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ENFORCEMENT IN NIGERIA OF INTERNATIONAL COMMERCIAL ARBITRAL AWARDS BASED ON *LEX MERCATORIA*

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ABSTRACT
Opinions are divided among arbitration law scholars as to the reality of the existence, the credibility, and the validity of *Lex Mercatoria* as a possible applicable law to be chosen by parties to arbitration agreement and proceedings. Many are scholars who do not uphold that *Lex Mercatoria* actually represents a discrete body of law. They argue that no definite body of law and legal principles can easily be fingered and identified as *Lex Mercatoria*. Some others, however, agree that *Lex Mercatoria* exists as an amalgam of most globally accepted principles which govern international commercial relations such as public international law, certain uniform laws, general principles of law, rules of international organizations, customs and usages of international trade, standard form contracts, and arbitral case law. Yet, it does appear that in spite of this controversy, the increasing appeal to *Lex Mercatoria* as a choice of governing substantive law to an arbitration has not been dampened. It is thus argued that as an international commercial law in miniature, *Lex Mercatoria* is often an ideal, if not the only, option when no single national law is acceptable. However, even as *Lex Mercatoria* undergoes more stringent definition, concerned scholars, and particularly parties may well wonder whether contracts governed by *Lex Mercatoria* are enforceable, and whether the ensuing arbitral awards are enforceable by national courts. This paper examines the possibility of enforcing in Nigeria an arbitral award based on *Lex Mercatoria*.
Keywords: *Lex Mercatoria*, Arbitral Awards, Enforceability, Jurisprudence, Nigeria

INTRODUCTION

There has been a controversy on whether international arbitral awards based on *lex mercatoria* is enforceable in Nigeria. This controversy further hinges on whether or not awards grounded on *Lex Mercatoria* is enforceable at all. Some scholars hold that *Lex Mercatoria* is, precisely as stateless, no law and hence maintain that the issue of enforcement should not arise. Others are, however, of the view that the fact of statelessness does not divest *Lex Mercatoria* of its legal nature, validity and credibility. Hence, these scholars note that statelessness is not synonymous with lawlessness. Thus, they are convinced that the enforceability of awards based on *Lex Mercatoria* in national courts under relevant conditions is taken for granted. This paper critically examines the nature of *Lex Mercatoria* as a valid legal framework regulating international business transaction and arbitration. The paper equally investigates the possibility of enforcing arbitral awards upon *Lex Mercatoria* generally and in Nigeria in particular. The study ends on a note of recommendation for better enforcement of *Lex Mercatoria* awards in Nigeria.

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CONCEPT AND ORIGINS OF *LEX MERCATORIA*

Lex Mercatoria may generally be seen as the body of rules, different in origin and content, created by the trade community to serve the needs of international trade. According to Black's Law Dictionary, *Lex Mercatoria*, otherwise called law merchant, is "that system of customary law that developed in Europe during the Middle Ages and regulated the dealings of mariners and merchants in all the commercial countries of the world until the 17th century"[2]. Surely, many of the principles of this customary law came to be incorporated into the common law, which in turn formed the basis of the Uniform Commercial Code[3]. Redfern and Hunter observe that *Lex Mercatoria* is not absolute in nature but relative as each commercial form of set-up has peculiar custom[4]. *Lex Mercatoria* has been variously called mercantile law, law merchant, commercial law, international law of contract, international trade law, or transnational law. However, Nwakoby opines that "irrespective of whatever name or description, the essence or purpose is clear, namely, to regulate international commercial transactions by a uniform system of law which avoids vagaries and hardships of different national systems in commercial or trade matters within a particular group of merchants, traders and businessmen"[5]. *Lex Mercatoria*, no doubt, encompasses trade usage, which idea represents the practice among operators in a particular trade that has attained such a general recognition in that form of trade that it now regulates the practice of merchants[6]. No wonder Obiozor regards *Lex Mercatoria* as "unwritten rules of the merchants arising from customs and usages"[7].

Lex Mercatoria is chosen as applicable law, for example, in contracts between a private company and a governmental entity, wherein no state law is likely to be ideal. The governmental party will resist being subject to another state's law, while the private party will be sceptical about receiving fair treatment in the other state's courts. At such an impasse, *Lex Mercatoria* can both adequately reflect the international character of the parties and the transaction, and solve the sometimes irresolute problem of choice of law. Further, by distilling internationally-accepted principles, it can avoid the effect of relatively unsophisticated national laws unsuited to international contracts. Finally, *Lex Mercatoria* is inherently flexible – as the law governing both the transaction and the dispute of resolutions arising thereunder. Despite its theoretical advantages, doubts abound as to the predictability and soundness of *Lex Mercatoria*. These doubts are reflected in the negligible number of reported arbitral awards where parties have specifically chosen *Lex Mercatoria* or, indeed, an extra-legal standard.

Consideration of the relationship between *Lex Mercatoria* and national laws divides scholars into camps, namely, the autonomist and the positivist. The autonomist view regards *Lex Mercatoria* as having autonomous character, independent from any national system of law. Hence, it is "a set of general principles, and customary rules spontaneously referred to or elaborated in the framework of international trade, without reference to a particular national system of law".[8] From a positivist approach, the *Lex Mercatoria* is defined as a body of rules, transnational in their origin, but which only exists by virtue of state laws that give them effect. For the supporters of this opinion, *Lex Mercatoria* is "ultimately founded on national law".[9]

Be that as it may, *Lex Mercatoria* precipitated out of trade that was above all pursued in the great markets, fairs and seaports which were the main trading places. Towns and markets soon reduced local practices into regulatory codes; and the laws of particular towns, usually those that were trade centres inevitably grew into dominant codes of customs of vast proportions.[10] The *Lex Mercatoria* governing a

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[2] Garner, Bryan, *Black's Law Dictionary*, 7th Ed., Minnesota: West Group, 1999, p.893.
[3] *Ibid.*
[4] Redfern & Hunter, *Law and Practice of International Commercial Arbitration*, London: Sweet &Maxwell, 1999, p.98.
[5] Nwakoby, G.C., *The Law and Practice of Commercial Arbitration in Nigeria*, Enugu: Iyke Ventures Production, 2004, p.229.
[6] *Ibid.*
[7] Obiozor, C.A., *Nigerian Arbitration Jurisprudence*, Onitsha: Allied Press & Co., 2010, p.153.
[8] Goldma, B., Contemporary Problems in International Commercial Arbitration, Julian D. M. Lew (ed.), 1986, pp. 113-125, at 116.
[9] Schmitthoff, C. M., *Commercial Law in a Changing Economic Climate*, 2nd Edition, 1881, p. 223.
[10] Trakman The Law Merchant: The Evolution of Commercial Law 1983, p. 8: In Gesa Baron, Do the UNIDROIT Principles of International Commercial Contracts Form a New *Lex Mercatoria*? Bonn/Edinburgh 1998.

special class of people (merchants) in special places (markets, fairs and seaports) was distinct from local, feudal, royal and ecclesiastical law. Its special characteristics were that it was first of all transnational. Secondly, it was based on a common origin and a faithful reflection of the mercantile customs. Thirdly, it was not administered (at least initially) by professional judges but by the merchants themselves. It was developed and promoted by mercantile cooperation and the special jurisdiction of the mercantile courts, business practice and the special courts of the great markets and fairs. Fourthly, its procedure was speedy and informal. Finally, as of overriding principles, *Lex Mercatoria* emphasized freedom of contract.[11]

However, this system of "loose" rules was progressively co-opted and embodied into various national statutes. Surely the incorporation of the law merchant into different national systems added an international dimension to these systems without which the commercial needs of the various states could hardly have been served. Yet national commercial law lost the cosmopolitan dimension and became increasingly divorced from experience of the merchants which was often coupled with hostility towards mercantile custom.[12] With the rise of nationalisms and the codification period of the 19th century, the law merchant was incorporated into the municipal laws of each country. It became blended with the peculiarities of national law and thus seemed to have lost its uniform character.

The development of international trades after the World War II show-cased some of the flaws of the traditional regulation of international contracts. The complexity of private international law rules and the obsolete character of domestic laws did not satisfy the simplicity and certainty required by the business community. States soon became aware of the impact of legally divided world upon international trade and they reacted by means of international conventions and model laws, which harmonize private international law or substantive law aspects of international transactions.

The supremacy of national law in international economic relations began to be questioned by scholars in the early nineteen sixties. At the same time, they noted the renaissance of the law merchant phenomenon. Just as medieval merchants overcame feudal law, present time traders were adopting alternative solutions to avoid the application of national law to their transactions. By means of standard clauses, self-regulatory contracts, trade usages and, especially, by recourse to international commercial arbitration, traders were creating their own regulatory framework independently from national law, the so-called *new Lex Mercatoria*.[13]

SOURCES OF *LEX MERCATORIA* AND RELATED MATTERS

The rules of *Lex Mercatoria* apply in accordance with the parties' agreement authorizing the arbitrator(s) to apply them. The effect is that the applicable law is dehors any particular national law. Yet, according to Olando, arbitrators have the right to apply such amalgam of rules as seems just in the circumstance taking into cognizance the rules of the trade or business[14]. Below are some of the elements that constitute the sources of *Lex Mercatoria*.

First and foremost, the rules of public international law on treaties have been applied to contracts between a government enterprise and a private party, or between private enterprises. For instance, Article 42 of the ICSID (International Centre for Settlement of Investment Disputes) 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 relevant and applicable. Therefore, public international law is one of the important sources of *Lex Mercatoria*.

Lex Mercatoria also includes uniform laws which have been adopted for international trade. Thus, where uniform laws exist which the courts that are connected with the parties or the subject matter of the dispute

[11] Berman H. J. and Kanfman E. *The Law of International Commercial Transaction* (L. M) 19 Harv. Int. L. J (1998) 221 at 224.
[12] Baron G., *Do the UNIDROIT Principles of International Commercial Contracts Form a New Lex Mercatoria*? 1998.
[13] E.g. Schmitthoff, C. M., "Das neue Recht des Welthandels", RabelsZ 28, 1964, pp. 47-77; Goldman, B., "Frontieres du droit et *lex mercatoria*", Arch. Phil. Dr 9, 1964, p. 89 et seq.: Goldstein, A., "The New Law Merchant". J. Bus. L., 1961, p. 11; Kahn, Ph., La vente commerciale internationale, 1961; Fouchard, Ph; L'arbitrage commercial international, 1965; Stoufflet, J., Le credit documentaries, Paris, 1959.
[14] Olando, O., "The *Lex Mercatoria* in International Commercial Arbitration*", International and Comparative Law Quarterly,* Vol.34, 1985, p.749.

are bound to apply, the arbitrator appointed to decide in similar matter ought to be persuaded and guided by these uniform rules. Again, some other important sources of *Lex Mercatoria* are the general principles of law recognized by the commercial nations. Some examples of these include the rules of *pacta sunt servanda* and the principles which empower a party to a contract to terminate same in the case of substantial breach by the other party. Although it is by no means easy to identify what constitutes general principles given the variety of legal cultures and traditions, yet the growing corpus of comparative law today enhances the possibility thereof.

Similarly, customs and trade usages form yet another source of the law merchant. Some of these customs and trade usages apply both to domestic and international contracts whereas others apply strictly to international relationships. An example is the INCOTERMS, *force majure*, and hardship clauses issued by the International Chamber of Commerce (I.C.C.). These customs and usages are not only applicable when the organizations or associations have agreed to apply them but also have persuasive effects on courts and arbitrators generally.

Standard form contracts are also recognized sources of *Lex Mercatoria*. Some of these standard form contracts have attained such international popularity, acceptance and recognition that today both courts and arbitrators have given decisions based on the interpretation of their clauses. The judicial or arbitral interpretations of these standard form contracts have constituted binding precedents depending on the frequency or the similitude of particular interpretations of a subject matter.

Furthermore, in spite of the confidentiality of awards, report of arbitral wards is also an element of *Lex Mercatoria* as this provides guidance on how matters falling within the subject matter of what were before an arbitrator was decided before by another arbitrator or a center. Happily, the current growing tendency towards publication of awards would be of no mean help in guiding arbitrators and the courts, to say the least, to be aware of the multifarious approaches employed by arbitrators.

LEGAL VALIDITY AND ENFORCEABILITY OF *LEX MERCATORIA*

As insinuated above, much disagreement undergirds the legal validity and existence of *Lex Mercatoria* in spite of its appeal as a choice of substantive law to arbitration. Those who are against its legal validity hold that *Lex Mercatoria* does not represent a discrete body of law. For them, it is an elusive system that is mythical and anachronistic in nature. These opponents believe that *Lex Mercatoria* has outlived its usefulness and has given way to more sophisticated laws and techniques for resolution of disputes that may arise in international commercial transactions[15]. However, opinions are agog that maintain that if *Lex Mercatoria* does exist, then it is as a mélange of most globally accepted principles which regulate international commercial relations, public international laws, certain uniform laws, general principles of law, rules of international organizations, customs and usages of international trade, standard form contracts, and arbitral case law. In spite of the outright antipathy to law merchant by some scholars, a long line of arbitration proceedings have been conducted sequel to same, and awards rendered by these arbitrators upon *Lex Mercatoria* have been enforced by national courts.

Although Lord Mustill is of the view that *Lex Mercatoria* is no law and that arbitration awards based on it should not be enforced by the courts[16], yet it is very well clear that a very important element of arbitration is the principle of party autonomy. Once parties are in agreement, enforcement is automatic unless such other elements are not there wherein the award can be challenged. This is perfectly illustrated in Article 19 of the UNCITRAL Model Law which provides for the right of the parties to determine the form and procedure to be adopted in arbitral proceedings in which they are involved. Proponents of this modern international *Lex Mercatoria* include Goldman in France and Lalive in Switzerland who canvassed strong arguments in favour of *Lex Mercatoria*.[17]

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[15] See Nwakoby, G.C., *Op. cit.,* p.229.

[16] Mustill M. and Boyd S., ***The Law and Practice of Arbitration in England 2nd Edition***, Butterworth Co. Ltd, London 1991, 80-81.

[17] Goldman, "La *Lex Mercatoria* dans les contract l'arbitrage internationaux: Realite-perspectives (1979) Clunet Journal du droit international p. 475 and The Applicable Law: General Principles of Law- The Lex Mercatoria" Contemporary Problems in

Despite the doubts on the *Lex Mercatoria* and indeed outright hostility from some commentators,[18] there have been arbitration awards in which reliance to a greater or lesser degree was placed upon the new *Lex Mercatoria* and some of these awards have come before national courts and recognized.[19]

This paper disagrees with the view that *Lex Mercatoria* is no law at all. Unfortunately, the English Courts had earlier decided that *Lex Mercatoria* awards were not enforceable. Nonetheless, later decisions have negated this approach. As early as 1608, Chief justice Coke said "The Law Merchant is part of this realm". National codes built on the principles laid down by trade commercial practice to a large extent embodied law merchant substantial rules. For example the Code Commercial was issued in France in 1807 where Law Merchant Rule was preserved to govern formation, performance and tradition of contracts. In effect, the nation states constituted the new law Merchant in their image,[20] as illustrated in *Orion Compania Espanola de Sequros v Belfort Maatschappij Voor. Algemene Verzekgringreen*.[21]

In *Maritime Insurance Co Ltd v Assecuranz Union Van*,[22] the parities declared in their agreement that the arbitrator or umpire shall interpret this treaty as an honourable agreement than as a legal obligation and shall be relieved from all judicial formalities and may abstain from the strict rules of law. Goddard J, held that the effect of this clause did not alter the requirement that English Law be applied by English arbitral tribunal in deciding disputes meaning that parties cannot agree as to the application of *Lex Mercatoria* or equitable standards as basis for dispute resolution. And in *Zarnikow v Rotl Schmidt & Co*[23], Banks LJ 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 as he or they think fit in other words to be outside the law.*

However, in 1978 in England, the approach changed. In the Court of Appeal case of *Eagle Star Insurance Co, Ltd V Yuval Insurance Co Ltd,*[24] the parties in their agreement declared that the arbitration should not be bound by the strict rules of law but shall settle any difference referred to them according to an equitable and not strict legal interpretation of the provisions of the contract. Denning M.R. upheld the validity of both the contract and the arbitration clause. In *RAKOIL* case,[25] the dispute for arbitration involved a 1973 concession agreement between the parties. In the absence of choice of law in the contract agreement the arbitrators relied on Art 13(3) of the ICC rules which empowers the arbitrators in the absence of the parties' choice to apply the law designated by appropriate conflict of law rules relating to all drilling and concession dispute. The tribunal found for the plaintiff DST.

In *Pabalk Ticaret Limited Sirketi (Turkey) v Sirketi Norsolor S.A (France)*,[26] the arbitral tribunal applied *Lex Mercatoria* and rendered an award on that basis. The Austrian Supreme Court held that the tribunal's application of *Lex Mercatoria* was justified and the arbitrators had applied private law principles which did not violate provisions of either Turkey or French Law, the award was thus enforceable.[27] Again, the Court of Appeal, in *Fougerolle v. Banque De Proche Orient (Lebanon)*,[28] just like the court of first

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International Arbitration (J. Lew Ed. 1986) p. 113 and also Lalive, Transnational or Truly International) Public Policy and International Arbitration" ICCA Congress Series (New York, 1986) No. 3, 257-271.

[18] Schmitthoff, Commercial Law in a Changing Economic Climate 2nd Ed. 1981 p. 86 where he notes that "the *lex Mercatoria* has sufficient intellectual credentials to merit serious study and yet is so generally accepted as to escape the skeptical eye"). See also Mann, "Private Arbitration and Public Policy", Civil Justices Quarterly, 1985, p, 257 at 264.

[19] Redfern & Hunter,*The Law and Practice of international Commercial Arbitration* 2nd Ed., London, Sweet & Maxwell, p. 117 at 119

[20] Wikipedia, the free encycloaedia.

[21] (1962)Iloyss Report 251.

[22] (1935) 52 ILR 16.

[23] (1922) 2 KB 478.

[24] (1978) Lyons Reprint 357.

[25] (1989) XIV YB Com. Arbitration III sited in David W Rivkin, "Enforceability of Arbitral Awards Based on *Lex Mercatoria*" ,*Arbitration International* vol. 9 No. 1 1993,75.

[26] *Paralr Ticamey Limited Sirketi (Tunrey) V Norsolars. A. (France*) (1984) Ix YB Commercial Arbitration 109.

[27] 1x4b Commercial Arbitration-1984 at 159; 1984, 34 I. C.L. Q. 757.

[28] 1982 Rev. Arb. 183.

instance, refused the application to set aside and held that the tribunal was right in choosing *Lex Mercatoria* principles in arriving at its decision. In *E. E. & Brian Smith (1928) Ltd v Wheat Sheaf Mills Ltd***,** the court recognized a practice which greatly modified the doctrine of *res judicata*. The practices followed by the various trade tribunals are recognized by the courts, not because they are part of the law relating to that trade, but because the parties are taken to have agreed that disputes shall be resolved according to the procedures usual in that trade. The practices of individual traders have thus become accommodated into the general frame work of the law of arbitration.[29]

In Nigeria, there is yet no reported case of an award rendered on the basis of the law merchant. The courts in Nigeria are expected to enforce the award on the basis of section 42 (1) of the ISCID Convention and section 47 of the Arbitration and Conciliation Act[30]. The said section of the ICSID Convention, to which Nigeria is a state party, provides that arbitral tribunal has to decide disputes in accordance with such rules of law as may be agreed by the parties. The concept of party autonomy is to the effect that parties can *suo motu* agree on a non-national law and which agreement is quite valid and legally sound. Hence, in the dearth of such a consensus by the parties, the tribunal shall apply the law of the contracting state that is a party to the dispute and such rules of international law as may be applicable. It is therefore trite that the rules of international law is not restricted to the rules of public international law but extends to *Lex Mercatoria*.

Furthermore, section 47(1) of the Arbitration and Conciliation Act provides that the arbitral "tribunal shall decide the dispute in accordance with the rules in force in the country whose laws the parties have chosen as applicable to the substance of the dispute". Section 47 (3) provides that where the laws of the country to be applied is not determined by the parties, the arbitral tribunal shall apply the law determined by the conflict of law rules which it considered applicable. Again, section 47 (4) states that the arbitral tribunal shall not decide *ex aequo et bono or as amiable compositeur* unless the parties has expressly authorized it to do so. More importantly, section 47 (5) provides that in all cases, the tribunal shall decide in accordance with the term of the contract and shall take account of the usages of the trade applicable to the transaction.

The domino effect of section 47(5) is that where the arbitral award is grounded on trade usage relevant to the transaction, the national court ought to give effect to the award. The implication of the subsection is that even when parties have chosen the national law as the applicable law, the arbitrators shall in deciding still have regard to the usages of trade governing the transaction. The result is that awards based on *Lex Mercatoria* are enforceable in Nigeria today.

The New York Convention in both Articles I & V is silent on the issue of *Lex Mercatoria*. It is pertinent to state that on the face of the convention, there is nothing said about *Lex Mercatoria* being unenforceable. The fact that a *Lex Mercatoria* award is not mentioned is however no justification for refusing to enforce awards rendered on the basis of *Lex Mercatoria*. Den Berg opines that "a national" or "de-national" award does not fall within the New York Convention. He however advocates the enforcement of substantially a-national awards and encourages the increasing use of arbitrators of non-national standard.[31] Olando holds the view that a stateless award is everywhere a foreign award and should be enforced as such under the New York Convention.[32] The courts should enforce such stateless award as long as the arbitration agreement is valid.

The adjectival procedure for enforcement of *Lex Mercatoria* awards in Nigeria is quite clear and distinct. A successful claimant can apply to court pursuant to the provisions of the Act in addition to those of other applicable laws in respect of arbitration practice in Nigeria. These include international instruments to

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[29] Mustill and Boyd, *The Law and Practice of Commercial Arbitration In England*,2nd Edition at p. 57-58 189a (1939) 63 LL Rep. 237.

[30] Cap A 19, Laws of the Federation of Nigeria 2004.

[31] Jan Dan Berg A. J., "The New York Convention of 1958. Towards A Uniform Interpretation", *Arbitration International* (LCIA); 1981, 29.

[32] David. W. Rivkim "Enforceability of Arbitral Awards on Lex Mercatoria" *Arbitration International* (LCIA) vo. 9. NO 1,1993,67 at 81. Ole Olando "The Lex Mercatoria International Commercial Arbitral, *International and Comparative Law Quarterly*, vol. 34. 1989, 747 at 763.

which the country is a party. It has to be noted that under ICSID provisions, the award has to be enforced in the Supreme Court of Nigeria in the proper manner. Other means of enforcing *Lex Mercatoria* awards in Nigeria are by action at law or by mere registration of the award in the court.

It is thus the duty of the courts whose powers are invoked by the successful claimant to honour the parties' choice of an extra-legal standard such as usages of trade to govern the substance of their disputes.[33] *Lex Mercatoria* awards are legally binding and enforceable like any other lawful decisions or awards rendered in line with national laws. They are binding not in honour but in law. Far from making its rules and attendant award lawless, the freedom conferred on arbitrators by *Lex Mercatoria* framework frees, to an advantage, the arbitrator from strict rules of interpretation[34]. The only vitiating factors by which *Lex Mercatoria* awards cannot be enforced are grounds for setting aside arbitral awards generally and they include issues of misconduct, public policy, lack of fair hearing, and error of law.

CONCLUSION

Arbitration has always been part of Nigerian jurisprudence from time immemorial. Nigeria has every reason to provide for *Lex Mercatoria* to govern resolution of disputes in commercial contracts. *Lex Mercatoria* is often good to apply when parties to arbitration fail to stipulate the arbitration agreement or the use of any national law in the event of a dispute. By choosing *Lex Mercatoria*, the parties are freed from the technicalities of national legal systems and also avoid rules which are unsuitable for international contracts. Law merchant precepts have been reaffirmed in new international mercantile law. National trade barriers are torn down in order to induce commerce. The new commercial law is grounded on commercial practice directed at market efficiency and privacy. Many of the rules of the law merchant were also directed to evade the inconvenient rules of common law.[35]

More so, the law merchant was the product of customs and practices among traders, and had been enforced through the local courts. Judges were chosen according to their commercial background and practical knowledge. Their reputation rested upon their perceived expertise in merchant trade and their law mindedness. In *Lex Mercatoria* practice, there is less procedural formality which results to speedier dispensation of justice, particularly when it came to documentation and proof. The law merchant is not adverse to party autonomy. Hence, whatever the rules of the law merchant were, the parties were always free to choose whether to take a case to court, what evidence to submit and which law to apply. *Lex Mercatoria* promotes a one-world market structure. It is believed that goods and services flowed freely during the medieval law merchant regime, thus generating more trade and wealth.

In Nigeria, trade unions are myriad and have local regulations which guide their activities. Their regulations are not state laws; yet they are recognized and have universal application to the knowledge of the public. These bodies or associations have their internal mechanisms of disputes settlement or resolution as provided in their different constitutions and other regulations concerning their ethics and discipline. These regulations are often unwritten. This scenario is also applicable in global trade structure. It would surely be unfair for Nigerian Courts not to enforce awards based on *Lex Mercatoria* just for the erroneous claim that *Lex Mercatoria* is imperfect and fluid and hence no law. Certainly, an important feature of customary law and law generally is flexibility. *Lex Mercatoria* would not be an exception. For a better appreciation and utilization of *Lex Mercatoria* regime in commercial arbitral practice in Nigeria, it is strongly recommended that an amendment be effected on section 47(5) of the Arbitration and Conciliation Act to specifically mention the application of the new law merchant. It is further submitted that section 1(a) of the Act be amended to accommodate modern trends like oral and online transactions in the global trade by eliminating the requirement of writing as a condition precedent to an arbitration agreement.

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[33] *Fotherhill v. Monarch Acrlimet Ltd (1981) Act 251. Home & Question & Answer Co Ltd v.Mentor Insurance Co UK Ltd* (1989) 3 All ER 74.

[34] *Ibid.*

[35] See *Lex Mercatoria* web version copy right @ 1998 by Nick Szabo. See again a student course on Legal History by Helen West Bradlee of the Suffolk Bar Boston 1929 section II; History of the New Law Merchant or *Lex Mercatoria*.