

4-1-2006

The Lex Mercatoria and The Culture of Transnational Industry

Michael Douglas

Follow this and additional works at: <https://repository.law.miami.edu/umicl>



Part of the [Comparative and Foreign Law Commons](#), and the [International Law Commons](#)

Recommended Citation

Michael Douglas, *The Lex Mercatoria and The Culture of Transnational Industry*, 13 U. Miami Int'l & Comp. L. Rev. 367 (2006)

Available at: <https://repository.law.miami.edu/umicl/vol13/iss2/4>

This Article is brought to you for free and open access by the Journals at University of Miami School of Law Institutional Repository. It has been accepted for inclusion in University of Miami International and Comparative Law Review by an authorized editor of University of Miami School of Law Institutional Repository. For more information, please contact library@law.miami.edu.

THE LEX MERCATORIA AND THE CULTURE OF TRANSNATIONAL INDUSTRY

*Michael Douglas**

Introduction.....	367
I. What is the Lex Mercatoria?.....	369
II. Why the Lex Mercatoria?.....	373
III. Culture, Industry, and Lex Mercatoria.....	379
A. Culture.....	381
B. Industry.....	383
C. The Lex Mercatoria Applied.....	394
Conclusion.....	400

Introduction

We are living in an increasingly globalized¹ and interdependent society. That is to say, we are living in an era in which it is becoming more and more common for people on one side of the globe to interact in all sorts of ways with people on the other side. Technological developments in transportation and communications have made this an undeniable fact of the modern world. The process of globalization is altering the significance of both political boundaries as well as cultural boundaries. This is not to say that the nation-state as our primary mode of political organization is going to disappear any time soon, or that national cultures are somehow merging into one. Rather, the growing interconnectedness that characterizes the modern world requires us to

* J.D., University of Miami School of law, 2005; B.A., University of British Columbia, 2001. I am truly grateful to Professor William Twining for all his generous support, patience, and guidance in helping me to bring this topic together and for introducing me to the idea of the lex mercatoria. I also wish to thank the University of Miami International and Comparative Law Review for its hard work and diligence in editing this comment. Last, but certainly not least, I thank Professors Paul Mier and George Feaver, for without their infectious and unceasing enthusiasm for political philosophy, I would never have discovered an interest in the law.

¹ There are many contexts in which the idea of “globalization” is invoked. I use the term here in accordance with Anthony Giddens’ interpretation of the process as “the intensification of world-wide social relations which link distant localities in such a way that local happenings are shaped by events occurring many miles away and vice versa.” ANTHONY GIDDENS, *THE CONSEQUENCES OF MODERNITY* 64 (1990).

reconsider perspectives that have historically been the exclusive domain of the nation-state and have characterized isolated national cultures. This certainly includes the concept of law, and it is increasingly apparent in the area of international commercial transactions.

Over the past fifty years, the geo-political structure of the world has changed markedly with the collapse of Soviet-backed communism in Eastern Europe, the emergence of independent African states, and the arrival of the Asian economic tigers. As a result, the international business community has enlarged significantly. As commercial transactions between parties of different nations continue to become more frequent and more diverse in their matter of business, the issue of whose law should govern a particular transaction weighs heavily. There is a growing community of legal scholars who are unsatisfied with the application of either national or international law to international business disputes, and these scholars question the effectiveness of such legal systems to adequately deal with issues of international commerce. These scholars advocate the move toward what is commonly called the *lex mercatoria*—a sort of middle ground between national laws, which fail to take account of the concerns of parties whose national legal backgrounds are different, and international laws, which generally fail to address the specific needs of the *international* business community since they have for the most part been designed to solve domestic issues. The concept of the *lex mercatoria* continues to generate a great deal of discussion among jurists, and many of its issues remain fiercely debated.

The primary focus of this comment is on the *lex mercatoria* as a body of substantive law and suggests an alternative view as to its application in the context of “industrial culture.” Part I examines the historical background, sources, and content of the *lex mercatoria* with an analysis of some of the competing definitional perspectives on the *lex mercatoria*. Part II addresses more specifically the problems facing the international business community in the context of current conflicts of law theory with a view as to how the *lex mercatoria* serves as a viable and preferable alternative to traditional conflicts of law. In addition, Part II provides a brief overview of the role of international commercial arbitration and its importance for the development of the *lex mercatoria*. Part III is divided into three sections. It begins with an examination of the idea of universality in relation to the *lex mercatoria* and proposes an alternative way of understanding the concept of universality by focusing on culture. Section A discusses the concept of culture from a theoretical perspective. Section B discusses how the concept of culture might be

applicable to specific international industries. This section focuses the discussion on the industry of international construction. Section C examines how culture and industry work together to make the *lex mercatoria* a realistic and useful idea. Finally, the comment concludes by remarking on the problems and prospects of the *lex mercatoria*.

I. What is the Lex Mercatoria?

The modern *lex mercatoria* has its origins in the *ius gentium* developed by the *praetor peregrinus* of ancient Rome and later the mediaeval law merchant². The *ius gentium* was designed to deal with disputes that arose between Romans and non-Romans. However, its sources were not purely Roman. Rather, it contained, for example, elements derived from Greek law.³ During the mediaeval era, merchants sought a specialized form of justice that addressed their needs, which, in the context of “transnational” business, domestic law at the time did not adequately address. This was particularly evident in the area of maritime law. Merchants wanted a uniform system of commercial law, adjudication of disputes to be fast and efficient, and judges to be mindful of merchant practice.⁴ The mediaeval law merchant was essentially a revitalization of the Roman *ius gentium*. Its sources were neither wholly local nor foreign, but a mix of the two.

The same factors that motivated the merchants of the mediaeval era to pursue a uniform system of law persist today among those whose commercial interests lead them to contract with an increasing number of foreign parties. The modern *lex mercatoria* represents a move away from national legal systems toward a more cosmopolitan concept of international commerce. The allure of the *lex mercatoria* lies in its potential as a means by which parties engaging in transnational commercial transactions can effectively and efficiently surmount the political, (national) cultural, economic, and legal differences they encounter as a result of transacting with each other. As Trakman notes, “[t]o promote only one standard of justice representing only one group of interests at the expense of other standards and other interested groups is

² EUGEN LANGEN, *TRANSNATIONAL COMMERCIAL LAW* 11 (1973).

³ Friedrich K. Juenger, *The Lex Mercatoria and Private International Law*, 60 *LA. L. REV.* 1133, 1134 (2000).

⁴ LEON E. TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 13 (1983).

to subvert the very underpinnings of a modern Law Merchant.”⁵

Despite a general consensus as to the overall concept of the *lex mercatoria*, arriving at a specific and useful definition has proven more difficult. Berthold Goldman, one of the foremost proponents of the *lex mercatoria*, defines it as “a set of general principles and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular system of national law.”⁶ Hight, a practicing lawyer and a skeptic of the *lex mercatoria*, refers to it as “an enigma created by a paradox that placed many investors in a dilemma.”⁷ It is “a sort of shadowy, optional, aleatory, international commercial congeries of rules and principles.”⁸ Lowenfeld, an arbitrator, takes the position that the *lex mercatoria* is not “a self-contained system covering all aspects of international commercial law to the exclusion of national law, but rather as a source of law made up of custom, practice, convention, precedent—and many national laws.”⁹

However one defines the *lex mercatoria* (and the definitions are numerous), one commentator has suggested that most definitions generally fall within three different perspectives.¹⁰ The first is that the *lex mercatoria* is a mass of legal rules and principles serving only as a complement to the national law applicable to the contract.¹¹ It serves as a “gap filler” of sorts when the applicable law does not seem to provide for a solution. The second is that the *lex mercatoria* is an amalgamation of trade usages and customs that is focused according to the needs of international business, thereby creating a *ius commune* among commercial merchants.¹² Lowenfeld’s vision of the *lex mercatoria* is

⁵ *Id.* at 43.

⁶ Berthold Goldman, *The Applicable Law: General Principles of Law—The Lex Mercatoria*, in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 116 (Julian D.M. Lew ed., 1987).

⁷ Keith Hight, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613, 616 (1989).

⁸ *Id.* at 618.

⁹ Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator’s View*, in LEX MERCATORIA AND ARBITRATION 71, 84-85 (Thomas E. Carbonneau ed., 1998).

¹⁰ KLAUS PETER BERGER, THE CREEPING CODIFICATION OF THE LEX MERCATORIA 40, (1999); see also CRAIG, PARK AND PAULSSON, INTERNATIONAL CHAMBER OF COMMERCE ARBITRATION 35.01, (1990).

¹¹ Berger, *supra* note 10.

¹² *Id.* Lord Justice Mustill, on the other hand, takes the view that customs and

essentially a combination of the first two premises. It is the pragmatist's view. The third perspective, and certainly the most ambitious, is that the *lex mercatoria* represents a "supra-national legal system, which derives its justification and validity either from its autonomous existence or through the principle of party autonomy as a meta-legal rule."¹³ This perspective is most in line with Goldman's definition above, but it is also the most difficult claim to sustain. Arguably, Lowenfeld's definition is the most reasonable, or at least the most workable, because it allows for the use of the *lex mercatoria* as an *alternative* to national law, not merely a *complement* to national law. In so doing, it would also allow for the development of a customary law within transnational industries to the extent that such customs are received by various national courts and arbitral tribunals.

As a practical matter, if one is to accept the *lex mercatoria*, it must be expected that one would want to know what the actual rules are. Lord Justice Mustill assembled twenty legal concepts that he cautiously presented as its core principles.¹⁴ The principles identified by Mustill include, for example, (1) *pacta sunt servanda*—a contract should be adjudicated according to its own terms; (2) *rebus sic santibus*—obligations end when the underlying facts are substantially changed; (5) contracts should be performed in good faith; (9) parties should negotiate in good faith to overcome unforeseen difficulties even if there is no revision clause in the contract; and (15) a party which has suffered a breach of contract must take sufficient steps to mitigate its loss. While accepting that these principles are legitimate legal concepts, Mustill rejects the idea that such principles could realistically form the basis of a viable and functional legal system that could be utilized to resolve transnational commercial disputes. They are just too vague to be of any

trade usages cannot be a source of law for the *lex mercatoria* unless the parties to the contract feel themselves bound to follow such custom or usage. Trade usage and custom in adjudication is important because it is either found in the terms of the contract (implicitly or explicitly) or it has been incorporated as a part of the applicable domestic law. In any event, according to Mustill, any respectable national court should be able to utilize trade usage and custom without resorting to the *lex mercatoria*. Rt. Hon. Lord Justice Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, in *LIBER AMICORUM FOR THE RT. HON. LORD WILBERFORCE 157-58* (Maartin Bos & Ian Brownlie eds., 1987).

¹³ Berger, *supra* note 10.

¹⁴ Mustill, *supra* note 12, at 174-77.

real use.¹⁵ On the other hand, there are those who feel that the principles outlined by Mustill represent a "clear picture of the thrust of a modern international commercial law..."¹⁶ However, as discussed below, Mustill's criticism is somewhat problematic.

Finally, it is worth discussing briefly what the *lex mercatoria* is *not*. First, the *lex mercatoria* is neither a form of amiable composition nor is it an invitation thereto. The power of amiable composition allows "an arbitrator to 'depart from the strict application of rules of law' and 'decide the dispute according to justice and fairness,' when necessary."¹⁷ Under this concept, an *amiable compositeur* is not obligated to apply the law as it stands; but his authority to act as *amiable compositeur* is not open to him to elect at whim. Whether or not an arbitrator may act as *amiable compositeur* is derived from two sources: first, the express consent or agreement of the parties to the contract; and second, the law of the forum of the arbitration if it permits amiable composition in such circumstances.¹⁸ If neither requirement is met, then a decision made *ex aequo et bono* (according to justice, fairness, and equity) is not enforceable. If amiable composition is permitted, then an *amiable compositeur* may resolve a dispute *ex aequo et bono* and is not restricted in the law he may apply. It follows that an *amiable compositeur*, may (or may not) employ the *lex mercatoria* to resolve a dispute.¹⁹ Conversely, an arbitrator, not acting as *amiable compositeur*, may not decide a case *ex aequo et bono* if the *lex mercatoria* would not allow it. The arbitrator's decision must be just, and to that extent, it is equitable. But it is equitable because the decision is rooted in considerations that are contained within a rule of law that, itself, calls for the application of equitable principles.²⁰ While the *lex mercatoria* includes principles of equity, it is not synonymous with amiable composition. "[T]he *lex mercatoria* means more than equity in that it includes more variable

¹⁵ *Id.* at 156.

¹⁶ Lowenfeld, *supra* note 9, at 89-90.

¹⁷ Karyn S. Weinberg, *Equity in International Arbitration: How Fair is "Fair"?* *A Study of Lex Mercatoria and Amiable Composition*, 12 B.U. INT'L L.J. 227, 231 (1994).

¹⁸ Abul F.M. Maniruzzaman, *The Lex Mercatoria and International Contracts: A Challenge For International Commercial Arbitration?*, 14 AM. U. INT'L L. REV. 657, 686 (1999).

¹⁹ *Id.* at 687.

²⁰ *Id.* at 688-89.

elements than equity, and in a given situation the application of the lex [mercatoria] may prevail over equity.”²¹

Second, the lex mercatoria is not a form of harmonization. Since the lex mercatoria is a-national and does not derive its principles from any one national body of law, the likening of the lex mercatoria to harmonization is misplaced. Harmonization, in the commercial context, refers to the process of minimizing “the differences between the laws of individual nations, so as to provide a stable and uniform basis for commerce.”²² Depending upon which definition one prefers to use, the lex mercatoria does not refer at all to any particular national legal system. Where it is conceived of as an autonomous body of supra-national law, it is separate from national laws. Even when thought of in its complementary form, the lex mercatoria is separate from national laws; it is *in addition to* national laws, not a *part of* them. Thus, it cannot be a form of harmonization. Although harmonization and the lex mercatoria may share similar goals, their focus is on different things and should not be thought of as being synonymous with one another.

II. Why the Lex Mercatoria?

The need of a modern lex mercatoria develops from the necessities of a growing international business community. Take, for example, two parties: one Paraguayan and one American. Both are resident, domiciled, and incorporated in their respective countries. The two parties want to do business together, and so they enter into negotiations in Caracas. They meet in Caracas because it is a middle point between the respective countries, is convenient for both parties, and the American party maintains operations there that are essential to the transaction. After some period of negotiations, they are ready to consummate the deal, and the contract is signed in Mexico City (again because it happens to be convenient at the time to consummate the agreement there). The contract they enter into requires that a large amount of goods manufactured by the American party in the United States from raw materials acquired in Venezuela be shipped to a subsidiary of the Paraguayan party located in Argentina. Assume further that at some point in the transaction there arises a dispute. Assume also that in the event of a dispute, the parties agreed to arbitration in Paris

²¹ *Id.* at 688.

²² Mustill, *supra* note 12, at 152.

(since that is where the International Chamber of Commerce is based).

The question arises: Which law should apply to settle this dispute? Supposing first that there is no choice of law clause in the governing contract, there are several possibilities in the above example under conflicts of law doctrine.²³ First, the *lex loci arbitri* could apply. That is, the law of the forum in which the settlement is taking place—in this example, that place is France. But there are practical reasons for choosing France as the *lex loci arbitri*, which say nothing about what law should govern the contract.²⁴

Second, the place in which the contract was consummated could apply—in this example, that place is Mexico City; so, the laws of Mexico would be applied by a French arbitral tribunal²⁵ to settle the dispute. Third, since the contract was negotiated in Caracas and one of the parties maintains key operations there, Venezuelan law could be a possibility. This is especially true if the dispute is related to that party's Venezuelan operations. However, because in our modern world it is so easy and commonplace for parties to travel, this solution makes little sense, especially when there are practical and obvious reasons for choosing a particular place for negotiation or consummation. Fourth, the nationality, residence, domicile, or place of incorporation of the parties could be given effect so that either United States or Paraguayan law could apply to settle the dispute. But which one? On what basis would U.S. law be chosen over Paraguayan law? Why should one be given preference over the other?

Fifth, the place of performance could provide the applicable law. In our example the goods were shipped to Argentina, so Argentine law could provide the solution because Argentina is the point of delivery. But both the American and the Paraguayan party must meet its obligation in a different place. So, the place of performance would depend on where exactly in the transaction the dispute arose. It is also possible that the contract could be split and governed by different bodies of law if the

²³ See, e.g., *Baffin Land Corp. v. Monticello Motor Inn, Inc.*, 425 P.2d 623, 628 (Wash. 1967). The application of United States conflicts of law doctrine generally assumes that suit is brought in a federal court in the United States.

²⁴ Thomas Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in *LEX MERCATORIA AND ARBITRATION* 23, 28 (Thomas E. Carbonneau ed., 1998).

²⁵ I say "French" tribunal meaning not that the arbitrators are necessarily French—indeed, they will likely be from various nations—but that the tribunal merely sits in France.

performance of each party could be divided into equivalent, corresponding parts. Sixth, the situs of the subject matter of the contract could provide a solution. The goods, whatever they may be in this example, were the subject matter and were in transit from the United States to Argentina. Which place is the situs? Again, it might depend on where the dispute arose. Seventh, and finally, the place under whose local law the contract will be most effective could be considered.

It is not suggested that the problem illustrated by the above example is hopelessly insoluble. The above hypothetical simply illustrates the wide range of possibilities that exist. Given the specific facts of each case, a solution as to which law to apply may be easier in one case than in others, and there is a substantial body of conflicts of law theory that attempts to sort out such situations. But the endeavour required by applying conflicts of law theory nevertheless entails time, and in the increasingly fast-paced world in which merchants operate, this can be very costly. There is also a methodological debate among conflicts scholars that persists and, according to some scholars, does not resolve the problem as to the applicable law.²⁶ Assuming the applicable law is found, there remains not only the question of the adjudicators' expertise in that body of law and their ability to apply it correctly, but also whether or not that law is adequate to provide a reasonable solution. There are also language issues and translation problems. Furthermore, given the transnational character of the transaction, the applicable law simply may not address the issue in dispute because it was enacted to handle domestic business disputes, not international ones. Whatever results emerge from the application of that law will be questionable, and the commercial community's desire for certainty and predictability is hindered. This, in turn, leads to greater risk and higher costs.²⁷ If instead

²⁶ See, e.g., Juenger, *supra* note 3, at 1136 (discussing the debate between "multilateralists" on the one hand and "unilateralists" on the other). See also Dean Prosser, 16 AM. JUR. 2d *Conflict of Laws* § 1, n.5 ("The realm of the conflict of laws is a dismal swamp, filled with quaking quagmires, and inhabited by learned but eccentric professors who theorize about mysterious matters in a strange and incomprehensible jargon.").

²⁷ See, e.g., William Park, *The Specificity of International Arbitration: The Case for FAA Reform*, 36 VAND. J. TRANSNAT'L L. 1241, 1254-58 (2003) ("For many wealth-creating transactions, the prospect of foreign court intervention will chill cross-border economic cooperation, causing productive transactions to falter or become more expensive. Without predictability about applicable substantive

of arbitration the dispute were tried before a national court, these sorts of problems might very well lead a judge to favour his own domestic law.²⁸ Instead of looking for and understanding the applicable law of a foreign jurisdiction, the judge looks for a way to apply the law of his own jurisdiction.

Apart from conflicts of law doctrine, international conventions, such as the United Nations Convention on Contracts for the International Sale of Goods (CISG), might provide a solution.²⁹ The CISG applies when the parties to the contract are "Contracting States," that is, the parties' respective states have adopted the CISG as law, and the transaction is one of a sale of goods. Thus, in a transaction involving the sale of goods between two parties whose countries are signatories to the CISG, the question of whose law applies becomes a non-issue because the CISG would be the only possible choice. But in the example above, the United States is a signatory to the CISG, while Paraguay is not. In a dispute that involves many different states, some of which are not signatories to the CISG, and many possible legal regimes, such as in the hypothetical above, a conflicts of law analysis will still be necessary because the CISG is not the only body of law that might be applicable.³⁰

Furthermore, the United States, although having adopted the CISG, has made a declaration under Article 95 allowing it to opt out of Article 1(1)(b).³¹ Thus, if the dispute were brought in a U.S. court, and the U.S. court had jurisdiction, the CISG would not apply where one state was not a Contracting State. But if the dispute were brought in

and procedural norms, business managers may hesitate to consummate transactions or charge greater prices to cover the risk of uncertainty in the event of dispute.").

²⁸ See, e.g., Langen, *supra* note 2, at 6; Jeunger, *supra* note 3, at 1138; PETER NYGH, AUTONOMY IN INTERNATIONAL CONTRACTS 185 (1999).

²⁹ United Nations Convention on Contracts for the International Sale of Goods, Apr. 11, 1980, U.N. Doc. A/CONF.97/18 (1980), Annex 1; see also 19 I.L.M. 668 [hereinafter CISG]. As of February 17th, 2004, there are 63 Contracting States.

³⁰ Under Article 1(1)(b), the CISG is applicable "when the rules of private international law lead to the application of the law of a Contracting State." 19 I.L.M. at 672.

³¹ Article 95 provides that "[a]ny state may declare at the time of the deposit of its instrument of ratification, acceptance, approval or accession that it will not be bound by sub-paragraph (1)(b) of Article 1 of this Convention." *Id.*

another state, and that state's conflicts of law doctrine pointed to the law of the United States, the CISG *would* apply even though a U.S. court would not have applied the CISG. Finally, the CISG applies only to the sale of goods, and it is further restricted to transactions between merchants and by certain other exclusions outlined in Article 2. If our hypothetical transaction instead involved the sale of aircraft or services, for example, the CISG would be inapplicable.³² In short, the existence of the CISG, while helpful in many situations, does not necessarily obviate the conflicts of law issue.³³ We face the same problem we did at the outset of the hypothetical as to whose law applies. Arguably, the analysis becomes even more complicated because, once it is decided which state's law applies, an added determination would have to be made as to whether the CISG or that state's domestic law applies.

To avoid the above problems, it may well be the case that the parties to the contract will have specified a national law as the applicable law in a choice-of-law clause. But this has its problems, too. The parties must expend time and resources negotiating which national law to apply in the clause. They may not come to an agreement easily, if at all. Indeed, choice-of-law clauses are often left out of international business transactions because their negotiation can be highly contentious, and the failure to come to an agreement can be a deal-breaker. The only way to close the deal may be to omit the choice-of-law clause altogether. The parties' negotiations can also be prone to a forum-shopping contest so as to stay one step ahead of their respective counterparts. Costly, outside legal counsel may have to be hired to advise one or both of the parties on a body of national law that is foreign to them; and, as discussed below, depending on the industry, a relevant body of foreign law may simply be unavailable or inchoate. Even when the parties do come to an agreement, a court's application of the choice-of-law clause may lead to unexpected results.³⁴

³² CISG art. 2(e).

³³ It has been suggested that the CISG "was considered helpful to United States interests only where it provided a clear resolution of the choice-of-law issues," which accounts for the United States' opting out of Article 95. RALPH H. FOLSOM ET AL, *INTERNATIONAL BUSINESS TRANSACTIONS* § 1.4 (2nd ed. 2001).

³⁴ Take, for example, the case of *Libyan Arab Foreign Bank v. Bankers Trust Co.*, [1989] QB 728 (Staughton, J.). The contract in question specified that New York law was to govern the contract. But because of the nature of the transaction, which involved the regular transference of very large sums of U.S.

It is in these situations that the *lex mercatoria* has its appeal. The *lex mercatoria* "can furnish an alternative to a conflict of laws search which is often artificial and inconclusive, and a way out of applying rules that are inconsistent with the needs and usages of international commerce and which were adopted by individual states with internal, not international transactions in mind."³⁵ Since the *lex mercatoria* is not formally attached to any national body of law, its significance is to be seen in the area of international commercial arbitration. Unlike judges sitting in their respective national courts, arbitrators are more likely to be free from the restraints of national law, procedure, and politics. Arbitrators generally have broader discretionary powers than do judges in the manner in which they apply the law.³⁶ Under the principle of party autonomy, the parties may specify in their contract whatever law they desire, and arbitrators have the duty to comply with that choice even if that law does not fit within a national legal framework.³⁷ Where there is no choice-of-law clause, the arbitrator could draw from various sources, including the *lex mercatoria*. It is precisely this sort of flexibility in the applicable rules of law that makes arbitration so attractive, and, indeed, so crucial for the development of the *lex mercatoria*.

To illustrate, consider the case of *Pabalk Ticaret Sirketi, Ltd (Turkey) v. Norsolor, S.A. (France)*.³⁸ Norsolor had entered into an agreement with Pabalk where Pabalk was to act as Norsolor's agent in Turkey to distribute Norsolor's products in that country. As the relationship between the parties declined, Norsolor terminated the principal-agent relationship. Pabalk initiated ICC proceedings in Vienna, Austria on the grounds of wrongful termination of contract and sought to recover commissions it was owed by Norsolor. The arbitral tribunal considered three possibilities in deciding the applicable law. First, the place of performance—in this case, Turkey. Second, the law of the principal—in this case, France. And third, the Hague Convention's law

currency between the New York and London branches of the defendant bank, the court split the contract and applied U.S. law to certain aspects of the contract and U.K. law to other aspects.

³⁵ Lowenfeld, *supra* note 9, at 85.

³⁶ Harold J. Berman and Felix J. Dasser, *The "New" Law Merchant and the "Old": Sources, Content, and Legitimacy*, in *LEX MERCATORIA AND ARBITRATION* 53, 66 (Thomas E. Carbonneau ed., 1998).

³⁷ *Id.* at 66.

³⁸ Int'l Comm. Arb. Award No. 3131 (1979).

of agency, which would have given effect to the law of the place of performance subject to the mandatory rules of public policy drawn from other legal systems, namely that of the principal. The tribunal rejected these possibilities and turned instead to the *lex mercatoria's* principle of good faith in deciding whether the breach of agreement was attributable to one of the parties and, if so, whether the damage required compensation. The tribunal found in favour of Pabalk. The award was subsequently challenged by Norsolor and upheld in both France and Austria.³⁹ The Austrian Supreme Court approved the award and held that the tribunal had *not* exceeded its jurisdiction.⁴⁰ The *Pabalk-Norsolor* case serves not only as a good illustration of the flexibility available in international commercial arbitration, but also of the general recognition of the *lex mercatoria* by two national courts, as well as the validity of good faith as one of its core principles.

III. Culture, Industry, and the *Lex Mercatoria*

It is necessary at this point to draw attention to an argument that has served as a criticism of the *lex mercatoria*. It has been argued that the *lex mercatoria* must be understood to mean that its principles form a sort of "*lex universalis*"—that it must be universally accepted in order for it to be a truly international system of law. Lord Justice Mustill, for example, understands the *lex mercatoria* in this regard.⁴¹ Mustill claims that the *lex mercatoria* is fatally flawed because the only principles of commercial law genuinely international inasmuch as they are shared by the entire international business community are necessarily so general and vague as to be useless.⁴² But universality is not a requisite element of the *lex mercatoria*. It is suggested that "[the *lex mercatoria*] need not be the same all over the world. The arbitrator will tend to confine his investigations to those legal systems which are connected with the subject-matter of the dispute."⁴³ Furthermore, according to Andreas Lowenfeld, "[u]niversality...depends on the universe."⁴⁴ The issue usually turns on the *national* culture of the parties. As Lowenfeld

³⁹ *Id.*

⁴⁰ *Id.*

⁴¹ Mustill, *supra* note 12, at 155-56.

⁴² *Id.* at 156.

⁴³ Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 INT'L & COMP. L.Q. 747, 750 (1985).

⁴⁴ Lowenfeld, *supra* note 9, at 86.

rightly points out, the question as to universality is really not relevant when the parties involved are from highly developed Western nation-states⁴⁵ because the "universe" is essentially the same. But the question may well be relevant when, for example, one of the parties is from an economically underdeveloped non-Western nation.⁴⁶

This is precisely what Mustill seems to take issue with. It is absurd to think that a commercial party from an underdeveloped nation-state would have agreed to submit itself to a contract based on principles of commercial law completely inconsistent with its own national legal system.⁴⁷ He is not alone in this position. An African lawyer has argued that the *lex mercatoria* is based on principles that Africans do not necessarily share with Western legal systems:

African lawyers reject the conceptual premise of a *lex mercatoria* because their views were never accommodated in the development of the *communis opinio doctrum* upon which a *lex mercatoria* is said to be predicated. The common principles that are said to make up the *lex mercatoria* were themselves largely developed at a point in time when trading relationships with Africans were undertaken mainly for the benefit of Europeans in the context of a colonial political structure. The Africans could take no part in those relationships.⁴⁸

The main thrust of the criticism is that since universality is central to the idea of the *lex mercatoria*, and since the *lex mercatoria* is not, and cannot be, universal, the *lex mercatoria* fails to amount to anything realistic and practical for use in transnational business transactions. It represents nothing more than Western ideas and is fundamentally Eurocentric.

Lowenfeld's idea of universality is particularly helpful in removing the *lex mercatoria* from the "universality" problem posed by commentators like Mustill. The idea that universality depends on the

⁴⁵ *Id.*

⁴⁶ *Id.*

⁴⁷ Mustill, *supra* note 12, at 156.

⁴⁸ Sampson L. Sempasa, *Obstacles to International Commercial Arbitration in African Countries*, 41 INT'L & COMP. L.Q. 387, 410 (1992).

universe can be altered somewhat to mean that universality depends not on the *national* universe but, rather, on the *industrial* universe. In this way “universe” signifies “culture.” In order to develop this idea, it is important to have some working concept of what constitutes culture.

A. Culture

The idea of culture is notoriously difficult to define, and there is by no means only one way to approach an analysis of culture. However, to attempt a full analysis of the various competing theories of culture is far beyond the scope of this comment. For the purpose of this discussion, John Bell’s description and analysis of culture is used:

Culture consists of patterns, explicit and implicit, of and for behaviour acquired and transmitted by symbols, constituting the distinctive achievements of a human group, including their embodiment in artifacts; the essential core of culture consists of traditional (i.e. historically derived and selected) ideas and especially their attached values; cultural systems may, on the one hand, be considered as products of action, on the other hand as conditioning elements of further action.⁴⁹

Bell goes on to develop the idea that there are two core principles at work in this definition of culture: first, *ideas* and *values*; and second, cultural *acts*.⁵⁰ Each principle works with the other as neither is sufficient on its own. “A set of ideas has to be rooted in a practical situation.”⁵¹ Thus, while ideas and values are important, they have meaning only in the particular context in which they operate and have effect. Culture influences human *behaviour*, not merely human *attitudes* towards it.⁵² An adequate definition of culture must therefore include practice.

Practice is important because it helps strip away the idealistic

⁴⁹ JOHN BELL, FRENCH LEGAL CULTURES 1 (2001), citing A.L. Kroeber and C. Kluckhohn, CULTURE: A CRITICAL REVIEW OF CONCEPTS AND DEFINITIONS 181 (1952).

⁵⁰ *Id.* at 2.

⁵¹ *Id.* at 4.

⁵² *Id.*

and unrealistic descriptions of culture. But just as ideology is not sufficient to understand culture, neither is practice on its own. Practice alone may be an indicator of culture, but without a set of ideas and values, practice is no more than a series of empirical, factual events.⁵³ Ideology thus helps one to understand the significance of the real events in which ideology is couched. There is here an idea of a common intention in events. An event has significance because those participating in it have a common intention and ascribe to it a certain significance.⁵⁴ For example, a group of people might get together in front of city hall to protest the city's policy on some unpopular issue. The gathering of those people has significance as a *protest* against city policy because the participants, as a human group, ascribe to it meaning, and the rest of society recognizes that ascription. Otherwise, it would just be meaningless, scattered polemic and a group of people blocking the entrance to city hall. So, even though the individual participants in any given event may have particular perspectives, "culture is a collective phenomenon where groups use the same language and have a common identity despite other differences."⁵⁵

The relationship between practice and ideology is further tied together by "institutional facts." According to Bell, "[a]n 'institutional fact' is a fact, which we invest with meaning within a particular set of social relations because it performs a particular function."⁵⁶ Bell points to law and money as two examples of institutional facts.⁵⁷ Law is not merely a collection of rules, but rather "an interpretive reality under which certain physical events take on special significance."⁵⁸ The special significance exists only where there is an ability to participate in a relevant institutional system—a particular legal system in this example. Similarly, money is not merely a piece of paper with a number and a design on it. Rather, a community acts with a common intention to invest in it the meaning of legal tender, which performs a function in society. In both cases, in Bell's view, collective intentionality serves to create institutional facts.⁵⁹

⁵³ *Id.*

⁵⁴ *Id.* at 5.

⁵⁵ *Id.*

⁵⁶ *Id.*

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ *Id.*

Since the central purpose of the *lex mercatoria* is to successfully remove commercial parties from the confines and problems of national law in transnational commercial transactions, consideration must be given to the meaning that its rules will have *cross-culturally*. Pierre Legrand makes the argument that rules are not inherently self-explanatory and so their meaning cannot be supplied by the rules themselves.⁶⁰ The “ascription of meaning is predisposed by the way the interpreter understands the context within which the rule arises and by the manner in which she frames her questions, this process being largely determined by who and where the interpreter is....”⁶¹ The interpretation of a rule, or a body of rules, such as the *lex mercatoria*, is culturally conditioned. As mentioned above, it might be argued that the *lex mercatoria* is unrealistic because law is culture, and culture is local. Therefore, the *lex mercatoria* will fail because it attempts to apply rules of commercial law across *national* cultures which do not, and arguably cannot, share the same understanding of the same rules of law. In this regard, the application of the *lex mercatoria* would seem to be tantamount to an unviable “legal transplant” of sorts.

The *lex mercatoria* can, however, avoid the problems of legal transplants and the sort of criticisms made by commentators, such as Mustill and Sempasa, if we conceive of individual industries as cultures. Here, the international construction industry is taken as an example of how “culture” might be understood to relate to industry and how this idea relates to the *lex mercatoria*.

B. Industry

The construction industry has been traditionally understood primarily as a local industry carried out by local, that is to say national, construction companies. But the construction industry is becoming increasingly international in scope. As it does, its focus is shifting towards large infrastructure projects in developing countries.⁶² As a general practice, the law applicable to construction contracts has tended to be that of the place of performance, that is, the law of the country

⁶⁰ Pierre Legrand, *The Impossibility of ‘Legal Transplants’*, 4 MAASTRICHT J. EUR. & COMP. L. 111, 114 (1997).

⁶¹ *Id.*

⁶² Charles Molineaux, *Moving Toward a Construction Lex Mercatoria: A Lex Constructionis*, 14 J. INT’L ARB. 55, 55 (1997).

where the construction project is located. In the case of international construction projects, this would in many instances be the national law of a developing country. Given the economic underdevelopment of such countries, the relevant law may also be inchoate or unavailable, and independent, local legal advice may be very scarce.⁶³ The lack of a well-developed body of construction law in such countries capable of handling the kinds of disputes that arise in large international projects makes it more desirable that the governing law of international construction contracts be a body of law common to, and understood by, the international construction community—a sort of *lex constructionis*. Having such a body of law operate within the international construction community would ameliorate the uncertainty that results from subjecting the parties to inadequate national construction law.⁶⁴ In turn, greater certainty and predictability would facilitate more participation in international construction projects.⁶⁵

In the context of international construction it is again Lowenfeld's definition of the *lex mercatoria* as "a source of law made up of custom, practice, convention, precedent—and many national laws," which is most useful.⁶⁶ It is not as though construction law in developing countries does not exist. Rather, it is simply inchoate. Consider this situation: Underdeveloped State *X* needs a dam built to serve as a water reservoir and hydroelectric facility. Because State *X* simply does not have the expertise or technology sufficient to properly and successfully undertake such a massive, costly, and important project on its own, State *X* initiates the tendering process and international construction firms begin to submit their bids. International Construction Firm *Y* makes the winning low bid and wins the contract. But because State *X* lacks the necessary expertise and technology to undertake the project itself, projects of such magnitude tend not to be undertaken by local engineering firms, and thus disputes involving such projects do not typically arise in State *X*. There is construction law in State *X* to be sure, but none that adequately addresses the kinds of disputes that may arise on an international project.

⁶³ Christopher R. Seppala, *FIDIC Conditions of Contract and the Dispute Adjudication Procedure*, FIDIC Resources, available at <http://www1.fidic.org/resources/contracts/> (last visited March 5, 2005).

⁶⁴ Molineaux, *supra* note 62.

⁶⁵ *Id.*

⁶⁶ Lowenfeld, *supra* note 9.

International Construction Firm Y is understandably concerned. After all, disputes in construction projects are inexorable:

Consider the basic facts of construction, especially for heavy, or civil works: Almost every structure is newly designed; every site is different, improving technology mandates changes even in projects already under way and even in our low-tech construction industry....The response to this reality is easily expressed but its goal of contractual certitude is somehow rarely reached. We almost always need more subsurface exploration during design and more complete drawings and specifications. Inevitably, there are design errors and there always seems to be shortsighted efforts by owners to save money by skimping on borings.⁶⁷

Moreover, a project of this scale is likely to involve massive financial costs⁶⁸ and major investments of both time and personnel. A construction-specific *lex mercatoria*, therefore, would serve as “a reference, and an aid, in deciding disputes when the applicable law is thin or non-existent.”⁶⁹

Conceiving of international construction as a *culture* begins to make sense when one first considers the details of international construction that distinguish it from the standard commercial transactions typical of most of the discussion on the *lex mercatoria*.

⁶⁷ Charles Molineaux, *Settlements in International Construction*, 50 DISP. RESOL. J. 80, 80 (Sep. 1996).

⁶⁸ Heavy construction projects, such as dams and bridges, for example, can reach costs in the billions of dollars. The Three Gorges Dam project in China is currently under construction, and it is estimated that it will reach a minimum cost of \$27 billion dollars. By the time the Channel Tunnel between England and France was completed it cost \$21 billion. As construction projects become increasingly ambitious as a result of new developments in technology, so the costs rise. See John Kosowatz, *Final Construction Phase of Three Gorges Dam Begins*, available at <http://www.enr.construction.com/news/powerindus/archives/021108.asp> (last visited March 5, 2005).

⁶⁹ Molineaux, *supra* note 62, at 56.

International construction has "a far broader impact than routinized and repeated trading transactions of concern to the merchants involved."⁷⁰ Molineaux outlines three distinguishing elements of international construction. These features are useful in conceiving international construction as a culture because they help us to see the unique, identifying characteristics that separate international construction from other industries and make international construction a more distinctive human group with its own particular idiosyncrasies.

First, international construction involves unique projects that are one of a kind by their nature.⁷¹ Building a dam on a river somewhere in Africa, for instance, is not the same as building a dam on another river somewhere in Asia. The geographic, economic, and political contexts surrounding each project vary greatly and no doubt influence how each project is handled. Furthermore, unlike the standard commercial transaction, construction projects are unique in that they are physically attached to the location, and they typically involve numerous other contracts, such as financing, engineering services, equipment rental, material purchasing, suretyship, and insurance, to name just a few, and without which the whole project would fail to come to fruition.⁷²

Second, the time frame involved in international construction is considerably greater than in standard commercial transactions.⁷³ Building a bridge or a dam is not the type of project that can be completed quickly. These projects may take years to complete. The increased time frame is accompanied by increased risks. For example, a construction project in a developing country under the control of an unstable or hostile political regime or in a region that is prone to violent civil strife poses specific concerns for any construction firm engaged in that project. The more time it must spend in such an environment, the more risk it is exposed to. This is the kind of long-term, constant risk exposure not generally experienced by the merchant in Europe, for example, who simply ships his goods to Africa or wherever.

Third, international construction projects tend to have at their core a humanitarian interest.⁷⁴ Since a great amount of international

⁷⁰ *Id.* at 58.

⁷¹ *Id.*

⁷² *Id.*

⁷³ *Id.*

⁷⁴ *Id.* at 59.

construction takes place in developing countries, the projects themselves tend to be development-related and concern fundamental human necessities. These include water supply projects (e.g., reservoirs and water treatment facilities), sewer treatment facilities, transportation projects (e.g., bridges and tunnels), and energy projects (e.g., hydroelectric facilities, such as dams). There is “a communitarian concern in seeing construction proceed with efficiency because human needs are being met by the process and public moneys are involved.”⁷⁵

The concept of culture can now begin to be applied to the international construction industry. The international construction industry itself constitutes a human group. As a *distinct* human group, it has ideas accompanied by a set of attached values that are collectively rooted in a factual context. In its most rudimentary form, the international construction industry has as its objective the undertaking and realization of infrastructural, civil projects. Of course, in the factual context of the undertaking, there are two parties. One party, the contractor⁷⁶, has the primary motive of making a profit; and the other party, the employer⁷⁷, has the primary interest of acquiring a much-needed human necessity. At the outset, there seem to be two competing ideas with attached values: profit and development. This is important in understanding the construction industry as a culture. Despite the fact that the individual participants in any given event may have differing perspectives, “culture is a collective phenomenon where groups use the same language and have a common identity despite other differences.”⁷⁸ Thus, the two core values and their representative parties are not at odds; they share a symbiotic relationship in an industrial, cultural context. The employer wants its project built as cost effectively as possible; the contractor wants to earn as much as possible. The contractor bids down to win the contract. The contractor bids only if it believes it can offer

⁷⁵ *Id.*

⁷⁶ The contractor will typically be either a single construction company or an unincorporated joint venture among two or more companies. *See* Seppala, *supra* note 63, at http://www1.fidic.org/resources/contracts/docs/seppala_dec03_1mar04.rtf (last visited March 5, 2005).

⁷⁷ The employer is generally the party who invites tenders. Thus, the employer could be a state or a relevant state agency or ministry, etc., which is overseeing the project. *See id.*

⁷⁸ Bell, *supra* note 49, at 5.

more cost effective construction than the prior bidder and still make a profit. In the end, the contractor wins a contract on which it can make a profit and the employer gets the most cost effective price the market will allow.

The ideas and values of the two parties, moreover, are not merely occasioned by the factual context of the construction project. The cultural system that develops around the international construction industry is a product both of action (as evidenced by the interaction of the parties from the beginning of contract negotiation throughout performance and completion) and ideas. The ongoing nature of the project, that is, the extended length of the undertaking unique to international construction, leads to further action on the part of both parties. This, in turn, "leads to the development and the revision of ideas in the light of the realities of experience."⁷⁹ Indeed, the construction contract, itself, may be "the announcement of the beginning of an extended negotiation."⁸⁰ The negotiation will surely involve other ideas and values, such as the willingness or reluctance of the construction firm to subject itself to certain amounts of risk, and so on. The culture of the industry begins to condition the factual behaviour of the parties as well as their respective attitudes.

The combination of practice and ideas is manifest in the context of international construction, but a more complete understanding of the relationship between ideas and practice in the culture of construction requires one to also consider the relevant "institutional facts." Recall that an institutional fact is "a fact, which we invest with meaning within a particular set of social relations because it performs a particular function."⁸¹ The particular set of social relations here, of course, is the relationship between the international construction firm and the corresponding state agency set within the wider context of the construction industry. The essential institutional facts relevant to the international construction industry are the *Fédération Internationale des Ingénieurs-Conseils* (FIDIC)⁸² and, more importantly, the most widely used form contract—the Conditions of Contract for Works of Civil

⁷⁹ *Id.* at 4.

⁸⁰ Molineaux, *supra* note 62, at 58.

⁸¹ Bell, *supra* note 49, at 5.

⁸² The International Federation of Consulting Engineers. Its membership is mostly comprised of national consulting and engineering firms representing some 67 countries. See <http://www1.fidic.org/> (last visited March 5, 2005).

Engineering Construction.⁸³ The existence of FIDIC and the centrality of its contract conditions serve to create the “imperative reality” that characterizes institutional facts.⁸⁴ It is within the ambit of FIDIC that events unique to international construction take on special significance because it is FIDIC which provides the institutional system in which members of the international construction community may take part, for example, to promote an industry wide code of ethics, facilitate technological transfer, and provide representation to international lending and financial institutions.⁸⁵ Just as a legal system is an institutional fact and provides the imperative reality to which a given national culture is subject, FIDIC similarly provides the imperative reality to which the international construction community is subject.

The FIDIC standard contract is particularly illustrative of an institutional fact and arguably the most important fact in understanding how the international construction industry may properly be thought of as a culture. It was especially formatted for use in international construction and provides comprehensive coverage of contract conditions for civil engineering projects, but also for electrical and mechanical works as well as for design-build and turnkey projects. Furthermore, given the magnitude of international construction projects and the incredible amount of money that is often necessary to fund them, involvement of institutions, such as the World Bank and the Asian Development Bank, is commonplace. The World Bank has even mandated the use of the FIDIC form contract as a condition to lending, and this has a “codifying” effect for the principles that are embodied in the FIDIC contract.⁸⁶

As an institutional fact, the FIDIC form contract must be versatile and adaptable so as to perform useful functions for the culture of international construction. It is generally impractical to negotiate *in toto* a new contract for each international construction project, and in the context of international construction, furthermore, the massive scale of

⁸³ The standardized FIDIC form contract is more informally known as the “Red Book.” *See id.*

⁸⁴ Bell, *supra* note 49, at 5.

⁸⁵ *See* FÉDÉRATION INTERNATIONALE DES INGÉNIEURS-CONSEILS, ENGINEERING OUR FUTURE: FINAL DRAFT REPORT, available at http://www1.fidic.org/resources/engineeringourfuture/fidic_engineeringourfuture_2004.pdf (last visited March 5, 2005).

⁸⁶ Molineaux, *supra* note 62, at 60-1.

the projects requires a significant amount of sub-contracting and networking within a single project that may involve, for instance, the use of non-FIDIC contracts. In light of this reality, the standardized form:

[P]rovides a tool for lawmaking which simultaneously affords a comprehensiveness and a degree of detail beyond the aspirations of the most universal and extensive civil code. It is designed, moreover, as a seamless, whole-cloth scheme for relations contracting which addresses a range of prospective relationship issues in polycentric fashion.⁸⁷

In this regard, the FIDIC contract effectively becomes the full legal universe in which the parties are situated. For example, “[u]nlike most other published forms of conditions, those published by FIDIC recognise the reality that the tender documents for a particular project typically have to include provisions that are not appropriate for other projects.”⁸⁸ The FIDIC contract is drafted, therefore, with flexibility and user-friendliness in mind by anticipating alternative contractual arrangements, maximizing general conditions, and stating which general conditions are likely to change in the particular conditions.⁸⁹

To illustrate the range of relationship issues in international construction, consider the following case.⁹⁰ A subcontractor initiated arbitration proceedings against the general contractor. The general contractor subsequently initiated proceedings against the employer. The subcontract was modelled after the English Federation of Civil Engineering Contractors (FCEC) while the main contract followed the FIDIC form. The subcontract provided that a dispute involving the main contract that “touches or concerns” the subcontract works may, upon written notice by the general contractor to the subcontractor, require the

⁸⁷ Thomas J. Stipanowich, *Reconstructing Construction Law: Reality and Reform in a Transactional System*, 1998 WIS. L. REV. 463, 523 (1998).

⁸⁸ Peter L. Booen and Gordon L. Jaynes, *The FIDIC's 1999 Forms of Contract*, available at http://www1.fidic.org/resources/contracts/booen_mar01.asp (last visited March 7, 2005).

⁸⁹ *Id.*

⁹⁰ Int'l Comm. Arb. Case No. 5898 (1989), in ICC INT'L CT. OF ARB. BULL., Vol. 9, No. 1, May 1998 at 83.

subcontract dispute to be referred to the arbitral tribunal hearing the main contract dispute. Accordingly, the general contractor sought to have the subcontract dispute joined with the main contract dispute. The arbitral tribunal refused to do so. The tribunal reasoned that the subcontract clause applied *only if*, as a condition precedent, a dispute had arisen under the main contract. Since the main contract was governed by the FIDIC conditions, the arbitral tribunal had to analyze Clause 67 of the FIDIC contract, a dispute resolution clause, which required a four step procedure before a dispute under the main contract could be referred to arbitration. In this case, the four steps had not been met. As a result, the general contractor's attempt to join the subcontractor's claim was rejected despite there being an unambiguous clause in the subcontract providing for joinder. The case illustrates how the FIDIC conditions are formulated in a way that allows for flexible interplay with other complex relational aspects of the international construction industry.

In addition, the standardized form contract provides the parties with the ability to overcome differences between disparate national cultures.⁹¹ The FIDIC form's expansive use within the international construction industry has led to numerous opportunities for adjudicative interpretation since its initial promulgation in 1957,⁹² which in turn has lent itself to increasing reliability and predictability over the extended time during which it has been used. For example, many of the disputes arbitrated at the ICC concerned issues that arose out of the second and third editions of the FIDIC conditions but were subsequently addressed and resolved in the current, fourth edition.⁹³ Moreover, as a general matter, the FIDIC conditions, although having English common-law origins, are quite compatible with foreign legal systems.⁹⁴ For example,

⁹¹Stipanowich, *supra* note 87, at 523.

⁹² Christopher Seppala reports that in the 1980s, construction disputes accounted for approximately twenty percent of ICC arbitration cases, while in 1997 construction disputes accounted for approximately fourteen percent of ICC cases. See Christopher Seppala, *International Construction Contract Disputes: Commentary on ICC Awards Dealing with the FIDIC International Conditions of Contract*, available at <http://www1.fidic.org/resources/contracts/seppala98.asp> (last visited March 5, 2005).

⁹³ *Id.*

⁹⁴ The FIDIC conditions of contract have their origins in the conditions of contract of the Institute for Civil Engineers (ICE), which were themselves based

the FIDIC conditions have been successfully adapted for use in several Arab Middle-Eastern countries.⁹⁵ The result is a community of understanding within the international construction industry. The parties involved in the industry invariably have differing and competing interests, but the FIDIC conditions provide the basic premise upon which the parties operate. They have the same starting point and use the same industrial "language."

Construction contracts, moreover, are not just concerned with scope and price. They are also concerned with risk allocation.⁹⁶ Risk allocation in this context refers in large part to country risk. Given the lengthy time frame of most civil construction projects, the exposure to political and economic instability in a developing country is greatly heightened. The lack of construction precedent in such countries only compounds the problem. "To leave the risk of uncertain contract interpretation lurking beneath the dark contractual waters, because the law of nation D (for developing) may have nothing relevant to say, inhibits tendering. If the risks are increased, the prudent will walk away and the tendering will devolve upon the few large contractors."⁹⁷ The use of the standardized FIDIC conditions helps to ameliorate this problem by facilitating more harmonious interpretation in disputes. After all, the "goal is the providing of greater certainty as to the applicable law and the consistent interpretation of construction contract provisions in the uncertain construction market."⁹⁸

However, the use of standardized contract forms is not without

on English legal concepts and construction industry practice in England. See, e.g., Hani Sarie-Eldin, *Operation of FIDIC Civil Engineering Conditions in Egypt and Other Arab Middle Eastern Countries*, 28 INT'L LAW. 951, 951-52 (1994).

⁹⁵ The FIDIC conditions of contract, for example, have provided the model upon which were based the Ministry of Public Works conditions in Kuwait; the standard public works contract promulgated by the Council of Ministers in Saudi Arabia; the General Conditions Book in Jordan; and the FIDIC conditions have provided the basis for public works contracts in Iraq and Oman. See Sarie-Eldin, *supra* note 94, at 953 (suggesting that the FIDIC conditions of contract are generally compatible with Arab Middle Eastern legal systems but may, in some respects, be difficult to reconcile with Egyptian law).

⁹⁶ Molineaux, *supra* note 62, at 63.

⁹⁷ *Id.* at 62.

⁹⁸ *Id.* at 63.

its problems. The criticism can be made generally that “model forms usually are less an evocation of group altruism and public-mindedness than a hard-headed effort by one or another of the various professional associations and trade groups to secure the high ground in negotiating and performing design and construction contracts.”⁹⁹ The claim might be made that the FIDIC form contract is really one-sided and its use is nothing more than a contract of adhesion that is imposed upon the employer. But the FIDIC conditions of contract do not represent the interests of the contractor alone. The conditions were developed in consultation with both international construction organizations, such as the European International Contractors,¹⁰⁰ and development banks on behalf of employer-borrowers.¹⁰¹ The FIDIC form avoids the claim of one-sidedness altogether since it has not been prepared by *either* party.¹⁰²

⁹⁹ Stipanowich, *supra* note 87, at 526.

¹⁰⁰ The member associations who participate in this process are far too numerous to list, but the membership is diverse. Among the members are: the Albanian Association of Consulting Engineers, the Association of Consulting Engineers Australia, Organisation des Bureaux d'Ingenieurs-Conseils, d'Ingenierie et de Consultance, the Bulgarian Association of Consulting Engineers and Architects, the Association of Consulting Engineers of Canada, Foreningen af Rådgivende Ingeniører, Bundesvereinigung Consultingwirtschaft, Félæg Rádgjafarverkfræðinga, the Iranian Society of Consulting Engineers, Sindacato Nazionale Ingegneri e Architetti Liberi Professionisti Italiani, Cámara Nacional de Empresas de Consultoría de México, Fédération Marocaine du Conseil et de l'Ingénierie, Stowarzyszenie Inżynierów Doradców i Rzeczoznawców, the Saudi Council of Engineers, the Association of Consulting Engineers of Sri Lanka, Orde van Raadgevende Ingenieurs in Suriname, the Association of Consulting Engineers Tanzania, the Uganda Association of Consulting Engineers, and the Association of Consulting Engineers of Zambia. For a complete list of member associations, see <http://www1.fidic.org/directory> (last visited March 5, 2005).

¹⁰¹ Molineaux, *supra* note 62, at 60.

¹⁰² Parties are free, of course, to alter the FIDIC form. Indeed, the FIDIC conditions were designed with that possibility in mind. Insofar as the contractor and employer may alter the form, the contract is more uniquely their own and less of a standard FIDIC contract. But this is carried out in the negotiation process between the parties, a process that has been preceded by tendering. During the tendering process, the employer will usually have provided the tendering contractors with the necessary information regarding the site and its surroundings; the contractors, of course, will be submitting their pricing estimates to the employer. The point is that a fair amount of information has been disclosed prior to the actual contract negotiation and signing. Whatever

The result is a "balanced document, perceived as fair and workable."¹⁰³

C. The Lex Mercatoria Applied

The foregoing discussion illustrates the way in which the international construction industry can fit within the theoretical framework of culture. By conceiving of the industry itself as a culture, we can now see how the *lex mercatoria* is much more realistic and workable in the more specific industrial context. In the *culture* of international construction, ideas and values of disparate national parties work together. As Lowenfeld has argued, "universality depends on the universe."¹⁰⁴ Despite geographic, political, and linguistic impediments, the parties to an international construction contract are speaking the same "language" and living in the same "universe." In the industry-specific context of international construction, national distinctions are superficial and can be overcome. What the parties to the agreement have in common is a shared understanding of the industry. They also understand each other's interests, and they are working within the same legal framework—the FIDIC contract conditions.

Recall that one of the bases upon which the *lex mercatoria* has been challenged is that its alleged claim to universality is illusory. The way a German, for example, understands commercial concepts is not the same as the way a Libyan understands them, so the argument goes. What may be a viable principle of commercial law to one is not necessarily so to another. Law is culture, and culture is local. Any attempt, therefore, to apply principles of law across cultural boundaries is misguided and doomed to fail. This argument, however, is constrained by an all too restrictive understanding of culture where the focus is on the *nation*.

If, instead of understanding culture as solely *national*, we understand it to embrace *industry*, then the *lex mercatoria* makes more sense because its principles take on context-specific meaning, and the

changes are made to the standard FIDIC form, neither party will necessarily be in a disadvantageous position during negotiation. See Christopher R. Seppala, *Contractor's Claims Under the FIDIC Civil Engineering Contract*, 13 CONSTRUCTION L. 1, 34 (1993).

¹⁰³ Molineaux, *supra* note 62, at 60. Molineaux suggests further that the fact the FIDIC form is often attacked as being both pro-contractor and pro-employer is illustrative of its balance and fairness. *Id.*

¹⁰⁴ Lowenfeld, *supra* note 9, at 86.

parties to an international construction contract, being members of the same cultural group, share a similar understanding of those principles and the issues they address. Lord Justice Mustill, as discussed above, criticizes the *lex mercatoria* for being little more than an amalgamation of principles that are too general to be of any use in dispute resolution. Ironically, it is Mustill's criticism that is too general, for he does not place his analysis in a factual context that is necessary to fully appreciate the application of the *lex mercatoria*.

In the context of international construction, the principle of *pacta sunt servanda*, for example, has special import. International construction firms typically win their contracts by tendering offers in an international bidding process.¹⁰⁵ The winner, of course, is the lowest bidder. That the terms of the contract must be observed is important to maintain the integrity of the bidding process. "Fairness, to both the taxpayer citizen and the losing bidders, demands that a winning low bidder be required to fully perform the contract for which he has competed."¹⁰⁶ It is not unreasonable, therefore, that parties should want as much contractual certainty as is feasible when they undertake to tender bids internationally. Parties to an international construction contract, and those charged with resolving disputes that arise in this context, understand this reality. *Pacta sunt servanda* is not, then, just some conceptually vague legal principle that has little meaning because it might be understood differently across national cultures. It has a special meaning that is culturally conditioned by the international construction industry and is understood accordingly.

Another principle of the *lex mercatoria* that takes on special importance in the international construction industry is *rebus sic stantibus*. This principle encompasses other similar ideas, such as frustration, *imprévision*, and *force majeure*. In the context of construction, *force majeure* "refers to certain circumstances and events

¹⁰⁵ International competitive bidding is one of the World Bank's procurement policies. Since the World Bank funds many of the international civil construction projects, participation in the process is crucial for construction firms that want to win contracts. See INTERNATIONAL BANK FOR RECONSTRUCTION AND DEVELOPMENT, GUIDELINES: PROCUREMENT UNDER IBRD LOANS AND IDA CREDITS, available at <http://web.worldbank.org/website/external/projects/procurement/> (last visited March 7, 2005).

¹⁰⁶ Molineaux, *supra* note 62, at 64.

which are recognized as being above and beyond the control of contracting parties and which could not reasonably have been foreseen or avoided by the due care of either of the parties.”¹⁰⁷ This principle is contemplated by the FIDIC conditions of contract and is very broad in its application. Generally, where performance becomes illegal or impossible as a result of an event beyond the control of both employer and contractor, either party may terminate the contract with the proper notice.¹⁰⁸ When the contractor, for instance, claims *force majeure*, he must notify the employer, attempt to complete the work as best he can, and notify the employer’s representative of possible alternative methods of completing the work, but he is not to act on those alternatives without consent.¹⁰⁹

The principle of *rebus sic santibus*, furthermore, has great meaning due to the nature of the industry. In a post-September 11th world, terrorist activity has become a painful reality of which all international contractors must be mindful. This is particularly true for those whose work takes them to a part of the world where terrorist activity might be more likely to happen.¹¹⁰ Contractors cannot simply remain safely at home and send to the employer all the parts needed to make a dam or a bridge and an instruction book on how to put it all together. International construction necessarily requires contractors to remain in the employer’s country and see the project through—and this can take years. The reality of this situation is something with which those in the international construction industry must contend more so than the average transnational merchant who stays at home and sends his goods abroad in a single transaction. Therefore, *rebus sic santibus*, specifically *force majeure*, has a different meaning depending on the industry in which one operates because different cultural realities

¹⁰⁷ Wm. Cary Wright, *Force Majeure Clauses and the Insurability of Force Majeure Risks*, 23 CONSTRUCTION L. 16, 17 (2003).

¹⁰⁸ *Id.* at 19.

¹⁰⁹ *Id.*

¹¹⁰ One need not look beyond the recent array of horrific kidnappings and executions of foreign workers, reporters, and contractors in the Middle East. See, e.g., Chris Whitlock, *Islamic Militants Behead American in Saudi Arabia*, WASH. POST, June 20, 2004, at A06; Richard Sisk, *Evil Butchers Do It Again*, N.Y. DAILY NEWS, September 21, 2004; Josh White, *Town Reflects Rising Sabotage in Iraq; 'Whatever We Build, They Are Going to Destroy,' Politician Says*, WASH. POST, December 9, 2004, at A01.

condition different interpretations of the principle.

Just as with *pacta sunt servanda*, the principle of *rebus sic santibus* embodies particular ideas that are uniquely applicable to the international construction context. Once placed in its proper industrial context, *rebus sic santibus* is no longer a bare legal concept. Rather, its meaning is “a function of the application of the rule by its interpreter, of the concretization or instantiation in the events the rule is meant to govern.”¹¹¹ The interpreter’s understanding of its meaning, in turn, will be shaped by the cultural context in which he is immersed, namely, the culture of international construction. Thus, when construction disputes go to arbitration, the arbitral tribunal will not only have a particular understanding of this concept, but will also know how to apply it because the arbitrators are invariably experienced in the field.¹¹²

There are other common legal principles in international construction that the *lex mercatoria* does not generally contemplate but would nevertheless be important in the specific context of international construction and would, therefore, likely be a part of its own *lex*. First, variations in construction projects are to be expected and do not amount to breaches of contract.¹¹³ It is the nature of the industry that specifications provided in the tender documents may be inaccurate, an employer’s budget may change, and natural events and other unforeseeable occurrences may require a variation in the works the contractor is to perform. The difficulty is that the works the contractor must perform are typically outlined in the construction contract, at least conceptually, and so any variation in the works would be equivalent to an alteration of the contract, which would be impermissible without renegotiation and mutual consent.¹¹⁴ Since the circumstances that require variations in the contractor’s performance are common and to be expected, the parties must be able to undertake them without a breach of contract occurring. Related to this is the principle of good faith, another principle of the *lex mercatoria*. Since it is the employer who typically provides the site, it is the employer who is in the best position to provide the necessary and very important information in regard to sub-surface

¹¹¹ Legrand, *supra* note 60, at 114.

¹¹² See, e.g., Molineaux, *supra* note 62, at 57 n.4 (acknowledging that “mud on the boots” is a qualification in construction arbitration).

¹¹³ *Id.* at 64.

¹¹⁴ Seppala, *supra* note 102, at 37-8.

data, for example.¹¹⁵ Failure on the part of the employer to provide accurate information due to a breach of good faith can have serious consequences for the contractor who has relied on this information throughout the tendering process. If variations are required, it is important that they be made with minimal difficulty so as to mitigate the situation as much as possible.

Second, requests of the contractor for time extensions should be handled expediently.¹¹⁶ It is a common fact in international construction that there will be disturbances and disruptions that will prevent the contractor from completing the project on time or a portion of the project that has its own time schedule to which the contractor must adhere. Such events may be caused by the failure of the employer to give possession of the site in a timely manner, a delay in issuing necessary drawings to the contractor, delayed supplies, and natural events, such as unavoidable weather conditions.¹¹⁷ Failure to respond in time to a request for a time extension tends to result in constructive acceleration for which compensation is generally due.¹¹⁸

Third, parties to the construction contract must act promptly to either assert their claims or deny them so as to facilitate early resolution by experts in construction and avoid unnecessary complication by the involvement of attorneys.¹¹⁹ Finally, increased costs incurred as a result of site conditions found to be more problematic than originally represented in the tender information are to be borne by the employer, while conditions more favourable resulting in cost savings are to be credited to the employer (providing the employer is the owner of the site).¹²⁰

The foregoing concepts certainly do not represent a complete list of principles that would form an industry-specific *lex mercatoria*, or a *lex constructionis*. Rather, they illustrate how the concept of the *lex mercatoria* would apply to the specific context of international construction. There are undoubtedly significant other core principles that relate specifically to the international construction industry, and conceivably there are boundless variations that stem from the basic

¹¹⁵ Molineaux, *supra* note 62, at 64.

¹¹⁶ *Id.* at 65.

¹¹⁷ Seppala, *supra* note 102, at 40.

¹¹⁸ Molineaux, *supra* note 62, at 65-66.

¹¹⁹ *Id.* at 65.

¹²⁰ *Id.* at 64-65.

principles like *pacta sunt servanda* and *rebus sic santibus* that are wholly unique to international construction.¹²¹

This brings us back to the question of how we might understand the *lex mercatoria*. As discussed above, it is Lowenfeld's conceptual analysis that proves to be the most practical and best suited to international construction. In the context of international construction, an industry-specific *lex mercatoria*, a *lex constructionis*, would no doubt serve as a "gap filler" when the applicable law does not seem to provide for a solution. But the idea holds more than just the notion of a "gap-filler." It represents an amalgamation of trade usages and customs that are focused according to the specific needs of the international construction industry. The trade usages and customs reflect industrial realities and are embodied in the FIDIC conditions of contract, which are themselves a product of co-operation among numerous national engineering associations, contractors, and lending institutions. The potential is there for a *ius commune* within the culture of international construction that overcomes the limitations that commentators, such as Sempasa,¹²² have identified.

Both the FIDIC standardized conditions and arbitration are crucial to facilitating a *lex constructionis*. The FIDIC conditions are generally comprehensive enough to cover the majority of disputes that might arise in international construction. But when disputes arise for which neither the FIDIC conditions nor the specified national law provides an apparent solution, recourse could be had to a *lex constructionis* if the dispute has been referred to arbitration, since arbitrators will not be constrained by national procedural and legal norms.¹²³ Thus, it is necessary that the arbitrators presiding over a dispute be those who have the technical expertise to fully understand the nuances of the industry and the specific nature of the problems that arise in international construction so as to be able to properly ascertain and apply the core principles of a *lex constructionis*.

¹²¹ For example, it is possible that an international contractor may incur cost and delay as a result of carrying out the engineer's instructions for dealing with the on-site discovery of fossils, coins, antiquities, structures, and other remains of archaeological or geological interest. Indeed, such a unique contingency is contemplated by the FIDIC conditions under Clause 27.1.

¹²² See Sempasa, *supra* note 48, at 410.

¹²³ See, e.g., William W. Park, *Arbitration's Protean Nature: The Value of Rules and the Risks of Discretion*, 19 ARB. INT'L 279, 281 (2003).

Conclusion

The *lex mercatoria* remains a much debated topic in legal discourse. It is criticized for being too ambitious, too vague, and therefore uncertain and impractical. It is criticized for not being capable of legal autonomy and for having no means of enforcement.¹²⁴ But the arguments made against the *lex mercatoria* are themselves constrained by their reliance on old ideas of positivism and restrictive attitudes towards culture, which are misplaced in our modern, increasingly interdependent world.

The practicality of the *lex mercatoria* depends on the culture in which it is applied. This requires us to reconsider our understanding of culture. By removing ourselves from an understanding of culture that focuses too much on the nation, and instead reconceptualizing culture so as to embrace other distinct human groups, such as specific industries, we can see how the *lex mercatoria* becomes a realistic possibility and a useful legal concept. The rules and concepts of the *lex mercatoria*, which otherwise might be too vague to be of any use, suddenly become more concretized and substantiated when placed in the context of a particular industry. The relevant rules and concepts are then capable of transcending national boundaries because their meaning, which is a required component of the rules, is a function of the assumptions of those who interpret and apply the rules to factual events. The assumptions of those who apply the rules are, in turn, culturally conditioned. Herein lies the importance of ascertaining what the relevant culture is.

This comment has sought to make the argument that, for the purpose of the *lex mercatoria*, the relevant culture is an *industrial* culture. The international construction industry has been used here to illustrate the argument. But the idea is applicable to other industries that are transnational in scope, such as the petroleum and maritime industries. Each specific industry constitutes a human group that shares core ideas and values, factual events, and institutional facts. Individual actors within a particular culture of industry necessarily interact on a continuing basis with a complex network of relations that embraces all the ideas and values, factual events, and institutional facts that characterize the particular industrial culture. When these actors enact and apply rules that

¹²⁴ It has been suggested that the New York Convention represents the appropriate enforcement mechanism inasmuch as it requires its signatories to recognize and enforce arbitration awards. See Molineaux, *supra* note 62, at 66.

relate to, and have their basis in, their industry, they are participating in events that are uniquely their own.

Examining the principles of the *lex mercatoria* has little meaning when done in a vacuum. The principles need a *context*, and that context is provided by the industrial *culture* which both occasions the principles and ascribes meaning to them. The starting point, then, for meaningful analysis of the *lex mercatoria* must be within the industrial context in which it is applied.