British bank for Foreign Trade Ltd. v. Novinex Ltd.* (1949) 1 KB 623. See, more recently, Q.B. (Com. ct) in *Gatoil International Inc. v. Tradex Petroleum Ltd.* and *Gatoil International Inc. v. Panatlantic Carriers Corp ("The Rio Sun")* LL.R, 1985, Vol. 1, p. 350.

to discharge in a second port. However, almost two weeks later, the charterer informed him that he maintained his right to appoint a second port, and, having kept the vessel for almost a month, decided to send her to Douala to discharge the rest of the cargo. The owner initiated arbitration proceedings before the CAMP to be indemnified for the immobilization of his vessel in Conakry.

In this regard, the arbitrators had, on the one hand, noted that negligence on the part of the charterer was the origin of the immobilization of the vessel in Conakry, but that, on the other hand, they found no evidence that the vessel had been used in an abusive way by the charterer. Therefore, they decided that the period of immobilization should simply be included in the calculation of demurrage.

In expressing their decision, the arbitrators felt it necessary to recall the specific outlines of the principle of detention: "The principle of detention can only apply in the case where the Charterer uses the vessel for other ends for an excessive period than that provided in the agreement between the parties."

The Arbitration Court considered that, in the case, the qualification of detention claimed by the charterer had no practical bearing, as the daily rate of the detention indemnity claimed was exactly the same as the demurrage.

Just as interesting is the award rendered by the CAMP on 20 March 1989.

4. *The "Sea Breeze" Award, Rendered by the Chambre Arbitrale Maritime de Paris, 20 March 1989—Not Published*

The vessel *Sea Breeze*, flying a Cypriot flag, was voyage chartered by a Synacomex Charter Party for the carriage of a cargo of rice from the port of Quasim (Pakistan) to three West African ports.

Leaving Quasim, the vessel sailed towards Abidjan (Ivory Coast), named as the first discharging port. Two days before the vessel's arrival, the owner requested the charterer to indicate the next port of discharge after Abidjan. Having received no reply from the latter, the owner informed it that any delay in the appointment of a second port would be considered as detention time to be paid as well as the diesel bunkers of the vessel.

Only three weeks later did the charterer appoint Douala (Cameroon) as the second discharging port, considering that there was no detention for the vessel as she had only been used during the contractual laydays in compliance with the charter party.

Confirming the acknowledged usage in matters of maritime voyage chartering, the arbitrators of the CAMP recalled that, having paid the cargo, the charterer was entitled to use the vessel in port throughout the laydays period, without paying any indemnity in the case of exceeding the permitted time. However, they inferred from this principle the exception according to which, this right must be limited to the sole commercial use of the vessel provided in the parties' agreement, that is to say, the loading and unloading operations and possible waiting for available berths in the ports named by the charterer.

Therefore, outside these situations, there is an extra-contractual use of the vessel for ends other than those defined in the parties' agreement.

In order to better situate their case law, the arbitrators developed the following judicial argumentation:

> "Indeed, in the voyage charter, time runs against the charterer, who has every interest that the time spent in port be as short as possible in order for the vessel to be liberated soonest. Any immobilisation of the vessel, apart from the time spent for the loading and unloading operations defined as laydays, disturbs the economic balance of the contract to the charterer's detriment .... The option granted to charterers to choose one or several ports in a geographical area has in exchange their appointment within a reasonable period. In the voyage charter, this appointment is one of the charterer's obligations."

Moreover, the arbitrators had determined the economic and financial parameters concerning the compensation due by the charterer. Indeed, they decided that the compensation for the damage suffered by the owner during the detention of its vessel should be calculated on the basis of a daily rate throughout the detention period, and adding the fuel costs incurred during this period.

The reasoning of the *Mangan* award finalized the definition by the CAMP of the outlines of the principle of extra-contractual detention of a vessel under a voyage charter.

5. *The "Managan" Award, Rendered by the Chambre Arbitrale Maritime de Paris, 10 May 1989—Not Published*

This vessel, flying the Liberian flag, was chartered by a Synacomex charter party for the carriage of a cargo of rice from the port of Ho Chi Min City (Vietnam) to one or more West African ports.

On the charterer's instructions, the vessel sailed for Cotonou (Benin) without entering territorial waters. Six days later, the master was ordered to sail for Conakry (Republic of Guinea) and to remain outside the territorial waters. This change of instructions happened when the vessel was two days away from Cotonou. The vessel waited almost three weeks outside Conakry before entering the port to discharge part of her cargo. It was only later that the vessel sailed, once more, for Cotonou.

Deciding on the immobilization of the vessel outside Conakry, the arbitrators considered that there had not been any agreement authorizing the charterer to keep the vessel outside under the charter party and that, therefore, the latter had engaged its liability with regard to the owner, who was entitled to collect an indemnity for detention.

To explain its decision, the Arbitration Court used reasoning which summarizes the whole principle of detention in voyage chartering:

> "In the absence of any appropriate agreement, a charterer is not founded to turn the vessel from its contractual subject, by making it wait until the outcome of the negotiations and settlement of the sale of a cargo .... A charterer who may require ease in the performance

> of some journeys, should seek the owner's agreement on the conditions of an interruption in the journey, as defined by an *ad hoc* clause called 'late orders/or stand-by orders .... Such an agreement cannot be found in the present case and the charterer had furthermore exceeded his rights granted by the charter party by giving instructions to the vessel signifying an interruption of the journey."

As settled by usage, the compensation due in respect of a detention indemnity was calculated by taking into account a daily rate corresponding to the value of the vessel on the *time charter market* at the time of the event.

IV. The Configuration of the Rule of "Extra-Contractual Detention"

1. *The Legal Régime*

A voyage charter party generally fixes a number of days, called laydays or laytime, within which the ship is to be loaded or discharged, as the case may be. In this context, the parties often agree on an amount, called demurrage, which will be paid by the charterer as liquidated damages for delay beyond such laytime.[12] Thus, the legal nature of demurrage is contractual.[13]

In contrast, the detention of the ship falls outside the framework of the contract of charter party. In that respect, the *Elias Angelakos* case shows that there is extra-contractual detention whenever the cause of the immobilization of the vessel is independent from the discharging itself. In the *Sea Breeze* case, the arbitrators refined their definition of the rule by stating that a detention is extra-contractual when the utilization of the vessel is made outside the loading and unloading operations, and possible waiting for berth in ports named by the charterer.

However, to be qualified as such, the charterer must detain the vessel during an excessive period, for which the arbitrators have discretion to appreciate in function of the laydays.

Indeed, in detaining the vessel as a "floating warehouse", the charterer upset the economic balance of the contract to the owners' detriment. It is for this reason that the arbitrators considered this detention to no longer be part of the charter party contract *per se*. This is the justification of the notion of "extra-contractual".

However, if the wait which gave rise to the detention of the vessel is due to factors independent of the charterer's will, such as local communication difficulties, this waiting period should be included in the calculation of demurrage, as the arbitrators decided in the *Paphos* case.[14]

It is important to note that in the majority of awards analyzed in this article, the owner had accepted to continue the journey despite the negligent detention of the vessel

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[12] Payne and Ivamy, *Carriage of Goods by Sea* (12th edn.), Butterworths, p. 225.

[13] See A. Fall, *Regard sur la règle de non-suspension des surestaries*, in *Droit Maritime Français*, 1986, pp. 464–470 and P. Simon, *Les règles non-écrites des contrats d'affrétement*, in DMF, 1987, p. 120. See also M. Monetti, *Arbitrage et Affrétement Maritime* a comparative study, IDIT, Rouen, 1981.

[14] See Section III, 3, above.

by the charterer. Indeed, one could consider that this later agreement by the owner would have the effect of extending the life of the charter party contract itself. Commercial use, from which this rule arises, does not lean towards this interpretation, as was shown by Mr Justice Saville in the *Saronikos* case.[15]

Indeed, at first instance, the arbitrators had considered that there had not been "extra-contractual detention" in this case, since in their view the wait of the ship off Aqaba had to be treated as if it had occurred during the laytime allowed under the charter party. However, leaning on judicial case law stemming from shipping usages,[16] the London Court of Appeal recalled that in acceding to the charterer's request, the owner had thus entered into an implicit contract, the subject of which was to collect a reasonable remuneration for a service which he was not obliged to supply.

In summary, the reasoning was that from the moment the charterer used the vessel for purposes other than those provided under the charter party, this detention was no longer linked to the contract. However, if, despite that breach of contract, the owner had accepted to continue the journey, a new contract would thereby have been formed with the aim of remunerating this new service.

2. *Assessment of the Detention Indemnity*

To determine the calculation of the detention indemnity that the owner should receive, the arbitrators appreciate the circumstances on a case-by-case basis. The basic postulation is that the earning power of the ship depends on her continuous employment with as little delay as possible between voyages. Generally, therefore, the Arbitration Court takes into account the owner's loss of earnings, that is the profit which he could have expected from the employment of his vessel on the time charter market during its immobilization. To this amount should be added an amount corresponding to the bunker consumption for this type of vessel in an anchored situation. Furthermore, the idea of a full indemnity for the owner seems to be justified by the intention to avoid the charterer making an unjust enrichment at the owner's expense. More important, however, is the fact that the indemnity granted to the owner is generally superior to the contractual amount of the demurrage. This situation recalls, under certain aspects, the difference under French law between the amount of contractual rents collected by the lessor and the occupation indemnity paid by the occupant who remains in the premises without entitlement.

V. Trade Usages as a Choice of Law

As stated by Lew:

"The existence of customs and usages is well known, their having developed through

[15] See Section III, 1, above.
[16] As note 9, above.

> practice over the years. Participants in particular areas of commerce know the customs and usages relevant to them. They presume their application and give them effect automatically. .... When contracting, parties rarely discuss the application of particular customs or usages, nor do they reduce to writing in the contract; they just take them for granted."[17]

Very often it is not necessary for maritime arbitrators to refer to a national law to settle the dispute, mainly when voyage charter parties are concerned. Indeed, the "*societa mercatorum*" already has its solution stemming from maritime trade usages, which will be applied. This is true even though a specific law has been elected in the charter party, as in the Synacomex type form which contains a arbitration clause that reads:

> "Any dispute arising out of the present contract shall be referred to arbitration of 'Chambre Arbitrale Maritime de Paris'. The decision rendered according to the rules of Chambre Arbitrale Maritime de Paris and according to French law shall be final and binding on both parties."

In that respect, it is worth noting that Article 1496 of the French Civil Code provides that the arbitrator is to decide disputes "according to the rules of law he deems appropriate". It is obvious that this article refers not only to national law, but also to other rules such as customs, usages and general principles of law, in other words, to *lex mercatoria*. In the same vein is Article 346 of the German Code of Commerce, which obliges courts to take into consideration trade usages when they decide upon the legal consequences of the acts and dealings of the parties.

In the United States, most of the rules of the Uniform Commercial Code (UCC) must give way to usages of trade (and, of course, dealing) as a means of construing, supplementing or qualifying the terms of an agreement. Section 1–205 of the UCC defines usages of trade as practices or methods of dealings having such regularity of observance in a place, vocation or trade, as to justify an expectation that they will be observed with respect to the transaction in question.

At an international level, the 1980 United Nations Convention on the International Sale of Goods (CISG) sets out, in Article 9, that the parties are not only bound by any usage to which they have agreed and by any practices which they have established between themselves, but are also considered, unless otherwise agreed, to have implicitly made applicable to their contract or its formation a usage of which they knew, or ought to have known, and which in international trade is widely known to apply, and regularly observed by parties to contracts of the type involved in the particular trade concerned. It follows from these provisions that the presumed expectations of participants in the usage are sufficient to give rise to the obligation to observe it.

Very recently, the International Institute for the Unification of International Private Law (UNIDROIT) adopted "principles related to international trade agreements". As a maritime arbitrator stressed, the aim of those who drafted these "principles" was

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[17] Julian D.M. Lew, *Applicable Law in International Commercial Arbitration: A study in Commercial Arbitration Awards*, Oceana Publications, Inc., Dobbs Ferry New York, 1978. See also, Nagla Nassar, in *Sanctity of contracts Revisited: A Study in the Theory and Practise of Long Term International Commercial Transactions*, Dordrecht, Martinus Nijhoff Publishers, The Netherlands, 1995. V. Pechota, *Book Reviews*, American Review of International Arbitration—1995, pp. 212–215.

not to require States to adopt these provisions in their domestic legislation, it was to incite parties to an international agreement to choose to refer to these principles in the same way as they already do to the documentary credit rules and customs, to Incoterms or, in maritime law, to the York and Antwerp Rules. Another aim was to provide arbitrators with a model to take into consideration in the event the parties accept their agreement be governed by the general principles of law or *lex mercatoria*.

More generally, the principles could serve as a reference for an arbitration tribunal when the tribunal wishes, as is often the case, to go beyond the scope of the applicable national laws, while basing its decision on stricter and more specific standards than the simple reference to equity.

As pointed out by a French pro-mercatorist,[18] application of *lex mercatoria* is welcome when the dispute is connected to more than two legal systems, because localization in a given national legal system might then be rather arbitrary. Most contracts dealing with maritime trade in general, and charter parties in particular, are connected with more than two national laws (laws of the different parties, law of the flag, etc. In such event, application of *lex mercatoria*, especially when trade usages are involved, generally brings the solution. The process is direct and without the need for a conflict of laws. As a matter of fact, and as suggested by Michael Medwig, "by choosing the law-merchant rather than a national law or the conflicts system, merchants avoid the surprises that lurk in national commercial laws whose application is often impossible to foresee at the time the parties structure an international transaction".[19]

With respect to the self-enforceability of *lex mercatoria* it is worth stressing that all the CAMP arbitration awards referred to in this article have been complied with by the parties without any national court's interference. This spontaneity is the mark of the acceptance, by the maritime community, of the rule of extra-contractual detention as designed by maritime arbitrators and courts.

Regarding judicial review by national authorities, one should bear in mind that, as far as French courts are concerned, decisions based on *lex mercatoria* are regarded as valid.[20]

This view rests on the premise that *lex mercatoria*, be it trade usage or a general principle of international law, is a rule of law, even though it has not been created by a national sovereign.

VI. CONCLUSION

In 1759, Lord Mansfield stated in *Luke v. Lyde* that: "Maritime law is not the law

[18] See Y. Derains, *Le statut des usages du commerce international devant les jurisdictions arbitrates*, Rev. Arb., 1973, p. 122.

[19] Michael T. Medwig, *The New Law-Merchant: Legal Rethoric and Commercial Reality*, 24 Law and Policy in International Business, 1993, p. 601.

[20] *Compania Valenciana de Clementos Portland c/ Société Primary Coal Ltd.* Paris Court of Appeal, 13 July 1989.

of a particular country, but the general law of nations."[21] In the light of the arbitration awards referred to in this article, one may conclude that maritime law is, in particular, the law of the shipping community and that the arbitrators are the guardians of its ethic.

More recently, an author wrote:

> "Maritime law has a great tradition of universality and uniformity. The desire for uniformity, along with the desire of predictability of law and the belief in just solutions are the three essential basic purposes for any conflict of law theory."[22]

In charter party disputes, arbitrators reach this goal by understanding the reasonable behaviour and justified expectations of the parties in the light of the usages of their particular trade, i.e. by applying the *lex mercatoria*.

[21] *Luke v. Lyde* (1759) 2 Burn 882, at p. 887, 97 E.R. 614 at p. 617. See also A.T. Carter, *The Early History of the Law Merchant in England* (1901) 17 L.Q.R. 232 at pp. 235–236.

[22] As note 6, above.