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LEX MERCATORIA ARBITRATION AND THE NEW YORK CONVENTION: THE NIGERIAN POSITION ON ENFORCEABILITY OF LEX MERCATORIA AWARD

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Abstract: The term *lexmercatoria* comes from Latin and means "merchant law". It refers to a set of trading principles, commercial law rules and procedures that were developed by merchants in medieval Europe. It conjures up romantic notions of ancient laws and practices adopted by merchants in medieval times as they traded from place to place. In the present time, it has resurrected and has gathered almost general appeal as a type of international commercial law which may displace national laws in international transaction. There are criticisms for and against its general application as a set of laws applicable to commercial disputes as it is stateless. The fundamental question to answer is how valid and lawful are the merchant rules in the settlement of trade disputes in Nigeria? Are arbitral awards rendered in accordance with the *lexmercatoria* rules enforceable in Nigeria pursuant to the provisions of the Arbitration and Mediation Act of Nigeria? Are the arbitral awards based on *lexmercatoria* rules enforceable by the provisions of New York Convention? Arbitral awards based on *lexmercatoria* awards though stateless awards are not lawless awards.

Keywords: Lexmercatoria, International commercial law, Arbitral awards, New York Convention, Arbitration and Mediation Act (Nigeria)

1. Introduction

Lexmercatoria is based on principles that are used to adjudicate disputes that arise from international commercial contracts. Merchants, businessmen, and traders in course of their trade practice develop certain trade and business culture and customs which regulate their activities in commerce. These culture and customs are not universal in nature but relative as each form of business has its peculiar culture. For a businessman to continue in business, he must respect and obey the custom and practice of his own trade. These customs are not

laws enacted by the state parliament or legislative house. There is no legislative house which drafted international commercial laws. There has not been any court which produced the judicial precedent for international commercial disputes. This also means that they are not state laws as they are not made by any state legislative house. They evolve as trade and merchant laws based on the conduct of the merchants in their everyday practice. The practice and custom of the merchant have over the years influenced the laws of the states. Suffice it to state that opinion is divided as to whether *Lexmercatoria* is actually law capable of being applied in commercial disputes. The opponents of *lexmercatoria* deny its character as a law and questioned whether there are sufficiently developed principles which are capable of universal application to complex international transactions. The proponents of *lexmercatoria* still maintained that it does exist and can be comfortably ascertained, to provide legal principles to govern international commercial transactions.[1] According to Michael Pryles writing on application of the *lexmercatoria* in International commercial arbitration, while there is no international commercial court there has developed an extensive system of international commercial arbitration and a number of arbitral awards are now published.[2] The question then is whether these form the basis of *lexmercatoria* and are they sufficient?

Professor Berger in his detail book describes *lexmercatoria* as follows:

Opinion about the terminology and the legal quality of the *lexmercatoria* diverged widely, especially with respect to its nature as a third legal system alongside domestic law and public international law. There is, however, a strong similarity in the starting points of all theories on transnational commercial law: the combined perspective of comparative law, usages, customs and practices of international commerce and trade leads to the evolution of transnational legal principles, rules and standards which are applied in practice in order to arrive at economically sensible solutions to transnational commercial disputes. The preference for substantive law solutions reflected in this transnational approach serves to avoid the uncertainties and unpredictable effects caused by the application of complicated conflict of laws doctrines and of domestic substantive law rules, which are frequently inadequate to solve the manifold legal problems of contemporary international laws.[3]

Lexmercatoria is a Latin term that refers to a set of commercial law rules and procedures that were developed by merchants in medieval Europe. It means merchant laws. *Lexmercatoria* simply put, is the law merchant or commercial law. That is, it is that system of laws that is adopted by all commercial nations, and constitute a part of the law of the land.[4] It has to be mentioned that custom of the trade is a subset of *lexmercatoria*, which includes conventions and customary law. The customs of the trade are that part of *lexmercatoria* derived from

[1] Michael Pryles, "Application of theLexMercatoria in International Commercial Arbitration," UNSW Law Journal, 2008, Vol.31 No.1 p.319

[2]Ibid

[3] Klaus Berger, The Creeping Codification of the LexMercatoria, (1999) cited in Michael Pryles, "Application of the LexMercatoria in International Commercial Arbitration,"2008, UNSW Law Journal, p.320.

[4]Back's Law Dictionary, 821.

common practice within specific usage, industries and trade. As stated above, it is not absolute in nature but relative as each commercial form of set up has its peculiar custom.[5]

Lexmercatoria or law merchant as it is often called goes under so many descriptions, including "international *lexmercatoria*", and "international trade law". Irrespective of whatever name or description that it is called, the essence or purpose is clear, it is to regulate international commercial transactions by a uniform system of law which avoids vagaries and hardships of different national legal systems in commercial or trade matters within a particular group of merchants, traders, and businessmen. The term trade usage is often associated with *lexmercatoria.* What then is trade usage? It is the practice of a particular trade that has attained general recognition in that form of trade, that it now regulates the practice of merchants. Article 13.5 of the ICC Rules requires arbitrators to take account not only of the applicable law but also of the provision of the contract and the relevant trade sage. A similar provision is to be found in Article 33 (3) of the UNCITRAL Rules and Section 47 (5) of the Nigeria Arbitration and Conciliation Act 2004. Fortunately such a provision as in the Arbitration and Conciliation Act Cap A18 Laws of the Federation of Nigeria also exists in the new Arbitration and Mediation Act 2023 particularly section 15(1) (5a)(5b). Section 15 provides:

15(1). The arbitral tribunal shall decide the dispute in accordance with the rules of law that is chosen by the parties as applicable to the substance of the dispute.

(2) Any designation of the law or legal system of a given jurisdiction or territory shall be construed, unless otherwise expressed, as directly referring to the substantive law of that jurisdiction or territory and not its conflict of law rules.

(3) Where parties fail to choose or designate any law or legal system of a given jurisdiction or territory as required in subsection (1), the arbitral tribunal shall apply the law determined by the conflict of law rules which it considers applicable.

(4) The arbitral tribunal shall not decide *ex aequoet bono* or as *amiable compositeur*, unless the parties have expressly authorized it to do so.

(5) In all cases, the arbitral tribunal shall-

(a) decide in accordance with the terms of the contract;

(b) where established by credible evidence, take account of the usages of then trade applicable to the transaction.[6]

Of particularly importance is section 15 (5b) which gives the arbitrators the right to decide in accordance with the trade usages even when relying on the terms of the contract and the law agreed by the parties.

There has been serious controversy over the existence, credibility, and even validity of *lexmercatoria* but this has not actually dampened its increasing appeal as a choice of governing substantive law in arbitration. Most parties and opponents of *lexmercatoria* hold the view that lexmercatoria does not actually represent a discrete body of laws, that it is an elusive system, mythical in nature whose time has passed since there are now more sophisticated laws and techniques for resolving disputes which are likely to arise in international commercial

[5]Redfern& Martin Hunter, Law and Practice of International Commercial Arbitration, Sweet & Maxwell, London, 2004,98.

[6] Section 15 Arbitration and Mediation Act of the Federal Republic of Nigeria, 2023.

matters. The main classic case against *lexmercatoria* is the one advanced by Lord Mustill who has presented a strong case against the *lexmercatoria*. His arguments may be classified into two principal headings; namely practical objections and physical or conceptual objections.

Turning first to his first objection, he noted that *lexmercatoria* is detached from national laws whereas its rules are to be ascertained by a process of distilling several national laws. Today, the international business community is unimaginably large and he then asked, how arbitrators or advocates appearing before them could amass the necessary materials on the laws of these large business community. According to Lord Mustill, some proponents, evidently oppressed by these difficulties, had suggested that the *lexmercatoria* may be one which is common to all or most States engaged in international trade. In his view, this fatally compromises the appeal of the *lexmercatoria* as a *lexuniversalis.*[7]

Lord Mustill raises further questions concerning the sources of the *lexmercatoria*. According to him, since reference can be made to standard form contracts as part of the sources and elements of the *lexmercatoria*, he notes that there is no assurance of homogeneity even within a single trade because standard form contracts vary even within the same trade. Beside the problem of practical difficulties, concerning the sources, ascertainment and predictability, there are also philosophical objections to the *lexmercatoria*. The main question is whether it can be classified as a law. From where does it derive its authority? Does it have the organization, conceptual framework and detail rules which would be expected of a legal system.[8]

As *lexmercatoria* has its critics, it also has its proponents as well. Early advocates and proponents of *lexmercatoria* were Professor Goldman and *lex*Schmitthoff. Recently, *mercatoria* has found support from Professor Berger, Ole Lando, and Gaillard,[9]Professor Lowenfeld,[10] takes issue with Lord Mustill and states:

Together with Goldman, Lando, and most of its proponents, I do not view *lexmercatoria* as some arcane mystery, open only to anointed guardians of an ambiguous flame. It is perfectly appropriate, in my view, for counsel to submit argument to the tribunal about the content of the *lexmarcatoria*, as well as about the usages of the Particular trade and the circumstances on which the parties had, or fairly could have, relied. In fact, in my experience, counsel nearly always do present such evidence and argument, in one guise or another.[11]

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[7] Lord Michael Mustill, "The New LexMercatoria: The First Twenty-Five Years" (1988) Arbitration International92 cited in Michael Pryles, "Application of the LexMercatoria in International Commercial Arbitration, 2008, UNSW Law Journal Vol. 31 No.1 319 at 324.

[8] ibid

[9]ibid

[10] Andres Lowenfeld, "LexMercatoria: An Arbitrator's View, (1990)6 Arbitration International, 133.

[11] Ibid 140 cited in Michael Pryles (supra) 325.

Fouchard, Gaillard, and Goldman contend that "it is by no means evident that to be the subject of a valid choice of governing law the rules chosen must necessarily be organized in a distinct legal order".[12] The argument as to whether the *lexmercatoria* qualifies as a system of law is purely academic in cases where the parties have expressly chosen it, or a version of it, to govern their contract or in cases where the arbitrator is empowered to decide a dispute by reference to rules of law as opposed to a legal system.[13]

Others do agree that if *lexmercatoria* does exist, it exists as an amalgam of most globally accepted principles which govern international commercial relations, public international law, certain uniform laws, general principles of law, rules of international organizations, customs and usages of international trade, standard form contract, and arbitral case law.[14]Lord Mustil, who incisively and critical wrote about the lexmercatoria, referred to the earlier work of Professor O. Lando wherein he stated that the sources of lexmercatoria included and not limited to the following:

i. Public international law;
ii. Uniform laws
iii. General principles of law;
iv. The rules of international organizations;
v. International customs and usages;
vi. Standard for contracts; and
vii. Reporting of arbitral awards.[15]

Despite outright hostility to *lexmercatoria* by some commentators' series of arbitration have been enforced by national courts. *Lexmercatoria* is often an ideal, and has often been the only choice when no single national law is acceptable. For instance, clauses to the effect that *lexmercatoria* should be applied are often inserted in contracts between a government or government entity and à private person or company. In such circumstance, the private person or company will not wish to have the contract governed by the laws of the foreign state party, and the government party will resist being subjected to the laws of another state. At such an impasse, *lexmercatoria* can both adequately reflect the international character of the parties and the transaction, and solve

[12] Philippe Fouchard, Emmanuel Gaillard and Berthold Goldman, International Commercial Arbitration (1999) 1446. David Rinkin, "Enforceability of Arbitral Awards Based on LexMercatoria" (1993) Arbitration International 67, at 68-70. Cited in Michael Pryless (supra)325.

[13] Michael Pryles (supra) 326.

[14] O. Lando, "The lexMercatoria in International Commercial Arbitration," International and Comparative Law Quarterly, Vol.34, 1985, 747 at 748-750

[15] Lord Michael Mustill, "TheLexMercatoria: the First Twenty-Five Years" (1998)4, Arbitration International 86, 109 cited in Michael Pryles, "Application of theLexMercatoria in International Commercial Arbitration", (supra)320

the sometimes irresolute and intractable problem of choice of law. Further, by distilling internationally accepted principle, it can avoid the effect of relatively unsophisticated national laws unsuited to international contracts.[16] By choosing *lexmercatoria*, the parties eradicate the technicalities of national legal systems and also avoid rules, which are unsuitable for international contracts. They also escape some of the difficulties created by domestic laws which are unknown in other countries.

2. Purpose of *LexMercatoria*

Lexmercatoria aims to alloy fear existing in minds of the parties especially the parties belonging to a different national legal background, relating to the local laws by assuring them that the dispute shall not be prejudicial to any of the parties and shall lead to a neutral outcome.

3. The Existing Elements of *LexMercatoria*

Lexmercatoria rules apply where the parties have by their agreement authorized the arbitrators to do so. In such situation there is no national law the mandatory rules of which must be applied to the contract and in which case the arbitrator has the right to apply such combination of rules as seem just in the circumstance taking into cognizance the rules of the trade or business. Some of the elements of what the law merchants or lexmercatoria consist of cannot be exhaustively discussed herein. As stated hereinbefore with reference to the book written by Professor O. Lando, we can make a start at listing the possible elements of *lexmercatoria*. The important elements of the *lexmercatoria* are:-

i. **Public International law**: This happens to be one of the important elements of the law merchant or *lexmercatoria*. The rules of public international law on treaties have been applied to contracts between a government enterprise and a private party. The ICSID Convention for example provides for the settlement of investment disputes between states and national of other states. Article 42 of the Convention provides that, in the absence of a choice of law by the parties, the arbitral tribunal shall, inter alia, resort to such rules of international law as may be applicable. These rules of public international law may also be applied to disputes between private enterprises. Public international law by its very nature is a very important element of *lexmercatoria*, which arbitrators called upon to decide a matter, may apply where there is no agreement among the parties as to the applicable law.

ii. **Uniform Laws:** Another important element of the *lexmercatoria* are the uniform laws. There are uniform laws, which have been adopted for international trade. Where there are uniform laws which the courts which are connected with the parties or subject matter of the dispute are bound to apply, the arbitrator who is appointed to decide in a similar matter would be guided by these uniform laws which have been adopted for international trade.

iii. **General Principles** of law: These are also important elements of the *lexmercatoria* as these are general principles of law recognized by the commercial nations. Some of the examples of these general principles of law include the rules of *pactasuntservanda* and the principles, which empowers a party to a contract to terminate same in the case of substantial breach by the other party. Though, it is not an easy task to identify which rules are general principles, with the growing volume of literature on comparative law, there is an

[16] David W. Rivikins, "Enforceability of Arbitral Awards Based on LexMercatoria," Arbitration International (LCIA)1993, Vol.9, No.1, 67.

improving possibility of doing so.[17] It is of common knowledge that arbitrators make use of the international Encyclopedia of Comparative Law to verify and ascertain the general principles of the major legal systems of the world. A comparative study and analysis of the various laws on the subject matter will tell the arbitrator whether the rules of the various legal systems though differently formulated, produce the same result. An arbitrator who is confronted with a general principle or a common solution to the issue will generally be obliged to follow it.

These law merchants or *lexmercatoria* are not international convention and they need not be the same all over the world. In searching for the applicable laws when investigation to those legal systems, which are connected with the subject matter of the disputes.

iv. Customs and Usages: This is also another important element of the law merchant or *lexmercatoria.* Some of these customs and trade usages apply both to domestic and international contracts whereas others apply strictly to international relationships. For instance, the INCOTERMS, the uniform, customs and practice for Documentary I.C.C.[18]These customs and trade usages, it must be mentioned, apply when the parties or their organization or association have agreed to apply them. In general, they provide guidance to the courts and arbitrators even when they have not been agreed upon by the parties.

v. **Standard Form Contracts**: These are also important elements of the law merchant or*lexmercatoria*. Some of these standard form contracts have attained international popularity and recognition that today both courts and arbitrators have given decisions based on the interpretation of their clauses. The interpretation given by courts and arbitrators on the clauses of the standard form contracts bind subsequent arbitrators and courts particularly where the courts of several countries have agreed upon the interpretation of these clauses. An interpretation of the clause on one single decision or award by an arbitrator will not bind a subsequent arbitral panel but may merely guide him.

vi. **Report of Arbitral Awards**: Report of arbitral awards is also an element of *lexmercatoria* as this provides guidance on how matters falling within the subject matter of what is before an arbitrator was decided before by another arbitrator or a center. Unfortunately, it is to be regretted that because of the reason of confidentiality in arbitration, most of these awards are not published. This is a regrettable incident because the reporting of arbitral awards is an important element of the law merchant. However, in the most recent times, there has been a tendency towards publishing these awards and those already published are highly helpful to scholars, practitioners, arbitrators, and the courts. These reports tend to provide guide to the arbitrators as they display a multitude of approaches.[19]

The *lexmercatoria* or law merchant, we must agree is in a diffuse state but will certainly grow with the growth of all these its elements set out above. This means that with the growth of public international law, Uniform law, the general principles of law, the rules of international organizations, customs and trade usages, standard form

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[17]ibidi

[18]ibid

[19] Dr. Nwakoby Greg Chukwudi, "LexMercatoria Arbitration and The New York Convention: The Nigerian Position," The Nigeria Academic Forum A Multidisciplinary Journal, Vol. 3, No.1, November 2002. 206 at 217.

contracts, and reporting of arbitral awards, *lexmercatoria* or law merchant will take a better form than what we know of it today. Following the fact that *lexmercatoria* is still a diffuse and fragmented body of law, an arbitrator appointed to apply it most often finds himself in a more difficult situation than an arbitrator appointed to apply a national law, conventions, or pre-existing rules. The arbitrator applying *lexmercatoria* may in some situations have to look for solution elsewhere or even invent new solutions and thus act as a "social engineer". The arbitrator must certainly act as an inventor if he must do justice in a matter before him. When faced with the restricted legal materials which law merchant offers, he must often seek for solution and guidance elsewhere. His main source is the various legal systems and when they conflict, he must make a choice or find a new solution as stated above. The application of *lexmercatoria* is a creative process and not a mere timid and passive application of rules. The arbitrator appointed to apply *lexmercatoria* must be a man of the society with creative ability to invent and act as a social engineer.

The task of the arbitrator in application of *lexmercatoria* will be appreciated when in a practical situation, the law merchant has been silent and national law connected with the subject matter have not led to the same result. In such a circumstance, the arbitrator is faced with the problem of either applying the solution provided by his own legal system or one of the conflicting national rules. In most practical situations the arbitrator will seek and apply the most appropriate and equitable solution to the case.

In applying *lexmercatoria*, the arbitrators may take advantage of their freedom to select better rules of law and not only that, some of these arbitrators are also specialists in commerce, and their knowledge of common notion of how business should be conducted and the ethics of the trade guide them in their decisions. From the foregoing, there is no doubt that *lexmercatoria* or law merchant may not provide the certainty, which is evident in arbitration conducted pursuant to national law or pre-existing rules. However, *lexmercatoria* provides the flexibility that is required in international commercial activity given its dynamic nature. It is to be mentioned that most opponents of *lexmercatoria* have so much emphasized the issue of uncertainty in its rules.

It is surprising that these opponents of *lexmercatoria* often subscribe for amiable composition (*amiable compositeur*) or decisions based on equity (*ex aequoet bono)*. This is however, a yet more uncertain basis than the*lexmercatoria*. In spite of the common character found in them, there is a difference between *lexmercatorial*, amiable composition or equity. *Lexmercatoria* obliges the arbitrator to base his decision on the law merchant even when equity may lead to a different result or another decision. However, there are situations wherein the parties to the contract may agree to both *lexmercatoria* and equity.[20]

4 How Parties Choose LexMercatoria

There are two ways by which parties can choose *lexmercatoria* as the applicable law or governing law in their own agreement or contract. The first is by express choice whereas the second is implied choice.

i. Expressed Choice

This involves those who expressly agree in their contractual terms for the application of *lexmercatoria*. This also includes those who though did not state expressly that *lexmercatoria* shall apply but rather agreed to the elements of *lexmercatoria* such as the general principles of international law, usage of trade or principles of municipal system common to each other and common to international law. Because of the peculiar character of

[20]Mustill and Boyd, The Law and Practice of Commercial Arbitration in England, 1982, 611.

lexmercatoria and its evolving nature, it will not be a thing of surprise that parties can rarely invoke its application by name.

In most cases its application is invoked by reference to its elements. In the case of *Petroleum Development Ltd vs. Ruler of Qatar,*[21] the application of *lexmercatoria* was invoked in a clause wherein the parties agreed in the following terms "disputes arising out of the contract are to be settled by arbitration, and the arbitrator's award is to be consistent with the legal principles familiar to civilized nation". The award made by the arbitrator in this case was based on the general principles of *pactasuntservanda*, as a general principle of law. In *Petroleum Dev.Ltd vs. Sheikh of Abu Dhabi,*[22]the agreement was declared to be based on good will and sincerity of belief and on the interpretation of the agreement in a fashion consistent with reason. The dispute in this case arose over the extent of an oil company's concessions, the arbitrator rejected the laws of Abu Dhabi and England and instead applied principles rooted in the good sense and common practice of generality of civilized nations which is a form of modern law of nature. The arbitrator in this regard enforced and applied mere logical and reasonable interpretation of the wordings of the agreement.

In *Government of State of Kuwait v. American Independent Oil Company (AMINOIL)*[23] the parties in their agreement declared that the law governing the substantive issues between the parties shall be determined by the tribunal having regard to the quality of the parties, the transnational character of the relationship and the principles of law and practice prevailing in the modern world. The arbitrator taking into cognizance the terms of the said 23rd June, 1977 agreement of the parties inferred that the government of Kuwait and its associates were clearly invoking the general principles of law. The arbitration agreement in this case produced a classic example of clauses invoking common principles of law.

ii. Implied Choice

It is the opinion of some scholars that parties may impliedly select *LexMercatoria* and its elements as applicable law by empowering the arbitrator to decide as *amiable compositeur*. This idea has generated two extreme opinions. According to Julian Lew, by authorizing arbitrator to decide *ex aequoet bono,* parties are aware that they will interpret contractual terms through the usages of trade concerned and the general principles of international law.[24] This basically means that by agreeing to subject the contract to *ex aequoet bono* necessarily implies use of an extra-legal standard. For Lord Mustill, the opinion as expressed by Julian Lew does not represent the correct position of the law. This is because there is a distinction between the choice of *LexMercatoria* and a choice of *amiable compositeur*. A clear distinction between *lexmercatoria* and *amiable compositeur* exists. As stated earlier, when parties select *lexmercatoria* the arbitrator becomes duty bound and obliged to base his decision on the law merchant even if equity will lead to different result.[25] Also *amiable*

[21]Petroleum Development (Qatar) Ltd. V. Ruler of Qatar (1951)18 ILR 161

[22] Petroleum Development Ltd. V. Sheikh of Abu Dhabi (1952)18 ILR 144.

[23] (1982)21 ILM 976 at 1053.

[24] Julian Lew,"Applicable Law in International Commercial Arbitration," Arbitration International, 1978, 125.

[25] E. Lowenfeld, "LexMercatoria: An Arbitrator's View", Arbitration International, 1990, 133 at 145.

compositeur as stated by Mustill frees an arbitrator from following any law which an arbitrator must follow. Not only that, *amiable compositeur* requires express party choice whereas *lexmercatoria* exists as a back drop to all international commercial arbitration, even in the absence of express choice.

In a number of cases, arbitrators have applied *lexmercatioria* rules on the basis of their mandate as *amiable compositeurs*. The correct position of the law is that while a choice of *lexmercatoria* per se as governing law, such a choice does however permit the application of certain elements of *lexmercatoria*, and this is basically because, among the elements comprising *lexmercatoria* are those general principles suited to a decision in *ex aequo et bono*.[26]

5. Enforceability of Arbitration Awards Based on *LexMercatoria*

1. Are arbitrators under any duty to decide a case on the basis of *lexMercatoria*?
2. Are *lexmercatoria* arbitral awards enforceable in our national courts in Nigeria?

The first question does not pose any serious obstacle and hardship. This is because the parties to the agreement are free to determine the applicable law in their contract and once that is done the arbitrator shall apply same as the applicable law in that regard. This result should not be surprising given the international acceptance and "codification" of the doctrine of party autonomy in arbitration matters.A more difficult task, is the issue of enforceability of the arbitration award based on *lexmercatoria*. This is not an easy matter as opinions are divided on the matter. There are scholars who feel that *lexmercatoria* is a stateless law and as such does not exist or where even it exists, should not be applied by arbitrators. Another group to which the writers of this article longs believes that stateless law is not the same with lawless law and as such *lexmercatoria* awards are enforceable in Nigeria. It is to these two extreme views that attention will be focused herein.

According to Lord Mustill, *LexMercatoria* is not law at all. It is his opinion that arbitrators shall not apply it unless parties had agreed as to that, and an agreement by parties to submit disputes to *lexmercatoria* is void, and also arbitral awards rendered by arbitrators according to *lexmercatoria* should not be enforced by the courts.[27] It is however wrong for anybody to hold the view that *lexmercatoria* is no law at all. Itis also not correct to declare that *lexmercatoria* does not exist in any sense useful for the solving of commercial disputes. This is because it is the law of commercial men and has served them well in the settlement of commercial disputes. It is the law known to commercial men in their trade. If one must be in trade and commerce, it is to the *lexmercatoria* that he must look and not the codified State and national laws.

Unfortunately the English courts had decided that *lexmercatoria* awards are not enforceable but that was long before their later decisions enforcing *lexmercatoria* awards. In *Orion Compania Espanola de Sequros vs. Belfort MaatschappijVoorAlgemeneVerzekgringeen,*[28] the respondent a Belgian Insurance Company filed a motion to set aside an arbitral award made by the umpire in favour of the claimants. The respondent sought to set aside the award on the premise that the award was based on equitable standard. The claimants however argued that the court should not excise its discretion to set aside an award on the ground that the parties have

[26] ibid

[27] ibid

[28] (1962) Lioyds Report 251

agreed or contracted on an equitable standard and also that the court should respect the contractual terms of the parties by refraining from reviewing the umpire's equitable construction of the contract or to treat that equitable construction as a question of law.

In reaction to opposition argument presented by the claimant, Megaw J who decided on this matter stated thus: - It is the policy of the law in this country that, in the conduct of arbitration, arbitrators must in general apply a fixed and recognizable system of law, which primarily and normally would be the law of England, and that they cannot be allowed to apply some different criterion such as the view of the individual arbitrator or umpire on abstract justice and equitable principles, which of course does not mean "'equity "in the legal sense of the word at all.[29]

In *Maritime Insurance Co. Ltd V. Ássecuranz Union Von*,[30] the parties declared in their agreement that the arbitrator or umpire as the case may be, shall interpret this treaty rather as an honorable engagement than as a merely legal obligation and shall be relieved from all judicial formalities, and may abstain from following the strict rules of law. Goddard J, interpreting this clause and deciding on the agreement of the parties held that the effect of this clause did not in any way alter the requirement that English law be applied by English arbitral tribunal in deciding disputes. The simple implication of this decision is that parties cannot agree as to the application of *lexmercatoria* or equitable standards as basis of deciding their disputes.

In *Zarnikow v. Rotl, Schmidt & Co.*[31]Bankes L.J. stated that "to release real and effective control over commercial arbitration is to allow the arbitrator or arbitral tribunal, or to give him or them a free hand to decide according to law or not according to law as he or they think fit in other words to be outside the law". With respect, Banks L.J. was in error when he arrived at the above decision. Firstly, *lexmercatoria* does not entail deciding on lawless basis and secondly *lexmercatoria* does not also permit the arbitrator to decide on principles which are contrary to public policy or fairness. It does not also mean that the national courts cannot exercise supervisory authority over awards rendered on basis of lexmercatoria. Generally, the position before 1978 in England was not to enforce arbitration awards based on lexmercatoria or equitable standards but in 1978 the English Court of Appeal in *Eagle Star Insurance Co Ltd Vs Yuval Insurance Co. Ltd*,[32]upheld an arbitration clause which was drafted in the form of equitable standard. In this case the parties in their agreement declared that the arbitrators should not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable rather than a strict legal interpretation of the provisions of this contract. Lord Denning, faced with this clause, upheld the validity of both the contract and the arbitration clause. In his well-considered opinion, Lord Denning M.R, found the arbitration clause in this case to be entirely reasonable and thus stated that the clause did not oust the jurisdiction of the courts but only removed technicalities and strict constructions.

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[29]ibid

[30] M. Mustill and S. Boyd, The Law and Practice of Arbitration in England, 2nd ed. 1991, 80 -82.

[31] (1922)2KB 478.

[32] (1978)1Lioyd's Rep. 357.

In *Rakoil Case*,[33]the arbitration involved a dispute over a 1973 concession agreement and two oil exploration agreements between the parties. The contract as of fact, contained no choice of law clause but the arbitrators in deciding on the issue of their jurisdiction held internationally accepted principles of law governing contractual relations to be the proper applicable law. The arbitrators in deciding on this, relied on Article 13 (3) of the ICC rules which empowers the arbitrators in the absence of parties' choice, to apply the law designated by appropriate conflicts rules. The arbitrators selected general principles from the common practice of arbitrators adjudicating matters in respect of oil drilling and concession disputes. The principles so selected were discovered to have been the general principles known to the parties and acceptable to them. The tribunal eventually found for the plaintiff (DST). In order to enforce the award made in favour of DST in the amount of $4.6 million, DTS focused on the Rakoil assets in England particularly, payment made to Rakoil by the Shell International Petroleum Company (SITCO), under a separate and unrelated agreement and transaction. In the month of June 1986 DST applied and obtained leave to enforce the award from SITCO in accordance with provisions of English Arbitration Act of 1975 which gave effect to the New York Convention. The application for leave to enforce was granted by the London High Court and SITCO was ordered to pay DST the amount it owedto RAKOIL. RAKOIL appeal against the order on the premise that it is contrary to English Public Policy to enforce an award rendered on unspecified and ill-defined internationally accepted principles of law. On 24th March, 1987 Donaldson MRrejected the submissions by the counsel to RAKOIL and held as follows:

I agree that parties can validly provide for some other system of law to be applied to an arbitration tribuna1. Thus, it may be… that the parties could validly agree that a part, or the whole of their basis of a foreign system of law, or perhaps on the basis of principles of international law I see no reason why an arbitral tribunal in England should not in a proper case, where the parties have agreed, apply foreign or international law.[34]

In arriving at this decision, Donaldson M.R. also proposed a three-part test which courts confronted with this type of matter should adopt. The court should in order to determine the validity of the contract and enforceability of the resultant award apply these tests. The first is to determine whether the parties intend to create legally enforceable rights and obligations. If the intention of the parties is to create legally enforceable rights and obligations, the state should not interfere. The second is to determine whether the resulting agreement is sufficiently certain to constitute a legally enforceable contract, and thirdly, to determine whether it will.be contrary to public policy to enforce the resulting award using the state machinery and legal force.

In the case of Rakoil, the court adopted these three-part tests and held that the award rendered in this case validly fell under the New York Convention and that its enforcement is mandatory pursuant to the 1950 and 1975 English Arbitration Act pursuant to which provisions of New York Convention was made applicable to England.[35]

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[33]Rakoil's Case (1989) XIV YB Com. Arb 111 cited in David W. Rivikin, "Enforceability of Arbitral Awards Based on LexMercatoria" Arbitration International, Vol.9, No.1, 1993, 75.

[34]ibid

[35]Deutsche Schachtbau-und Tiefbohrgesellschaft GBH (DST) FR Germany v. Ras AL Khaimah National Oil Co (UAE) & Shell International Co. Ltd. (UK) (1987)2 Lioyd's Rep 246 – 258 or (1987)2All ER 769 – 784.

In *PabalkTicaret Limited Sirketi (Turky) vs. Norsolor S. A. (France)*[36] the arbitral tribunal applied *Lexmercaoria* in the interpretation of the contract and rendered an award on the same. The Supreme Court of Austria upheld the award as enforceable. The dispute in this regard, arose from the French respondent's cancellation of an agency contract pursuant to which the Turkish claimant was to market the respondent's goods in Turkey. Pabalk claimed lost commission and charges. As the parties did not determine the applicable law, opted for the *Lexmercatoria* and specifically the principles of good faith dealing. The arbitral tribunal found in favour of the claimant as Norsolor's termination of the contract was unjustified, the award of the arbitral tribunal which was rendered on 26th October 1979 was then challenged by Norsolor on the premise that both the liability and damages were decided on equity in clear violation of the arbitrations jurisdictional mandate.

The Paris Tribunal de Grand Instance which granted an order for the enforcement of the award decided on 4t"h March, 1981 that the tribunal in selecting *lexmercatoria*, had acted within the scope of their mandate pursuant to Article 13 of ICC rules. The French Court de cassation also upheld this decision. In a simultaneous Austrian proceeding, Norsolor unsuccessfully pleaded with the Commercial Court of Vienna to invalidate the award because it was based on equity. The court dismissed its application. The matter finally got to the Austrian Supreme Court which then decided that the tribunal's application of *LexMercatoria* was justified in the circumstance. According to the court, the arbitrators had applied private law principles which did not violate mandatory provisions of either French or Turkish law. The award was thus enforceable.[37]

In a similar case of *Fougerolle (France) v. Banque de Proche Orient (Lebanon)*[38] the court upheld the enforcement of an award based on *lexmercatoria*. The dispute in this case arose from an agency agreement in which Fougerolle was appointed as an intermediary to negotiate a contract for respondents. The Respondents terminated the contract before the claimant could complete the negotiation. In the absence of a chosen law by the parties in their agreement, the arbitral tribunal based their award on the issue of partial remuneration for services rendered so far on the general principles of obligation generally applicable in international trade. The Respondents unsuccessfully contested the award on the premise that the arbitral tribunal wrongly-decided the matter on the basis of *lexmercatoria*. The Court of Appeal, just like the court of first instance refused the application to set aside, and held that the tribunal was right in deciding on *lexmercatoria*. According to the court, the arbitrators had implicitly and necessarily referred to usages of international trade evidently in force and had thus based their awardon a rule of law. *LexMercatoria* as the court stated is a valid source of law in international trade.

The application of *lexmercatoria* by arbitrators in accordance with party agreement or where parties have failed to state the applicable law is one recognized by law. In accordance with Article 42 of the ICSID Convention, the arbitral tribunal has to decide disputes in accordance with such rules of law as may be agreed by the parties. The parties can on their own agree to a non-national law and such agreement based on non-national law is valid and

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[36] (1984) IX YB Com. Arb. 109.

[37]PabalkTicaret Limited Sirketi (Turkey v. Norsolar S. A. (France)(1984)IX YB Com. Arb. 109.

[38] The facts and award on the decision of the Supreme Court of Austria of 18th November 1982 is contained in IX YB Commercial Arbitration 1984 at 159 and also in the (1984) 34 I.C.L.Q. at 757.

legal. The aforesaid Article 42 (1) further provides that in the absence of such an agreement by the parties, the tribunal shall apply the law of the contracting state which is a party to the dispute and such rules of international law as may be applicable. It is the correct position of law to state that the rules of international law refer not only to the rules of public international law as may be applicable. It is the correct position of law to state that the rules of international law refer not only to the rules of public international law but also to what is here referred to as the law merchant.

From the foregoing, it is unfair for any national court to refuse the enforceability of arbitral award rendered on the basis of *lexmercatoria* simply as some scholar had argued *lexmercatoria* is no law at all in that it is imperfect and in fusion state. The fact is that most legal systems are imperfect because they have failed to provide predictable answers to some legal questions but yet they are recognized and enforced by courts. It then follows that one cannot on grounds of principle refuse to apply a legal system such as *lexmercatoria* simply because of its low degree of perfection.[39]

In Nigeria, there is not yet in the most recent times a reported case of any award rendered on the basis of *lexmercatoria*. It is expected that the courts in Nigeria on the basis of Article 42 (1) of ICSID Convention, section 47 (5) of the Arbitration and Conciliation Act 2004, and now section 15 (5b) of Arbitration and Mediation Act 2023 will enforce *lexmercatoria* awards.

In accordance with section 15(5) of the Nigeria Arbitration and Mediation Act 2023, the arbitral tribunal shall decide the dispute in accordance with the rules in force in the country whose law the parties have chosen as applicable to the substance of the dispute. The sub-section 15(3) and 15(4) of the said section 15 made provisions for conflict of law rules and also for *ex aequo et bono*, and *amiable compositeur*. Of particular importance is section 15 (5a & b) of the Arbitration and Mediation Act of Nigeria 2023. The said Section 15 (5b) provides that "in all cases, the arbitral tribunal shall decide in accordance with the terms of the contract and shall take account of the usages of the trade applicable to the transaction."[40]

The import of this section is that where the award is based on usages of trade applicable to the transaction, the national courts in Nigeria could recognize the award. This is because the aforesaid section implied that even when parties had agreed to a national law, the arbitrators shall in deciding according to the agree law, have eyes and regard on the usages of trade applicable to the transaction. As stated hereinbefore, usages of trade is an element of law merchant. It then follows from the above that *lexmercatoria* awards are enforceable in Nigeria. There is no doubt that the Nigerian position on the enforceability of the *lexmercatoria* award followed the 1978 English position.

As to the mode of enforcing *lexmercatoria* award, the successful claimant has right to apply to court in accordance with the rules of the court. He can also enforce same by action or by mere registration of the award in the court. Where the award is one that is within ICSID provision, the award shall be enforced at the Supreme Court accordingly. This is because from the lines of judicial authorities discussed so far and also on the basis of

[39]Nwakoby Greg Chukwudi, "LexMercatoria Arbitration and New York Convention: The Nigerian Position," 216

[40] Section 15(5b) of the Arbitration and Mediation Act of Nigeria 2023

section 15 (5) of the Nigeria Arbitration Mediation Act, *LexMercatoria* awards are legally binding and are enforceable in this country just as any other lawful decision or award rendered in accordance with national law.

Lexmercatoria is not binding in honor but in law. The only thing is that *lexmercatioria* frees arbitrator from strict rules of interpretation. This freedom conferred on the arbitrator by *lexmercatora* system does not in any way make its rules and the resultant award to be lawless.[41] The duty of the arbitrator is to ensure that he conducts the proceeding in accordance with the agreement of the parties and if while so acting, an award is rendered, the parties are by law bund to comply with the terms of the award so rendered. It is the duty of the courts whose owners are invoked by the successful claimant to honor the parties' choice of an extra-legal standard, such as usages of trade to government the substance of their disputes.[42]

The only ground pursuant to which the court can refuse the enforcement of *lexmercatoria* awards are as stated before, on issues of misconduct, lack of fair hearing, public policy, and error of law. Beside these common grounds which are also grounds for setting aside arbitral awards, there is then no other justifiable reason why awards rendered by arbitrators who adopted *lexmercatoria* as the applicable law in its proceedings should not be enforced by the courts.

6. *LexMercatoria* and The New York Convention

New York Convention in both its Article 1 and V is silent on the issue of *lexmercatoria*. Article I of the Convention provides that the Convention shall apply to the recognition and enforcement of arbitral awards made in the territory of a state other than the state where the recognition and enforcement of awards are sought. Article V of the Convention sets out the grounds for refusing enforcement. It is important to state that on the face of the Convention, there is nothing said about *lexmercatoria* or about awards rendered on the basis of *lexmercatoria* not being enforceable.

The Convention by virtue of its Article 1 applies to foreign award or simply put, awards made in a foreign contracting state. The court of the contracting state must recognize and enforce such award unless there is a ground pursuant to Article V of the Convention on which the court could refuse enforcement of the award. The fact that the arbitrator relied on *lexmercatoria* in deciding a dispute is not one of such reasons for refusal of recognition and enforcement of arbitral award.

The valid question to ask is whether an award must be based on the national law of one of the parties or the seat of arbitration for it to be enforced? It seems that the Convention never in any of its provisions made it mandatory that the award must be based on a national law for it to be enforced. The essence of this is because awards rendered on reliance on *lexmercatoria* are stateless award. It is correct to hold that stateless award are not lawless awards and courts cannot set aside stateless arbitral award merely because they were not basically rendered in accordance with a state law or an enactment of state parliament unless it could be shown that such award violated the principles and rules of public policy. This is because a stateless award is expected to be in

[41]Home Insurance Co. & St Paul Fire andMarine Insurance Co. v. Administration Asigurarico De Stat (1983)2Lioyd's Rep. 674. Home & Overseas Insurance Co. Ltd v. Mentor InsuranceCo. UK Ltd, The Financial Times 10th August, 1988. 5.

[42]Forhergill v. Monarch Airlines Ltd. (1981) AC 251. Home and Overseas Insurance Co Ltd. Mentor InsuranceCo. (UK) (1999)3All E.R. 74.

conformity with the public policy rules particularly where the public policy rules is one which is general in nature.[43]

To insist that the award must be based on the law of the place of arbitration, or that of the contracting state, is contrary to the expectations of the businessmen who are participants in arbitration. It means forcing the parties to arbitrate on the basis of law whose result may not have been anticipated by the contracting parties. We do not also think that it is the intendment of the Convention to force parties into arbitrating in accordance with any particular law. The reason for the choice of neutral arbitrators and neutral place of arbitration is obvious. It is to ensure fairness and avoid undue advantage which one party may have against the other. It does not mean that the arbitral award must be made pursuant to the national law of the place of arbitration which may not have direct link or connection with either the contract or the parties.

The arbitrator is expected to act in accordance with the terms of the agreement of the parties. He is also expected while keeping to the agreement of the parties to have regard to the principles of public policy of the country closely connected with the contract and the parties. To apply *lexmercatoria* is to base the decision on legal considerations having regard to both private and public interest. To disregard the public interests of the communities and to decide contrary to same would be to make an award in blinkers. To decide contrary to law is wrong and to render an award pursuant to *lexmercatoria* in total disregard of the basic general principles of public policy will make the award both stateless and lawless and also unenforceable under the New York Convention or any law at all.

It is to be mentioned however, that some scholars have declared that *lexmercatoria* award are not enforceable pursuant to the provisions of the New York Convention. For Albert Jan Van Den Berg, "a-national" or de-national award does not fall within the New York Convention. For him, a-national award is one resulting from an arbitration law by means of an agreement of the parties. According to Berg, only award which are removed from the procedural arbitration law of a particular state are to be considered a national and thus outside the scope of the New York Convention. In his extensive argument, he however advocated the enforceability of substantively a-national awards and also encourages the increasing use by arbitrators of non-national standard.[44]However, his distinction of substantively a-national award and procedurally a-national arbitration award is unsatisfactory and unnecessary. This is because the substantive law chosen by the arbitrator may indirectly determine the procedure that could be adopted in determining the matter before the arbitrators. This dichotomy is unnecessary in this matter even though it could also encourage the enforcement of *lexmarcatoria* awards at the long run.

For the opponents of the enforceability of awards made or rendered pursuant to *lexmercatoria* by New York Convention, the Convention applies to the enforcement of award made in another state other than the state where the recognition and enforcement is sought. However, the advocates of this view consistently denied the

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[43] Lew, "Applicable Law in International Commercial Arbitration" (supra), 1978, No.139, 367 at 372 wherein he said that there exists a general principle of law recognized by civilized nations that contracts which seriously violate bonos more ort international public policy are invalid or at least unenforceable and that they cannot be sanctioned by courts or arbitrators. This principle is especially apt for use before international tribunal that lack a "Law of the forum" in the ordinary sense of the term.

[44] A. J. Van den Berg, "The New York Convention of 1958 Towards a Uniform Judicial Interpretation," 1981, 29.

fact that award rendered by reliance on the law merchant is made in any particular state. This view is wrong. There is a sharp distinction between making an award in a state where the award was made. The place where an award was made has been chosen on the basis of convenience and not because its state law shall apply to the arbitration proceedings. Once an award rendered in the state where it was made is enforceable within that state and is not made contrary to any of the provisions of Article V of New York Convention, that award shall be enforceable pursuant to the Convention.

It is also proposed by the advocates of unenforceability of *lexmercatoria* awards under New York Convention that because of the provision of Article V (1) (e) of the Convention such awards are unenforceable. A careful perusal of the provisions of Article V (1) (e) of the Convention does not support the views of these advocates of non-enforceability of *lexmercatoria* awards. The idea is that an arbitral award becomes binding immediately it is made until set aside by the appropriate authority. The fact that an award was rendered by arbitrators on total reliance on *lexmercatoria* does not necessarily mean that it shall be contrary to the law of the country where it was made. The arbitrators generally are required to observe the ordinary rule of fairness and general principles of public policy. The fact that an award is a-national award does not mean that it is lawless or contrary to the law of the country where it was made.

Secondly, Article V (1) (e) of the New York Convention does not specifically require that the award shall be rendered in accordance with the national law of the country where it was made. Also, the opponents of the enforceability of *lexmercatoria* award or a-national award under New York Convention hold the view that Article 1 (1) which provides for a non-domestic award also excludes a-national (de-national award) and award rendered by *lexmercatoria* rules. It is obviously clear that Article 1 (1) of the New York Convention never said anything about non-national award and it is wrong for anyone to now exclude it from the provisions of the Convention. Once the parties had agreed to *lexmercatoria* rules and the award did not violate the laws of the state where it was rendered, the award will be enforced in accordance with the rules of the New York Convention if its enforcement is sought outside the state where it was made.

According to Ole Lando who is one of the serious proponents of the enforceability of *lexmercatoria* award under New York Convention, the fact that the Convention's legislative history indicates no clear consensus and that Article V (1) (e) aims to set aside awards which violate the law of the country governing the arbitration, he asserts that the Article V defenses only permit but do not oblige, action against enforcement. For him, a stateless award does not necessarily mean a lawless award and should be enforced under the Convention. The stateless award is everywhere a foreign award and should be treated as such under the Convention.[45]

The fact still remains that the essence of adhering to the New York Convention was to encourage recognition and enforcement of arbitration agreement in international contracts and to unify standard of enforcement. In this regard, arbitration clauses are liberally constructed in favour of enforcement. This means that since the stateless awards are international award based on international contracts, the court should construe them to be one under the New York Convention provided that the parties are members of the contracting states within the meaning of the provision of the New York Convention. Secondly the provisions of Article V of the Convention are

[45] David W. Rivkin, "Enforceability of Arbitral Award Based on LexMercatoria" Arbitration International, Vol. 9 No.1, 1993, 67 at 81. Ole Lando, "LexMercatoria in International Commercial Arbitration" (supra) Vol. 34 1985, 747 at 748-750.

interpreted narrowly to be exclusive. Thus, this means that so far, the defense is not provided by Article V of the Convention, it shall not constitute a ground for refusal of recognition and enforcement. The court should enforce such a stateless award as long as the arbitration agreement is valid, and no Article V defenses apply to the awards.[46]

Conclusion

Sequel to the discussion so far, *lexmercatoria* merely means law merchant. It implies laws based on trade usage and custom. It is not the law of any national or the enactment of a state parliament. They are rules, which have evolved in course of trade practice and merchant activities.

Lexmercatoria is not a lawless law but rather a stateless law. If common law and customary Law arbitration awards are enforceable in Nigeria, it then follows that arbitration awards rendered on the basis of trade usage and customs are also enforceable. Customary Law and Common Law are not laws of any national parliament or State legislative House. There is no law so far which bars a court from enforcing *lexmercatoria* awards in Nigeria rather section 15 (5) of the Arbitration and Mediation Act 2023 empowers arbitrators to take *lexmercatoria* into cognizance in arbitral proceedings even when parties have agreed to an applicable law. The New York Convention did not in any was disallow the application of *lexmercatioria* and it is for this reason that we hold the view that *lexmercatoria* awards are enforceable pursuant to New York Convention. The ICSID arbitration Convention recognized the existence of *lexmercatoria*. Its application in arbitral proceedings conducted pursuant to ICSID Convention is one, which is recognized.

[46]ibid