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**THE GENERAL MARITIME LAW—
THE LEX MARITIMA***
(With a brief reference to the *ius commune* in
arbitration law and the conflict of laws)

William Tetley, Q.C.**

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I. INTRODUCTION

1) *Lex maritima*

The *lex maritima* is a *ius commune* and exists today in the United States, the United Kingdom, Canada and many of the world's shipping nations as the "general maritime law". It has at least two main sources. First, the *lex maritima*, which developed as part of the *lex mercatoria* and evolved primarily from the Rôles of Oléron of the 12th century. There are traces of its existence, however, as far back as the Rhodian law of the 8th or 9th century B.C. The attachment, maritime liens and general average are examples of the *lex maritima*, which continue to exist even today. Second, the common forms, terms, and practices of the shipping industry, particularly with respect to carriage of goods by sea under bills of lading and the hire of ships and their services under charterparties, are international examples of accepted general maritime law.

2) *Arbitration law*

Similar to general maritime law today, maritime arbitration in the 20th century is developing a *ius commune* to be found in a respectable number of reported arbitration awards. This is especially true in the United States, where awards are published as a general rule. It is less true, however, in the United Kingdom, where the giving of reasons and the reporting of awards has been discouraged.

3) *Conflict of laws - U.S.*

Finally, American conflict of laws theory, in its latest "teleological" manifestations, has also turned to what has been called a theory of *ius commune* to solve tort conflicts. One example is its use in resolving major air disasters. But is this purported *ius commune* in the conflict of laws a *ius commune* at all? One should ask this question because the teleological theory leaves each conflict problem to the discretion of the court, with instructions to deliver multistate justice. Such justice, usually in favour of the disenfranchised, is determined without an identifiable body of law, rules, traditions, or reported decisions to rely on.

4) *Maritime law, arbitration and conflict of laws*

Although it may seem strange that maritime law, arbitration law and conflict of laws have been joined together in this brief essay on the *ius commune* in the twentieth century, many common themes and principles link the three subjects together.

In particular, the *lex maritima*, or "general maritime law," is found more and more today in maritime arbitral awards throughout the world.

It is also noteworthy that one of the two American proponents of the teleological theory of conflict of laws finds sources for his theory in maritime law decisions.

II. THE PLAN OF THIS PAPER

The plan and purpose of this paper is to show how a *ius commune* in maritime law developed, first orally and then in writing, and still exists and flourishes today as the general maritime law in Canada, the United Kingdom and the United States, as well as in common forms, terms and practices in maritime matters. A very brief commentary will then be made on the well-known debate as to whether there is a modern *lex mercatoria* in international arbitration. Finally, the existence of a *ius commune* or *ius gentium* in modern American conflict of laws theory will be very briefly commented on.

III. DEFINITION OF IUS COMMUNE

The *ius commune* or *jus commune* is a law common to a whole jurisdiction¹ or more than one jurisdiction. It is composed of broad, general principles and is usually unwritten at first and then often codified.

The *lex mercatoria* is a *ius commune*, as is the *lex maritima*, which latter is known as the "general maritime law" today.

A *ius commune* applies in a particular state, unless there is a specific statute limiting it.

IV. DEFINITION OF THE GENERAL MARITIME LAW

1) *The general maritime law*

The general maritime law is a *ius commune*, is part of the *lex mercatoria* and is composed of the maritime customs, codes, conventions and practices from earliest times to the present, which have had no international boundaries and which exist in any particular jurisdiction unless limited or excluded by a particular statute.

1. The Preliminary Provision (para. 2) of the Québec Civil Code 1991 is as follows: "The Civil Code comprises a body of rules which, in all matters within the letter, spirit or object of its provisions, lays down the *jus commune*, expressly or by implication. In these matters, the Code is the foundation of all other laws, although other laws may complement the Code or make exceptions to it."

2) *Excluded by statute*

The general maritime law crosses national boundaries, unless it is limited or excluded by statute. This was declared by the Emperor Antoninus (138-161 A.D.), as reported in the Digest of Justinian, of the sixth century A.D., when referring to the *lex maritima*:

"I, indeed, am Lord of the world, but the law is lord of the sea. Let it be judged by Rhodian Law, prescribed concerning nautical matters, *so far as no one of our laws is opposed.*" [Emphasis added.]²

V. THE ORIGINS OF THE LEX MARITIMA

1) *The Rhodian law*

The Rhodian law of the 8th or 9th century B.C. (an unwritten body of sea law emanating from the Island of Rhodes and referred to above) was a *lex maritima*, three principles of which (on general average) were eventually recorded in the Digest of Justinian. Thus at least small parts of this oral *ius commune* eventually found their way into a written code.³

2) *The Rhodian Sea-Law*

In the 7th or 8th century A.D., the Rhodian Sea-Law,⁴ prepared at Byzantium, contained provisions on maritime liens and ship mortgages. It influenced the Basilica,⁵ was intended as a recodification of Justinian's Digest, and contained an entire book (Book 53) on maritime law.

3) *Early European lex maritima*

The *lex maritima* (the *ius commune* of maritime law) was quite uniform throughout Western Europe, until about the sixteenth century.

The principal source of early maritime law in Europe was an oral, customary *lex maritima*, applicable to commercial transport of goods by sea, which came to be accepted by European merchants between the ninth and twelfth centuries.⁶ The *lex maritima* was a branch of a wider

2. DIG. 14.2.9 (Volusius Maecianus)

3. On the Rhodian Law generally, see Benedict, *The Historical Position of the Rhodian Law* 18 YALE L.J. 223 (1909); REDDIE, AN HISTORICAL VIEW OF THE LAW OF MARITIME COMMERCE 63 (1841).

4. See generally ASHBURNER, THE RHODIAN SEA-LAW (1909). This law is better described as the Byzantine/Rhodian Sea-Law to distinguish it from the oral Rhodian Law of antiquity. See TETLEY, MARITIME LIENS & CLAIMS 4 (Les Éditions Yvon Blais Inc. 1985)

5. TETLEY, *supra* note 4; See also LAWSON, *The Basilica*, 46 L.Q.R. 486 (1930) and 47 L.Q.R. 536 (1931).

6. TETLEY *supra* note 4, at 5. See also GRANT GILMORE & CHARLES L. BLACK JR., THE LAW OF ADMIRALTY (2d ed. 1975).

customary mercantile law, the *lex mercatoria*.⁷ The influence of the *lex maritima* increased when it was codified and the customs thereby became formalized.⁸ Three documents exerted the most influence on this merchant,⁹ maritime law: the Rôles of Oléron, appearing in written form by the end of the twelfth century, were accepted in northern and western Europe from the Atlantic coast of Spain to Scandinavia;¹⁰ the *Consolato*

7. MALYNES, *CONSUETUDO VEL LEX MERCATORIA* (1622), describing the relationship of the *lex maritima* to the *lex mercatoria*:

"And even as the roundness of the globe of the world is composed of the earth and waters; so the body of the *Lex Mercatoria* is made and framed of the Merchants Customs and the Sea Laws, which are involved together as the seas and the earth." (Quoted by W.S. Holdsworth, *The Development of the Law Merchant and its Courts*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 292-293, n. 10 (1907).

On the development of the *lex mercatoria* in the Middle Ages generally, see LEON TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 1-21 (1983). He argues that the "cosmopolitan Law Merchant" which gained ascendancy in the twelfth and thirteenth centuries, resulted from the "needs of sea-borne traffic." *Id.* at 8.

Joseph Story, *Progress of Jurisprudence*, in MISCELLANEOUS WRITINGS 214-215 (1852), spoke of maritime law and commercial law interchangeably, as constituting a largely uniform body of law in all commercial nations of his day:

"[A]s to commercial law. From mutual comity, from the natural tendency of maritime usages to assimilation, and from mutual convenience, if not necessity, it may reasonably be expected, that the maritime law will gradually approximate to a high degree of uniformity throughout the commercial world. This is, indeed, in every view exceedingly desirable. Europe is already, by a silent but steady course, fast approaching to that state, in which the same commercial principles will constitute a part of the public law of all its sovereignties. The unwritten commercial law of England at this moment differs in no very important particulars from the positive codes of France and Holland. Spain, Portugal, and the Italian States, the Hanseatic Confederacy, and the Powers of the North have adopted a considerable part of the same system."

See also Michael Conant, *The Commerce Clause, the Supremacy Clause and the Law Merchant: Swift v. Tyson and the Unity of Commercial Law*, 15 J. MAR. L. & COM. 153, 155-156 (1984) (and especially at 155: "The commercial law or law merchant was an integral part of maritime law. International contracts for the sale of goods and bills of exchange drawn on foreign creditors for payment were closely tied to maritime contracts to ship the goods by sea and to insure them.") See, e.g., *Luke v. Lyde* 2 Burr. 882, 887, 97 Eng. Rep. 614, 617 (1759); *Pelly v. Company of the Royal Exchange Assurance* 1 Burr. 341, 347, 97 Eng. Rep. 342, 346 (1757).

8. Leon E. Trakman, *The Evolution of the Law Merchant: Our Common Heritage*, 12 J. MAR. L. & COM. 1, 3 (1980) states:

"Merchants began to transact business across local boundaries, transporting innovative practices in trade to foreign markets. The mobility of the merchant carried with it a mobility of local custom from region to region. The laws of particular towns, usually trade centers, inevitably grew into dominant codes of custom of transterritorial proportions."

9. *Id.* at 4-5.

10. TETLEY, *supra* note 4, at 10. As an example of merchants' awareness of the Rôles in Scotland, see Nicolsoun v. Watsoun, in 2 STAIR SOCIETY, *ACTA CURIAE ADMIRALLATUS SCOTIAE* (1557-61) 164 (1937). In that case was pleaded "'the law of the buik of Olouris safer as thai ar ressavit in this realme'" (the law of the book of Oleron so far as they are received in this realm). There are over thirty copies of the Rôles extant today. On the Roles of Oléron generally, see James Shephard, *Les Origines des Rôles d'Oléron* (1983) (unpublished M. thesis, Université de Poitiers) and *Les Rôles d'Oléron: Étude des Manuscrits et Édition du Texte* (1985) (unpublished

del Mare governed Mediterranean maritime affairs from about the late 1300's,¹¹ and later the Laws of Wisbuy (based on the Rôles of Oléron) controlled trade in the Baltic.¹²

These three "documents" were not really codes in the modern sense. They were rather compilations of decisions rendered by merchant-judges in real-life cases, usually accompanied by a loosely-formulated principle thought to be relevant to future incidents of the same kind.

Articles IV and IX from the Rôles of Oléron are typical of the early codal style and refer to the principles of salvage and general average:

"ARTICLE IV. [Salvage] If a vessel . . . happens in the course of her voyage, to be rendered unfit to proceed therein . . . [and if the master] has promised the people who helped him to save the ship the third, or the half part of the goods saved for the danger they ran, the judicatures of the country should consider the pains and trouble they have been at, and reward them accordingly, without any regard to the promises made them by the parties concerned in the time of their distress."

[This principle was only put into an international convention by the Salvage Convention 1910.]

"ARTICLE IX. [General Average] If it happen, that by reason of much foul weather the master is like to be constrained to cut his masts . . . [or] cut their mooring cables, leaving behind them their cables and anchors to save the ship and her lading; all which things are reckoned and computed livre by livre, as the goods are that were cast overboard. And when the vessel arrives in safety at her port of discharge, the merchants ought to pay the master their shares or proportions without delay"¹³ [This is the source of the York-Antwerp Rules 1994.]

The Laws of Wisbuy, circa 1505, and a successor of the Rôles of Oléron, has a more advanced form of codal drafting:

"ARTICLE L. [*Collision*] If two ships strike against one another and receive damage, the loss shall be borne equally between them unless the

D.E.A. thesis, Université de Poitiers). These studies have been described as ". . . so far superior to the nineteenth century work of Twiss . . . that it is to be hoped that they may be published" See CVIII M.J. PRICHARD & D.E.C. YALE, HALE AND FLEETWOOD ON ADMIRALTY JURISDICTION xxxv-xxxvi (Selden Society 1993).

11. TETLEY, *supra* note 4, at 12. The earliest text available today is the Catalan version of 1494.

12. W.S. HOLDSWORTH, SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 291 (Little Brown & Co. 1907). The Laws of Wisbuy were first printed in Copenhagen in 1505.

13. This version of the Rôles of Oléron is a version of forty-seven articles found at 30 F. C. 1171. An earlier version of 35 articles appears in 1 TWISS, THE BLACK BOOK OF THE ADMIRALTY, 88 (1871) and an even earlier version of 24 articles in 2 TWISS, THE BLACK BOOK OF THE ADMIRALTY 210 (1873).

men on board one of them, did it on purpose; in which case that ship shall pay all the damage."¹⁴

The foregoing basic Admiralty rule for collision damages (the divided damages rule) existed for centuries and was only changed to proportionate fault in ship collision in the U.K., France and the world's shipping nations by the 1910 Collision Convention,¹⁵ and in the U.S. in 1975 by the U.S. Supreme Court in *United States v. Reliable Transfer*.¹⁶

Thus again, the general maritime law prevailed, until included or excluded by a particular statute or code.

4) *The influence of the civil law*

The civil law was also the source from the beginning of much of the universality of the law merchant¹⁷ and the civilian influence continued in Admiralty law and in the English Admiralty Court, Doctors' Commons, which was a civilian court.¹⁸ Thus, even in 1835, it could be reported that Sir D. Dodson K.C. (assisted by his "junior", Dr. Lushington) had pleaded for respondents in *The Neptune* as follows:

"By the civil law, and the laws of Oleron, which have been generally adopted by the nations of Europe as the basis of their maritime law, whoever repaired or fitted out a ship had a lien on that ship for the amount of his demand. It is useless to cite authorities on this head, for they are undoubted, and are collected in a note in Lord Tenterden's "Treatise on Shipping" Part. 2, cap. 3, s.9.

The United States of America have in a great measure followed the civil law (see the authorities cited in a note to this case, 3 Hag. Adm. p. 14). In England the same law prevailed. . ."¹⁹

14. 30 F. C. 1189, 1193; 4 TWISS, *THE BLACK BOOK OF THE ADMIRALTY* 279 (1876)

15. Collision Convention, September 23, 1910, Brussels.

16. 421 U.S. 397, 1975 AMC 541 (1975).

17. See, e.g., W.S. Holdsworth, *The Development of the Law Merchant and its Courts*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 330-331 (Little Brown & Co. 1907): "Forasmuch as the general law of nations which is and ought to be law in all Kingdoms, and the Law Merchant which is also a branch of that law, and likewise the Imperial or Roman law, have ever been admitted by the kings and people of England in causes concerning Merchants and Merchandize . . ." (quoting SIR JOHN DAVIES, *THE QUESTION CONCERNING IMPOSITIONS* ch. VI (1656)). See also Thomas E. Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty and Law Merchant*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 208, 237-246 (Little Brown & Co. 1907).

18. On Doctors' Commons see generally F.L. WISWALL, *THE DEVELOPMENT OF ADMIRALTY JURISDICTION AND PRACTICE SINCE 1800* chs. 1-3 (1970); G.D. SQUIBB, *DOCTORS' COMMONS, A HISTORY OF THE COLLEGE OF ADVOCATES AND DOCTORS OF LAW* (1977).

19. 3 Knapp. 94, 103, 12 Eng. Rep. 584, 587-8 (1835). For the appellant were Holt K.C. and his "junior", Dr. Phillimore. Note that the judge was none other than Thomas Erskine.

5) *Lack of conflicts - early maritime law*

Early maritime law was not characterized by conflicts, because until at least the end of the sixteenth century in Europe, there was considerable homogeneity in maritime law.²⁰ In consequence, European courts did not have to choose between different systems of substantive law when hearing a dispute that had links to more than one state.²¹

In other words, the *ius commune* obviated the need for conflict of laws.²²

This uniformity did not exist for other types of law. Not only were conflicts between national laws a well-known topic of study on the Continent as early as the 13th and 14th centuries,²³ but there were also intranational conflicts. For instance, Italy was composed of many city-states, each with its own laws, while the provinces of France enforced their own customary laws.²⁴ Conflicts were inevitable.

By contrast, England historically had few problems with conflicts until the 1600's. This was because there had been a strong monarchy and almost complete political centralization since Norman times, as re-

20. TETLEY, *supra* note 4, at 5-15.

21. Unfortunately, some authorities do not believe in a general maritime law today: "The natural inference to draw from the expression 'general maritime law' is that there exists a body of law which is universally recognised as binding upon all nations in respect of acts occurring at sea. There is, however, no such law." CHESHIRE & NORTH, *PRIVATE INTERNATIONAL LAW* 559 (12th ed., Butterworths 1992), referring to *Lloyd v. Guibert*, (1865) 1 L.R.-Q.B. 115, 123-125. See however, 2 BATIFFOL & LAGARDE, *DROIT INTERNATIONAL PRIVÉ* 288, no. 578 (7th ed., L.G.D.J. 1983); MAYER, *DROIT INTERNATIONAL PRIVÉ* 21-23, nos. 23-25 (4th ed., Montchrestien 1991). Andreas Lowenfeld, "*Lex Mercatoria*": *An Arbitrator's View*, 6(2) *ARB. INT'L.* 133, 136 (1990). There is also customary international maritime law on the High Seas.

22. LEON E. TRAKMAN, *The Evolution of the Law Merchant: Our Common Heritage*, 12 *J. MAR. L. & COM.* 1 (1980)(quoting SIR JOHN DAVIES, *THE QUESTION CONCERNING IMPOSITIONS* 10 (1656)):

"That commonwealth of merchants hath always had a peculiar and proper law to rule and govern it; this law is called the Law Merchant whereof the law of all nations do take special knowledge."

See also 1 WILLIAM BLACKSTONE, *COMMENTARIES ON THE LAWS OF ENGLAND* 273 (1st Am. ed. 1771-1772):

"... the affairs of commerce are regulated by a law of their own, called the law merchant or *lex mercatoria*, which all nations agree in and take notice of. And in particular it is held to be part of the law of England, which decides the causes of merchants by the general rules which obtain in all commercial countries."

See also Conant, *supra* note 7, at 155: "Admiralty, maritime and commercial law and conflicts of law were a highly integrated body of law. No sharp distinctions or borderlines existed between these branches of the law of nations." Conant's article illustrates the influence of the law merchant in the early U.S. Supreme Court conflict of laws decision in *Swift v. Tyson* 41 U.S. 1 (1842).

23. See Alexander N. Sack, *Conflicts of Laws in the History of the English Law*, in 3 *LAW: A CENTURY OF PROGRESS 1835-1935* 342 (N.Y.U. Press 1937).

24. *Id.* at 342-343.

flected in the dominance of royal courts, which administered the nation-wide common law. The fact that England was one political unit, and, for the most part, a single legal unit, meant that intranational conflicts did not pose a problem.²⁵

In England, in the 16th century, the law merchant was absorbed by the common law courts, so that Graveson, in writing of the period, could say:

"But even in Admiralty there was no conflict of laws because, in cases to which the law merchant applied, there was only one law. And when, in the sixteenth century, the law merchant was taken over and administered in the courts of common law, it was applied on the theory that it was part of the common law, and not a law foreign to the court."²⁶

And as for conflicts between the laws of nations, the tradition of the common law courts was to refuse to hear foreign cases or at least to refuse to apply foreign law.²⁷ This practice thus rejected both conflicts and the *ius commune*. This was, in good part, the cause of the dispute between the common law courts and Doctors' Commons, where foreign cases would be and were litigated under civil law principles, including those rooted in the *lex mercatoria* and the *lex maritima*.²⁸

25. *Id.* at 343-344.

26. GRAVESON, CONFLICT OF LAWS 33-34 (7th ed. Sweet & Maxwell 1974). Note, however, that even after the mercantile law became part of the common law system, in the nineteenth century at least, as Michael Conant points out, lawyers and scholars spoke of commercial law as being distinct from the common law. See *supra* note 7, at 157. See, e.g. M.M. BIGELOW, THE LAW OF BILLS, NOTES AND CHEQUES 6 (2d ed. Little, Brown & Co. 1900) ("... the law merchant is an independent, parallel system of law, like equity or admiralty. The Law Merchant is not even a modification of the common law: it occupies a field over which the common law does not and never did extend.")

The incorporation of the law merchant into the common law system arguably dates more from the eighteenth, than from the seventeenth, century. This process has been attributed in good part to Lord Mansfield during his tenure as Chief Justice of King's Bench (1756 to 1788). See Conant, *supra* note 7, at 157. See also C.H.S. FIFOOT, LORD MANSFIELD ch. 4 (Clarendon Press 1936); 12 W.S. HOLDSWORTH, HISTORY OF ENGLISH LAW, 524-542 (Methuen 1938). In France, this process of incorporation began with the ORDONNANCE SUR LE COMMERCE (1673) and the ORDONNANCE DE LA MARINE (1681) and was completed only with the publication of the CODE DE COMMERCE in 1807. See ANTOINE KASSIS, THÉORIE GÉNÉRALE DES USAGES DE COMMERCE, DROIT COMPARÉ, CONTRATS ET ARBITRAGE INTERNATIONAL, LEX MERCATORIA 272-273, para. 444 (Librairie Générale de Droit et de Jurisprudence 1984).

27. Sack, *supra* note 23, at 344.

28. On the struggle of Doctors' Commons with the courts of common law, see WISWALL, *supra* note 18, at 4-7; 1 W.S. HOLDSWORTH, A HISTORY OF ENGLISH LAW 553 *et seq.* (7th ed. Methuen 1956); Thomas L. Mears, *The History of the Admiralty Jurisdiction*, in HOLDSWORTH, *supra* note 12, at 312; Lionel H. Laing, *Historic Origins of Admiralty Jurisdiction in England*, 45 MICH. L. REV. 163 (1946).

VI. LEX MARITIMA (THE GENERAL MARITIME LAW) - U.K.

1) *The civilian influence*

Arthur Browne, Professor of Civil law in Dublin, and author of *A Compendious View of the Civil Law and of the Law of the Admiralty*,²⁹ influenced the English-speaking maritime law world, giving Admiralty law a status never previously attained.

Browne recognized the true origins of Admiralty law. It is typical that Browne should note:³⁰

"The instance court [of Admiralty] is governed by the *civil law*, the *laws of Oléron* and the *custom of the admiralty*, modified by statute law." (emphasis added).

And further on Browne stated:³¹

"As to *practice*, how can the practice of the admiralty court be intelligible without knowing the practice of the civil law? *The Court of admiralty . . . always proceeds according to the rules of the civil law, except in cases omitted.*"

Much later, Sir Thomas Scrutton succinctly summed up the origins of Admiralty in the United Kingdom as follows:³²

29. ARTHUR BROWNE, *A COMPENDIOUS VIEW OF THE CIVIL LAW AND OF THE LAW OF THE ADMIRALTY* (London 1802 and New York 1840). Note that Browne's work was cited by Chief Justice Marshall of the U.S. Supreme Court only five years after its first publication, as a standard authority on Admiralty. *See Jennings v. Carson* 8 U.S. 2, 23, 24 and 27 (1807).

30. BROWNE, *supra* note 29, at 29.

31. *Id.* at p. 507. 1 W.S. HOLDSWORTH, *A HISTORY OF ENGLISH LAW* 546 (7th ed. 1956) notes that the part of the *Black Book of the Admiralty*, *supra* note 13, dealing with procedure and practice of the English Court of Admiralty (dating from the fifteenth century) ". . . shows that it was being settled on the model of the civil law." In 1584, Queen Elizabeth I, in a letter to the Chief Justice of England, *reprinted in Burrell* 231-232, 167 Eng. Rep. 550, required that: "in all other like matters concerning the Admiralty, that the same being triable by mere civil law be not admitted to trial before you at the common law." Furthermore, as late as 1733, proceedings and records of the Admiralty Court were in Latin (*see Burrell* 231, 167 Eng. Rep. 549-550) and thereafter the civilian tradition continued in English.

Examples of English Admiralty decisions where references were made to the civilian sources include *The Renard, Hay & M.* 222, 165 Eng. Rep. 51 (1778); *The Aquila*, 1 C. Rob. 37, 165 Eng. Rep. 87 (1798) (wherein Lord Stowell, as Admiralty judge, examined Selden, Loccenius, Valin, the *Consolato del Mare*, the laws of Rhodes, the Code of Antoninus, the commentaries of Vinnius upon the *Institutes*, Bodin and the *ORDONNANCE DE LA MARINE* (1681) OF LOUIS XIV). *See also Hodges v. Sims* (*The Neptune*), 3 Knapp. 94, 114, 12 Eng. Rep. 584, 592 (P.C. 1835) (where Erskine, J. recognized that "the law of the Court of Admiralty is the civil and maritime law, except in those points in which it has been expressly controlled by the municipal law of England"). *See also Chartwell Shipping v. Q.N.S. Paper Co.*, [1989] 2 S.C.R. 683, 717-720.

32. James Hanemann Jr., *Admiralty: The Doctrine of Laches*, 37 TUL. L. REV. 811, 811-812 (1963) (citing Thomas E. Scrutton, *Roman Law Influence in Chancery, Church Courts, Admiralty, and Law Merchant*, in 1 SELECT ESSAYS IN ANGLO-AMERICAN LEGAL HISTORY 208, 233 (Little, Brown & Co. 1907).

"The foundations of Admiralty are thus to be found in: (1) the Civil Law, (a) as embodied in the Law Merchant, especially in the Laws of Oleron, (b) as introduced by subsequent clerical judges, mainly in procedure; (2) in subsequent written and customary rules, adopted in view of the developments of commerce."

2) Jurisdiction

Another distinguishing characteristic of English maritime law is that it is based on *jurisdiction*, a feature which is of common law origin.³³ If the court has jurisdiction to hear a claim for damage by a ship or claims of cargo against a ship, for example, then the right of a lien exists without there being legislation creating maritime liens and mortgages. (This is quite contrary to the substantive lien and mortgage statutes in the United States³⁴ and France³⁵.) In other words, once the court's jurisdiction is established in the U.K., the substantive law (the governing right) is found in the general maritime law (going back to the *lex maritima* and the *Rôles of Oléron*). For example, today, the general maritime law still provides the following *rights* (amongst others):

- (a) maritime liens for wages;³⁶
- (b) necessities liens (statutory rights *in rem*);³⁷
- (c) the divided damages rule in ship collision, as opposed to contributory negligence or proportionate fault (see art. L. of the Laws of Wisbuy, above).³⁸ This English Admiralty rule remained unchanged in

33. CVIII M.J. PRICHARD & D.E.C. YALE, HALE AND FLEETWOOD ON ADMIRALTY JURISDICTION xxxiii (Selden Society 1993).

34. The Ship Mortgage Act of 1920, 46 U.S.C. App. 951 *et seq.*, now Pub. L. No. 100-710, 102 Stat. 4735, 46 U.S.C. 31301 *et seq.* (adopted November 23, 1988 and in force January 1, 1989), especially at 46 U.S. Code 31301(4) and (5), 31341 and 31342.

35. Law No. 67-5 of January 3, 1967, as amended by Law No. 75-300 of April 29, 1975 and Decree No. 67-967 of October 27, 1967.

36. Jurisdiction is found in the Supreme Court Act, 1981, ch. 54, § 20(2)(o) (U.K.). In France, by comparison, a privilege for wages, outranking other claims, was conferred *expressly* upon seamen by Louis XIV's ORDONNANCE DE LA MARINE (1681). See Book II, Title Fourth, art. XIX: "The ship and freight shall be specially liable for the seamen's wages," 30 F. C. 1203, 1210. In the United States, the maritime lien for wages has also been recognized for decades as part of the general maritime law. See, e.g., the John G. Stevens, 170 U.S. 113, 119 (1898) (where Gray, J., citing judgments by both Lord Stowell in England and Story, J. in America, described the lien for wages as a "sacred lien", enduring as long as a plank of the ship remained and taking precedence over all other maritime claims.) See also Francesco Berlingieri, *Lien holders and mortgagees: who should prevail?* [1988] LMCLQ 157, 159-160. Today, the U.S. maritime lien for crew wages is a "preferred maritime lien" under 46 U.S.C. § 31301(5)(D).

37. Supreme Court Act, *supra* note 36, at § 20(2)(m).

38. 30 F. C. 1189, 1193. See also arts. XXVI, LXVII and LXX of the Laws of Wisbuy, published in 30 F. C., 1189, 1191, 1194 and 1195 respectively, and 4 Twiss, *supra* note 14, at 272-273, 283-284 and 284.

the U.K. until it was replaced by the proportionate fault rule by the Maritime Conventions Act, 1911.³⁹

In 1873, with the consolidation of the courts of England,⁴⁰ including the Admiralty court, the substantive, civilian nature of the law was modified by the common law, with its jurisdiction-oriented style and conception.⁴¹

VII. LEX MARITIMA (GENERAL MARITIME LAW) - CANADA

1) Federal jurisdiction

Maritime jurisdiction over specific types of claims in Canada is found in sects. 22(2)(a) to (s) of the Federal Court Act.⁴² General admiralty jurisdiction exists as well under sect. 22(1) of the Act:

“in all cases in which a claim for relief is made or a remedy is sought under or by virtue of Canadian maritime law or any other law of Canada relating to any matter coming within the class of subject of navigation and shipping, *except to the extent that jurisdiction has been otherwise specially assigned*”. [Emphasis added]

Where the Federal Court of Canada exercises admiralty jurisdiction in Canada, a maritime *right* exists (as in the United Kingdom), without a statute being required. Thus, if there is jurisdiction, the governing law is the general maritime law of England, “received” into Canadian law as of 1934 (or 1891), when the Admiralty Acts⁴³ were adopted by the Federal Parliament, unless amended by a specific statute or judicial precedent.

2) Canadian maritime law - definition

Canadian maritime law is defined at sect. 2 of the Federal Court

39. 1 & 2 Geo. 5, ch. 57, § 1, (U.K.) giving effect to the Collision Convention 1910, adopted by the Comité maritime international (CMI), September 23, 1910 (Brussels).

40. The consolidation of the English courts was effected by the Supreme Court of Judicature Act, 1873, 36 & 37 Vict., ch. 99 (U.K.).

41. See Vaughan Black, *One If By Land, Two If By Sea: Old Directions in Maritime Law*, in *NEW DIRECTIONS IN MARITIME LAW* 1984 26-27 (David Sharpe and W. Wylie Spicer eds., 1985). See also LEON TRAKMAN, *THE LAW MERCHANT: THE EVOLUTION OF COMMERCIAL LAW* 8 (Fred B. Rothman & Co. 1983).

Even since 1873, however, English judges continue to look to civil law principles in maritime cases. See *The Heinrich Bjorn*, (1885) 10 P.D. 44, 50-51, 53-54 (C.A.), *aff'd* (1886) 11 App. Cas. 270 (H.L.); *The Ripon City* [1897] P. 226; *The Beldis* [1936] P. 51 (C.A.); *The Goring*, [1987] 2 Lloyd's Rep. 15 (C.A.), *aff'd* [1988] 1 Lloyd's Rep. 397 (H.L.); *The Sennar* (No. 2), [1984] 2 Lloyd's Rep. 142 (C.A.); *Soya G.m.b.H. Kommanditgesellschaft v. White*, [1982] 1 Lloyd's Rep. 136 (C.A.); *Tehno-Impex v. Gebr. van Weelde Scheepvaartkantoor B.V.*, [1981] 2 All Eng. Rep. 669 (C.A.) and *The Halcyon Isle* [1981] A. C. 221 (P.C.). See also *Chartwell Shipping v. Q.N.S. Paper Co.*, [1989] 2 S.C.R. 683, 721.

42. R.S.C., ch. F-7, (1985)(Can.).

43. Admiralty Acts, 54 & 55, Vict. ch. 29 (1891)(Can.); 24 & 25 Geo. V c. 31 (1934)(Can.).

Act as follows:

"2. In this Act 'Canadian maritime law' means the law that was administered by the Exchequer Court of Canada on its Admiralty side by virtue of the Admiralty Act or any other statute, or that would have been so administered if that Court had had, on its Admiralty side, unlimited jurisdiction in relation to maritime and admiralty matters, *as that law has been altered by this or any other Act of the Parliament of Canada;*" [Emphasis added]⁴⁴

The final phrase of the definition hearkens back to the "so far as none of our laws is opposed" dictum of the Emperor Antoninus quoted above, and is reinforced by sect. 42 of the Federal Court Act, which provides:

"42. Canadian maritime law as it was immediately before the 1st day of June 1971 [the date the Federal Court Act came into force] continues *subject to such changes therein as may be made by this or any other Act.*" [Emphasis added]⁴⁵

Canadian maritime law, as defined in sect. 2 of the Federal Court Act, is composed of two categories, as was declared by the Supreme Court of Canada in the *Buenos Aires Maru*.⁴⁶

Firstly: "all that body of law which was administered in England by the High Court on its Admiralty side in 1934 as such law may, from time to time, have been amended by the federal Parliament, and as it has developed through judicial precedent to date."⁴⁷

Secondly: "an unlimited jurisdiction in relation to maritime and admiralty matters. As such, it constitutes a statutory recognition of Canadian maritime law as a body of federal law dealing with all claims in respect of maritime and admiralty matters. Those matters are not to be considered as having been frozen by The Admiralty Act, 1934. On the contrary, the words "maritime and "admiralty" should be interpreted within the modern context of commerce and shipping."⁴⁸

Conclusion: "Canadian maritime law is a body of federal law encompassing the common law principles of tort, contract and bailment . . . [It] is uniform throughout Canada . . . [and] is that body of law defined in s. 2 of the *Federal Court Act*. That law was the maritime law of

44. R.S.C., ch. F-7, § 2, (1985)(Can.).

45. *Supra* note 2.

46. *Buenos Aires Maru*, [1986] 1 S.C.R. 752, 771 (Can.).

47. It can be strongly argued, however, that it was the general maritime law of England, as it was in 1891, which was incorporated into Canadian maritime law. See Tetley, *The Buenos Aires Maru*, 10 SUP. CT. L.R. 399 (1988).

48. See *Buenos Aires Maru supra* note 46, at 774.

England as it has been incorporated into Canadian law and it is not the law of any province of Canada."⁴⁹

Regrettably, the Supreme Court of Canada, in deciding that Canadian maritime law was of common law character, overlooked the essentially civilian origin and nature of English admiralty law from which Canadian maritime law flows.⁵⁰ Happily, this error was later rectified in *Chartwell Shipping v. Q.N.S. Paper Co.*⁵¹

3) *Supreme Court and its extended definition*

The Supreme Court of Canada has declared that the following subjects (which have no appropriate federal *substantive statute*) are, nevertheless, of the Federal Court of Canada's admiralty jurisdiction and

49. See *Buenos Aires Maru supra* note 46, at 779.

50. A clear indication of the historic civilian influence in Canadian maritime law may be seen in the wording of the Imperial commissions issued to the judges of the Vice-Admiralty Courts in Nova Scotia (Halifax) and Quebec from their inception in the eighteenth century. The judges of these courts were typically granted jurisdiction:

"... to take Cognizance of and proceed in all *Causes Civil and Maritime* and in complaints contracts Offenses or suspected Offenses Crimes Pleas Debts Exchange Policies of Assurance Accounts, Charter Parties Agreements Bills of Lading of Ships and all matters and Contracts which in any manner whatsoever relate to freight due for Ships hired and let out Transport Money or Maritime Usury (otherwise Bottomry) or which do any ways concern Suits Trespasses Injuries Extortions Demands and *Affairs Civil and Maritime* whatsoever between Merchants or between Owners and Proprietors of Ships or other Vessels and Merchants or other persons whomsoever with such Owners and Proprietors of Ships and all other Vessels whatsoever employed or used or between any other persons howsoever had made began or contracted for any Matter Cause or Thing Business or Injury whatsoever done or to be done as well in upon or by the Sea or Public Streams freshwaters Ports Rivers Creeks and places overflowed whatsoever within the ebbing and flowing of the Sea or High Water Mark, as upon any of the Shores or Banks adjoining to them or either of them together with all and Singular their incidents emergencies dependencies annexed connexed Causes whatsoever and such Causes Complaints Contracts and other the premises abovesaid or any of them howsoever the same may happen to arise, be contracted had or done, *TO HEAR and determine according to the Civil and Maritime laws and Customs of the High Court of Admiralty of England* in Our said Province of Nova Scotia. . . ." (Emphasis added).

See, e.g., the High Court of Admiralty Commissions appointing as judges of the Nova Scotia Court of Vice-Admiralty, Benjamin Green, September 9, 1751, Records of *Nova Scotia Court of Vice-Admiralty*, Public Archives of Nova Scotia, R.G. 1, vol. 492 (Reel 15,494); Richard Bulkley, September 8, 1769, *id.*, vol. 495 (Reel 15,496); Dr. Alexander Croke, September 7, 1801, *id.*, vol. 499 1/2 (Reel 15,498). See also Mr. Justice Arthur Stone, *The Nova Scotia Court of Vice-Admiralty, 1749-1891 10-11* (Nov. 5, 1993)(unpublished manuscript, presented to the Social Science History Association Annual Conference, Baltimore, Maryland).

51. See *Q.N.S. Paper Co. v. Chartwell Shipping Ltd.*, [1989] 2 S.C.R. 683, 700-749 (Can)(L'Heureux-Dubé, J.); See also H. Patrick Glenn, *Maritime Law- Federal Court Jurisdiction - Canadian Maritime Law - Relationship to Civil and Common Law: ITO - International Terminal Operators Ltd. v. Miida Electronics Inc.*, 66 CAN. B. REV. 360, 363-365 (1989)(cited in *Chartwell, supra* [1989] 2 S.C.R. at 715-716.

therefore subject to the *general maritime law of Canada*:⁵²

- a) *Tropwood v. Sivaco Wire and Nail Co.*⁵³
The Supreme Court of Canada decided that the general maritime law of Canada applied to a shipment by sea from France to Canada, although the Canadian Carriage of Goods by Water Act⁵⁴ applies only outwards from Canada. Normally, the French equivalent of the Hague Rules 1924 would apply.
- b) *Antares Shipping v. The Capricorn.*⁵⁵
Again, the Supreme Court of Canada declared that the general maritime law of Canada, and not provincial law, applied to the sale of a ship, without specifying what that federal law consisted of.
- c) *Wire Rope Industries v. B.C. Marine Shipowners.*⁵⁶
The Supreme Court held that a *third-party claim* arising from the defective resocketing of a tug's towing cable fell within the scope of "Canadian maritime law".
- d) *Triglav v. Terrasses Jewellers.*⁵⁷
The Supreme Court declared that the general maritime law of Canada applied to marine insurance, although, at the time, there were only provincial marine insurance acts. Thus the general maritime law of Canada governed, probably being the marine insurance law of England, as it existed in 1891.⁵⁸ In 1993, the Government of Canada adopted the Canadian Marine Insurance Act 1993,⁵⁹ thus confirming that the provincial marine insurance acts were *ultra vires* or, at least, inoperative.
- e) *Buenos Aires Maru* (ITO Int'l Terminal Operators v. Miida Electronics).⁶⁰
The loss of cargo four days after discharge in a warehouse on a pier before delivery is subject to "Canadian maritime law" (*see note 49 supra*) despite the fact there is no Federal statute on the question.
- f) *Ontario v. Pembina Exploration.*⁶¹
The Supreme Court of Canada held that a claim arising from the net of a fishing vessel being damaged by a submerged and unmarked gas well in Lake Erie, "falls under the broad purview of admiralty

52. Thus provincial laws on the matter are presumably *ultra vires*.

53. *Tropwood v. Sivaco Wire and Nail Co.*, [1979] 2 S.C.R. 157 (Can.).

54. Carriage of Goods by Water Act, R.S.C. ch. c-27 (1985)(Can.); now S.C. ch. 21 (1993)(Can.).

55. *Antares Shipping v. The Capricorn*, [1980] 1 S.C.R. 553 (Can.).

56. *Wire Rope Indus. v. B.C. Marine Shipowners*, [1981] 1 S.C.R. 363 (Can.).

57. *Triglav v. Terrasses Jewellers*, [1983] 1 S.C.R. 283 (Can.).

58. Tetley, *supra* note 47.

59. Marine Insurance Act, S.C., ch. 22 (1993)(Can.).

60. *International Terminal Operations v. Miida Elec.*, [1986] 1 S.C.R. 752 (Can); *See also* Tetley, *Buenos Aires Maru*, 10 SUP. CT. L. REV. 399 (1988).

61. *Ontario v. Pembina Exploration*, [1989] 1 S.C.R. 206 (Can.). *See also* commentary by Tetley (1989) 34 MCGILL L.J. 1099.

law"⁶² (i.e. Canadian maritime law).

- g) *Chartwell Shipping v. Q.N.S. Paper*.⁶³
English common law of agency is part of "Canadian maritime law" and applies to contracts made by a shipping agent with a stevedore, even in the Province of Quebec.
- h) *Whitbread v. Walley*.⁶⁴
Maritime torts, even in respect of pleasure craft on inland navigable waterways of Canada, are governed by Canadian maritime law. Only two-ship collisions are covered by the Canada Shipping Act,⁶⁵ and the Supreme Court did not explain what the general maritime law of Canada was with respect to division of damages, in this case of a single ship grounding and causing injury to a passenger. Was it the old common law rule of contributory negligence or proportionate fault under provincial contributory negligence acts, or the old English admiralty law rule of equally divided damages? The Canadian Parliament is expected to adopt a federal contributory negligence act in order to solve the problem.
- i) *Monk Corp v. Island Fertilizers Ltd.*⁶⁶ An arrangement involving the sale and transportation of urea resulted in claims for a) demurrage, b) delivery of excess cargo and c) the cost of shore cranes to unload the cargo. It was held that all three claims were subject to the general maritime law of Canada.
- j) *Compania Maritima Villa Nova S.A. v. Northern Sales Co.*⁶⁷ Demurrage disputes fall under Canadian maritime law.

4) Conclusion - general maritime law of Canada

Clearly, the general maritime law is acknowledged in Canada in all matters of navigation and shipping. Its role has been greatly expanded in recent years by the Supreme Court of Canada.

VIII. LEX MARITIMA (THE GENERAL MARITIME LAW) - U.S.

1) Introduction

Much of American maritime law today is civilian in nature and origin. Much is unwritten and appears in the "general maritime law", i.e. a modern American *lex maritima*.⁶⁸

62. *Pembina Exploration*, [1989] 1 S.C.R. 206, 212.

63. *Chartwell Shipping v. Q.N.S. Paper*, [1989] 2 S.C.R. 683 (Can.)

64. *Whitbread v. Walley*, [1990] 3 S.C.R. 1273 (Can.).

65. Canada Shipping Act, R.S.C., ch. S-9, §§ 565 to 573 (1985)(Can.).

66. *Monk Corp. v. Island Fertilizers Ltd.*, [1991] 1 S.C.R. 779 (Can.).

67. *Compania Maritima Villa Nova S.A. v. Northern Sales Co.*, [1992] 1 F. C. 550, (1992) 137 N.R. 20 (Federal Court of Appeal).

68. See GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 47 (2d ed.

2) *The civil law influence on U.S. maritime law*

The early influence of the civil law (as opposed to the common law) on the admiralty law of the United States can be seen in An Act to regulate Processes in the Courts of the United States, adopted by the first Congress of the United States in 1789.⁶⁹ Sect. 2 of the *Act* reads in part:

“And the forms and modes of proceedings in causes of equity, and of admiralty and maritime jurisdiction, (a) shall be according to the course of the *civil law* . . .” (Emphasis added.)

In this respect, Samuel R. Betts, *Admiralty Practice*,⁷⁰ wrote:

“It was manifestly the general acceptance of the profession in this country, at the adoption of the Federal Constitution, that the admiralty courts here were conducting their proceedings in conformity to the principles and rules of the civil law, and that the course of the English admiralty was not an authority or guide in that matter, and such was clearly the understanding of the first congress.”

“The act of 1790 (sic) expressly declared, that the ‘forms and modes of proceeding in causes of admiralty and maritime jurisdiction, should be according to the course of the civil law.’ ”

In consequence, that whole body of general maritime law (*lex maritima*) existing in 1789 became part of U.S. law.⁷¹

Foundation Press 1975):

“The ‘general’ maritime law in the United States, insofar as it remains unmodified by statute, contains, then, two parts. First, is the corpus of traditional rules and concepts found by our courts in the European authorities, Second are rules and concepts improvised to fit the needs of this country, including, of course, modifications of the first component.”

Note that, just as the original *lex maritima* (the Rhodian law) was subject to alteration by the positive law of Rome (as Emperor Antoninus’ famous dictum indicates, *supra*, text surrounding note 2), so too, the modern American *lex maritima* can and is regularly changed by statutes. GILMORE & BLACK, *supra*, at 47, state that Congressional legislation, none of it ever declared unconstitutional, has added to judicial jurisdiction, changed or filled out maritime law rules, or added “whole new chapters” to the corpus of that law. See also 1 THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 152-153 (2d ed. West 1994). See also *Miles v. Apex Marine Corp.* 498 U.S. 19, 1991 AMC 1(1990) (general maritime law action for wrongful death did not permit recovery of damages for loss of society or loss of decedent’s future earnings where such remedies were inconsistent with applicable U.S. federal statutes).

69. Act of September 29, 1789, Stat. 1, ch. 21.

70. SAMUAL R. BETTS, *ADMIRALTY PRACTICE* 1838 x-xi (N.Y.). Note that, in early American case law, U.S. courts, applying the law merchant derived from England in commercial disputes generally, did not hesitate to cite the French and other civil codes and civilian authors. See *Conant*, *supra* note 7, at 169. See also *Donnell v. Columbian Insurance Co.*, 7 F. C. 889, 895 (C.C.D. Mass. 1836) (No. 3,978); *The Seneca*, 21 F. C. 1081, 1082-1084 (C.C.E.D. Pa. 1829) (No. 12,670); Joseph Story, *Growth of the Commercial Law in MISCELLANEOUS WRITINGS* 268, 281 (1852).

71. In *Morgan v. Insurance Co. of North America*, 4 Dall. 455, 457-458 (Pa. 1806), Chief Justice Tilghman of the Supreme Court of Pennsylvania, confronted with a maritime law question

3) *The attachment*

A striking example of the general maritime law is the U.S. attachment or *saisie conservatoire* of the civil law. It is normally found in the attachment procedure under Supplemental Rule B of the Supreme Court Rules. But attachment also exists (even if the prerequisites of Rule "B" are not complied with) under the general maritime law, which the United States inherited from the general maritime law of England at the time of the American Revolution and particularly in the first Congress in 1789⁷² and confirmed in the second Process Act of 1792.⁷³

In consequence, in (*Schiffs. Leonhardt v. A. Bottacchi*),⁷⁴ the Eleventh Circuit, relying on *Manro v. Almeida*,⁷⁵ declared:

"We view the procedures employed in the present case, including the post-attachment hearing, as entirely consistent with Rule B(1). For this reason we find that the court had the authority, under its *inherent power* to apply traditional maritime law, to issue the writ of attachment; it need not have relied on any grant of authority under the Rule B(1)." [Emphasis added.]

on which there were then no American precedents, referred to Valin's commentary on Louis XIV's 1 ORDONNANCE DE LA MARINE, 656, art. 15, (1681) declaring:

"These ordinances, and the commentaries on them, have been received with great respect, in the Courts both of England and the United States; not as containing any authority in themselves, but as evidence of the general marine law. Where they are contradicted by judicial decisions in our own country, they are not to be respected. But on points which have not been decided, they are worthy of great consideration."

(cited by GILMORE & BLACK, *THE LAW OF ADMIRALTY* 8 (2d ed. Foundation Press 1975).

See also Chief Justice Marshall of the U.S. Supreme Court in *American Insurance Co. v. Canter* 26 U.S. 511, 545-546 (1828):

"... A case in admiralty does not, in fact, arise under the Constitution or laws of the United States. These cases are as old as navigation itself; and the law, admiralty and maritime, as it has existed for ages, is applied by our Courts to the cases as they arise."

(cited by GILMORE & BLACK, *THE LAW OF ADMIRALTY* 45 (2d ed. Foundation Press 1975).

See also Joseph Story, *Literature of the Maritime Law*, in MISCELLANEOUS WRITINGS 93-121 (1852), where that distinguished American jurist assesses the classic maritime law writings of the great civilian authors, including, among others, Roccus, Bynkershoek, Casaregis, Cleirac, Valin, Pothier and Emerigon. This essay was written for the *North American Review* in 1818. Story frequently referred to one or more of these authors in rendering his decisions in admiralty cases, such as his famous decision on U.S. admiralty jurisdiction, *DeLovio v. Boit*, 7 F. C. 418 (C.C.D. Mass. 1815) (No. 3,776).

See also well-known U.S. Supreme Court decisions, including *The Lottawanna* 88 U.S. 558, 574-575 (1874); *Southern Pacific Co. v. Jensen* 244 U.S. 205, 215-216 (1917); *Detroit Trust Co. v. The Thomas Barlum* 293 U.S. 21, 43, 1934 AMC 1417, 1428 (1934).

72. *Supra* note 69.

73. Act of May 8, 1792, Stat. 1, Ch. 36, § 2.

74. *Schiffs. Leonhardt v. A. Bottacchi*, 1986 AMC 1, 9 (11th Cir. *en banc* 1985)

75. *Manro v. Almeida*, 23 U.S. 473, 488-489 (1825), which had held that maritime attachment was a part of American general maritime law at the time the American Constitution was adopted.

4) *Other general maritime law principles in U.S. maritime law*

(a) The civilian theory of "abandonment" in limitation of shipowners' liability was finally legislated upon in the U.S. Limitation Act of 1851.⁷⁶ Thus, unlike virtually every advanced shipping nation of the world, the U.S. has retained the right of shipowners to be responsible only up to the value of the ship, *after* the collision (even if the ship has no value) and freight due, if any, and \$420 per ton for all personal injury or death claims. The limitation fund for the Titanic, sunk in 1912, was, therefore, only the value of the salvaged lifeboats and advance passage money, or \$91,805.00 U.S. The total claims amounted to 22 millions U.S.

(b) The general maritime law of liens for "repairs, supplies, towage, use of dry dock or marine railway or other necessities" against the ship were finally legislated upon in the U.S. Ship Mortgage Act, 1920.⁷⁷

(c) The general maritime law principle of divided damages in ship collision was only abandoned by the Supreme Court of the United States in 1975 in *United States v. Reliable Transfer*.⁷⁸

(d) In *Moragne v. States Marine Lines, Inc.*,⁷⁹ a remedy for wrongful death was recognized under the general maritime law. Mr. Justice Harlan of the U.S. Supreme Court invoked civilian principles in support of this decision, stating:

"Maritime law had always, in this country as in England, been a thing apart from the common law. It was, to a large extent, administered by different courts; it owed a much greater debt to the civil law; and, from its focus on a particular subject matter, it developed general principles unknown to the common law. These principles included a special solicitude for the welfare of those men who undertook to venture upon hazardous and unpredictable sea voyages."⁸⁰

76. 46 U.S.C. App. 183 (1851).

77. The Ship Mortgage Act of 1920, *supra* note 34. 46 U.S.C. App. 951, now 46 U.S.C. 31301(4), 31341 and 31342. The U.S. maritime lien for necessities may be traced back at least as far as the ORDONNANCE DE LA MARINE of Louis XIV (Book I, Title XIV, art. XVI re claims for supplies and repairs furnished to the ship and at art. XVII re claims for the construction or sale of the ship and for the supply of labour and material). See also art. 191 of the FR. CODE DE COMMERCE (1807). The repairman's claim was also secured by a maritime lien in Germany. The supplier's claim was also granted a privilege in the commercial codes of Argentina, Brazil, Chile, Costa Rica, Italy, Portugal and Spain. See Francesco Berlingieri, *Lien holders and mortgagees: who should prevail?* [1988] LMCLQ 157, 158-159.

78. *United States v. Reliable Transfer*, 421 U.S. 397, 1975 AMC 541 (1975).

79. *Moragne v. States Marine Lines, Inc.*, 398 U.S. 375, 1970 AMC 967 (1970).

80. *Id.* U.S. at 386-387, AMC at 976-77. See also Note, *The Legitimacy of Civil Law Reasoning in the Common Law. Justice Harlan's Contribution*, 82 YALE L.J. 258 (1972). See also *supra* note 36 regarding the maritime lien for seamen's wages under the general maritime law in the U.S.

(e) Conflicts decisions in American maritime cases (both domestic and international) stress the "general maritime law" as a separate body of law, applicable in all cases of "admiralty and maritime jurisdiction", to the exclusion of state law.⁸¹

(f) The U.S. doctrine of *forum non conveniens* ". . . originates in federal maritime law"⁸² and has been a prominent concept of that law since 1801.⁸³

(g) The American ocean carrier's possessory lien for bill of lading freight comes from the general maritime law.⁸⁴ The U.S. general maritime law also confers a lien for charter hire.⁸⁵

(h) There is also a lien on the cargo for demurrage in the United States, even absent any specific contractual provision on the subject.⁸⁶

81. See, e.g., *Pope & Talbot, Inc. v. Hawn*, 346 U.S. 406, 409-410, 1954 AMC 1, 7 (1953); *Garrett v. Moore-McCormack Co.*, 317 U.S. 239, 243-246, 1942 AMC 1645, 1648-1650; The *Scotia* 81 U.S. (14 Wall.) 170, 187-188 (1872); The *Maggie Hammond*, 75 U.S. (9 Wall.) 435, 452-453 (1870). See also *Stevens, Erie R.R. v. Tompkins and the Uniform General Maritime Law*, 64 HARV. L. REV. 246 (1950); Conant, *supra* note 7, at 172-173 and jurisprudence cited there. See also GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY* 45 (2d ed. Foundation Press 1975).

82. *Exxon Corp. v. Chick Kam Choo*, 1994 AMC 609, 634; 37 Tex. Sup. Ct. J. 375 (Tex. 1994). But see, *contra*, *Miller v. American Dredging*, 114 S.Ct. 981, 1994 AMC 913 (1994).

83. The earliest U.S. cases applying the *forum non conveniens* doctrine were maritime decisions. See *Willendson v. Forsoket*, 29 F. C. 1284 (D.C. Penn. 1801) (No. 17,682); *Mason v. The Blaireau* 6 U.S. 240, 264 (1804). See generally Alexander M. Bickel, *The Doctrine of Forum Non Conveniens as Applied in the Federal Courts in Matters of Admiralty: An Object Lesson in Uncontrolled Discretion*, 35 CORNELL L.Q. 12 (1949); Robert Braucher, *The Inconvenient Federal Forum*, 60 HARV. L. REV. 908 (1947); Gordon W. Paulsen & Robert S. Burrick, *Forum Non Conveniens in Admiralty*, 13 J. MAR. L. COM. 343 (1982); Paula K. Speck, *Forum Non Conveniens and Choice of Law in Admiralty: Time for an Overhaul* 18 J. MAR. L. COM 185 (1987).

84. *The Bird of Paradise*, 72 U.S. 545, 555 (1866); 4,885 Bags of Linseed, 66 U.S. 108, 114-115 (1861); WILLIAM TETLEY, *MARITIME LIENS AND CLAIMS* 344 (1985); *The Volunteer*, 28 F. C. 1260, 1266 (D. Mass. 1834)(No. 16,991)(Story, J., citing *Abbott, Cleirac, Valin and Louis XIV's ORDONNANCE DE LA MARINE* (1681)). In French civil law, the carrier's privilege on cargo for the payment of freight, provided at article 23 of Law 66-420 of June 18, 1966, may be traced back to the French CODE OF COMMERCE (1807) at arts. 307-308; from there to Louis XIV's ORDONNANCE DE LA MARINE OF 1681, BOOK II, TITLE III, ART. XXIV (see 30 F. C. 1203, 1208); and beyond that to Roman law. See RODIÈRE, *AFFRÈTEMENTS ET TRANSPORTS* 563 (Tome II, Dalloz, 1968). See also 2 VALIN, *COMMENTAIRE SUR L'ORDONNANCE DE LA MARINE*, LIVRE III, Titre I, art. 11, (2d ed. 1841).

85. *The Searaven*, 288 F. Supp. 77, 80, 1968 AMC 704, 708 (C.D. Cal. 1967); *rev'd on appeal on other grounds*; *Beverly Hills B. & T. Co. v. Nav. Almirante S.A.*, 437 F. 2d 301, 1971 AMC 890 (9th Cir. 1971); *Jebsen v. A Cargo of Hemp*, 228 F. 143, 149 (D. Mass. 1915); *The Jackie Hause*, 181 F. Supp. 165, 170, 1961 AMC 83, 88 (S.D.N.Y. 1960); TETLEY, *supra* note 84, at 344-345. Conversely, U.S. admiralty law recognizes a contract maritime lien for cargo damage, as well as charterer's liens for breach of charterparty. See TETLEY, *supra* note 84, at ch. 18. This lien may also be derived from the ORDONNANCE DE LA MARINE (1681) (BOOK I, TITLE XIV, ART. XVI). See Francesco Berlingieri, *Lien holders and mortgagees: who should prevail?* [1988] LMCLQ 157, 160.

86. *The Hyperion's Cargo*, 12 F. C. 1138 (D. Mass. 1871) (No. 6,987), *aff'd sub nom*;

In *The Hyperion's Cargo*, a leading decision on the lien for demurrage, Lowell, D.J., after reviewing French commercial law and referring to Valin, Pardessus and the Rôles of Oléron, noted the inability of the English law courts to recognize or enforce such a lien except by contract and concluded:

"My own conviction is that the privilege of the ship-owner in the admiralty is not limited by the master's lien at common law, but depends on the law-merchant, and that by the law-merchant the privilege extends to all charges, damages and expenses arising out of affreightment."⁸⁷

(i) Maintenance and cure expenses, the costs of normal medical care and treatment of a seaman for a reasonable period of time while he recovers from an illness or injury suffered (without wilful misconduct on his part) while in the service of the ship,⁸⁸ must be borne by the ship-owner. Maintenance and cure is a principle of ancient origin, introduced into the old European sea codes primarily to encourage seamen to participate in the defence of their vessels against piracy.⁸⁹ It may be traced back to the Rôles of Oléron,⁹⁰ the Laws of Wisbuy,⁹¹ the Laws of the Hanse Towns⁹² and others.⁹³ This general maritime law principle was acknowledged early on in American admiralty jurisprudence as an "immutable obligation that would be read into every seaman's contract".⁹⁴

Donaldson v. McDowell, 7 F. Cas. 887 (D. Mass. 1873) (No. 3,985); *The Saturnus*, 250 F. 407, 411 (2 Cir. 1918); *California & Eastern Steamships Co. v. 138,000 feet of Lumber*, 23 F. 2d 95, 96, 1928 AMC 73, 76 (D. Md. 1927); TETLEY, *supra* note 84, at 345-346.

87. *The Hyperion's Cargo*, 12 F. C. 1138, 1139.

88. TETLEY, *supra* note 84, at 120.

89. See John W. Sims, *The American Law of Maritime Personal Injury and Death: An Historical Review*, 55 TUL. L. REV. 973, 975 (1981). See also John B. Shields, *Seamen's Rights to Recover Maintenance and Cure Benefits*, 55 TUL. L. REV. 1046 (1981). See also Mitchell v. Trawler Racer Inc., 362 U.S. 539, 543-44, 1960 AMC 1503, 1507 (1960).

90. RÔLES OF OLÉRON, arts. VI and VII. See 30 F. C. 1171, 1174.

91. LAWS OF WISBUY, arts. XVIII and XIX. See 4 TWISS, BLACK BOOK OF THE ADMIRALTY 270 (1876); 30 F. C. 1189, 1191.

92. LAWS OF THE HANSE TOWNS (c. 1597), arts. XXXV and XLV. See 30 F. C. 1197, 1199-1200.

93. Maintenance and cure provisions are found in the sea codes of Gotland, Bruges, Dantzig and Flanders. See Sims, *supra* note 89. See also the ORDONNANCE DE LA MARINE (1681), BOOK II, TITLE FOURTH, ARTS. XI AND XII (30 F. C. 1203, 1209). See also FR. CODE DE COMMERCE, 1807, art. 262. These and other civilian authorities, including the codes of Italy, Belgium, Netherlands, Brazil, Chile, Argentina, Portugal, Spain and Germany, were cited expressly in *The Osceola*, 189 U.S. 158, 168-70 (1903). See also arts. 79-86 of the French Maritime Labour Code.

94. Sims, *supra* note 89, at 978. See also *Evans v. Blidberg Rothchild Co.*, 382 F. 2d 637, 639 (4 Cir. 1967), where Boreman, C.J. declared that the shipowner's obligation to pay for maintenance and cure was: "... is a contractual form of compensation given by general maritime law to a seaman who falls ill while in the service of his vessel. The shipowner's obligation is deep-rooted in maritime law and is an incident or implied term of a contract for maritime employment". Early U.S. recognition of maintenance and cure is seen in *Harden v. Gordon*, 11 F. C. 480 (C.C.D. Me. 1823) (No. 6,047) (Story, J.); *Reed v. Canfield*, 20 F. C. 426 (C.C.D. Mass.

It is still a vibrant doctrine.⁹⁵

(j) Equity, understood not as the body of law administered by the Court of Chancery in England, but rather as the doing of justice to the parties⁹⁶ is “. . . no stranger in [U.S.] admiralty; admiralty courts are, indeed, authorized to grant equitable relief.”⁹⁷ Equity has been applied, as part of the general maritime law of the United States, in awarding attorney’s fees;⁹⁸ in ordering the payment of wharfage expenses as expenses in *custodia legis* (therefore outranking maritime liens) in respect of a vessel arrested and sold in a judicial sale;⁹⁹ in granting an equitable lien,¹⁰⁰ in permitting the U.S. Government to claim against the proceeds of the judicial sale of a ship for damage to navigational aids;¹⁰¹ and in altering normal rules of ranking of maritime claims where equitable considerations warrant so doing.¹⁰² There are many other examples as well,

1842)(No. 11,641) (Story, J.); *Brown v. Overton*, 4 F. C. 418 (D. Mass. 1859) (No. 2,024); *Knight v. Parsons*, 14 F. C. 776 (D. Mass. 1855) (No. 7,886); *The Osceola*, 189 U.S. 158 (1903). To secure prompt treatment of seamen aboard ship, the U.S. Congress, as early as 1790, passed an act requiring vessels above a certain size to carry a ship’s medicine chest. See Act of 1790, ch. 29, s. 8, 1 Stat. 134, 46 U.S.C s. 666. An Act of 1798, ch. 77, s. 4, 1 Stat. 606 further provided for the creation of a seamen’s hospital where sick and injured mariners could receive free medical care, paid for by contributions of twenty cents a month, deducted by masters from their wages. See Sims, *supra* note 89, 980-81.

95. Shields, *supra* note 89. See also GRANT GILMORE & CHARLES L. BLACK, JR., *THE LAW OF ADMIRALTY*, 281-324 (2d ed. Foundation Press 1975); I THOMAS J. SCHOENBAUM, *ADMIRALTY AND MARITIME LAW* 348-353 (2d ed. West 1994).

96. TETLEY, *supra* note 84, at 392.

97. *Vaughan v. Atkinson* 369 U.S. 527, 530, 1962 AMC 1131, 1133 (1962). See also *Swift v. Compania Colombiana del Caribe*, 339 U.S. 684, 691-92, 1950 AMC 1089,1095 (1950):

“We find no restriction upon admiralty by chancery so unrelenting as to bar the grant of any equitable relief even when that relief is subsidiary to issues wholly within admiralty jurisdiction.”

See also *Brown v. Lull*, 4 F. C. 407, 409 (C.C.D. Mass. 1836) (No. 2,018):

“Courts of admiralty . . . act upon the enlarged and liberal jurisprudence of courts of equity; and, in short, so far as their powers extend, they act as courts of equity.”

98. *Vaughan v. Atkinson*, *supra* note 97. Attorney’s fees were also awarded in this case as damages on the ground that the seaman’s employer had been callous and unreasonable in denying the seaman his rightful wages and maintenance and cure. See TETLEY, *supra* note 84, at 83-84.

99. *The Poznan*, 274 U.S. 117, 121, 1927 AMC at 723, 725-26 (1927):

“The most elementary notion of justice would seem to require that services or property furnished upon the authority of the court or its officer, acting within his authority, for the common benefit of those interested in a fund administered by the court, should be paid from the fund as an ‘expense of justice’.”

This decision was based on “equity and conscience”. See also TETLEY, *supra* note 84, at 78-79, 395.

100. *The Zizania*, 1934 AMC 770, 774-75 (D. Mass. 1934). The equitable lien, rather than a maritime lien, was granted to a person who had advanced money to repair a ship when he expected to form a company to operate the ship with the owner. See TETLEY, *supra* note 84, at 395.

101. *United States v. Maryland Casualty*, 235 F.2d 50, 54; 1956 AMC 1822, 1826 (5th Cir. 1956). See TETLEY, *supra* note 84, at 395.

102. *Ardell Marine Corp. v. Vessel Mars*, 163 F. Supp. 691, 692-93, 1958 AMC 2193, 2195

notably marshalling of claims.¹⁰³

Because equity is also known to the civil law,¹⁰⁴ its application in U.S. admiralty cases may be seen as another example of a *ius commune* in contemporary maritime law, linking the civilian and common law traditions.

IX. OTHER EXAMPLES OF THE GENERAL MARITIME LAW

1) *General Average*

General average means general loss ("*avarie*" in French means loss). It is a loss shared by all the parties to a maritime adventure when, for example, the mast is cut or the anchor cable is cut or cargo is jettisoned to save the ship and all the other cargo.

General average continues to exist today in the U.S., the U.K., France, Canada and all the world's shipping nations under the York-Antwerp Rules 1994,¹⁰⁵ which were first adopted as the Glasgow Resolutions of 1860, to become the York Rules of 1864 and the York/Antwerp Rules of 1877, 1890, 1924, 1950, 1974, 1990 and, finally, 1994.

The Rules have their existence and authority only by agreement between merchants who incorporate them voluntarily into bills of lading and charterparties. They are not the subject of national statutes or international conventions.

General average is a case of the *lex maritima*, dating back to the

(E.D.N.Y. 1958); *Schilling Trustee v. Dannebrog*, 320 F.2d 628, 633, 1964 AMC 678, 685-86 (2d Cir. 1963); *Florida Bahamas Lines v. Barge Star 800*, 1970 AMC 2189, 2199 (5th Cir. 1970); *Payne v. S.S. Tropic Breeze* 423 F.2d 236, 239, 1970 AMC 1850, 1855 (1st Cir. 1970); *Ramsay Scarlett v. Koh Eun* 462 F. Supp. 277, 288, 1979 AMC 970, 984 (E.D. Va. 1978). See TETLEY, *supra* note 84, at 395-96.

103. See jurisprudence cited by TETLEY, *supra* note 84, at 396. Marshalling is the equitable process whereby the Admiralty Marshal or court orders a creditor who has a secured right on more than one *res* or fund belonging to the debtor, or security from two or more debtors for the same debt, to exercise his right in a manner conforming to the best interests of all creditors. *Id.* at 393-394. See also *The Edith*, 94 U.S. 518 (1876).

104. Although equity does not play as large a role in civil law systems as in common law jurisdictions, its existence is expressly acknowledged in many civil codes. See, e.g., art. 1135 c.c. (Fr.):

(translation): "Agreements extend not only to what is expressed in them but also to all the consequences which equity, usage and law give to the obligation according to its nature." See also the Québec Civil Code 1991 (in force January 1, 1994), art. 1434 c.c.:

"A contract validly formed binds the parties who have entered into it not only as to what they have expressed in it but also as to what is incident to it according to its nature and in conformity with usage, equity or law."

105. York-Antwerp Rules 1994 adopted by the Comité Maritime International (CMI) in Sydney in 1994.

Rhodian Law of 800-900 B.C., and still existing today.¹⁰⁶

2) *Marine Insurance*

Like general average, marine insurance is of Continental origin, having been developed by Lombard merchants in northern Italy in the twelfth century, from which these same merchants brought it to the cities of the Hanseatic League and to England (London) as early as the mid-thirteenth century.¹⁰⁷ Like other aspects of the European *lex mercatoria*, its usages came to be codified in various ordinances and early codes on the Continent.¹⁰⁸

106. TETLEY, *supra* note 84, at 714. See also LOWNDES & RUDOLF, *THE LAW OF GENERAL AVERAGE AND THE YORK-ANTWERP RULES 1-2* (D.J. Wilson & J.H.S. Cooke eds., 11th ed. Sweet & Maxwell 1990). See also *Simonds v. White* 2 B. & C. 805, 811, 107 Eng. Rep. 582, 584 (1824), per Abbott, C.J.:

“The principle of general average . . . is of very ancient date, and of universal reception among commercial nations. The obligation to contribute, therefore, depends not so much upon the terms of any particular instrument as upon a general rule of maritime law.”

See also 1 J.M. PARDESSUS, *COLLECTION DES LOIS MARITIMES ANTÉRIEURES AU DIX-HUITIÈME SIÈCLE XXIX* (1828), considers it probable that the Rhodians borrowed their maritime laws from the Phoenicians. The Romans devoted a chapter of Justinian’s Digest (DIG XIV, Title 2) to *De Lege Rhodia de Jactu*. There are references to what is in effect general average in the RÔLES OF OLÉRON at arts. VIII and IX (30 F. C. 1171, 1175-1176); the LAWS OF WISBUY at arts. XX and XXI (30 F. C. 1189, 1191); and the ORDONNANCE DE LA MARINE (1681), TITLE SEVENTH (30 F. C. 1203, 1214-1215).

The earliest known English report of a dispute over a general average contribution is a decision of the Court of King’s Bench, dating from 1285. See 1 G.O. Sayles, *Select Cases in the Court of King’s Bench 156-157* (Selden Society, Vol. 55, London, 1936), *reprinted in* LOWNDES & RUDOLF, *THE LAW OF GENERAL AVERAGE AND THE YORK-ANTWERP RULES 10-11* (D.J. Wilson & J.H.S. Cooke eds., 11th ed., Sweet & Maxwell 1990). The earliest definitions of general average are to be found in the *Guidon de la Mer* (1556-1584), the ORDONNANCE DE LA MARINE OF LOUIS XIV (1681), BOOK II, TITLE SEVENTH, (30 F. C. 1203, 1214-1215), and the Ordinances of Rotterdam (1721), Königsberg (1730), Hamburg (1731) and Stockholm (1750). See Lowndes & Rudolf, *The Law of General Average and the York-Antwerp Rules 10-11* (D.J. Wilson & J.H.S. Cooke eds., 11th ed. Sweet & Maxwell 1990).

107. ALEX L. PARKS, 1 *THE LAW AND PRACTICE OF MARINE INSURANCE AND AVERAGE 4-8* (Cornell Maritime Press 1987). In England, King Henry IV granted the Lombard merchants a special section of the City of London in which to conduct their trade and live, which became “Lombard Street”. Parks further notes (at p. 6) that the Lloyd’s form of marine insurance policy, first adopted in 1779, and reproduced in the First Schedule to the Marine Insurance Act, 1906, 7 Edw. 6, ch. 41 (Eng.), still contains a reference to Lombard Street.

108. WILLIAM GOW, *MARINE INSURANCE* (4th ed. McMillan & Co. Ltd. 1913), notes that the insurance usages of the medieval merchants are reflected in the Ordinances of Barcelona (1434, 1458, 1461 and 1484); Florence (1523), Burgos (1538), Bilbao (1560), Middleburg (1600), Rotterdam (1604, 1635 and 1655), the *Guidon de la Mer* (Rouen, 1556-1584), the *Us et Coutumes de la Mer* by Cleirac (1656) and Louis XIV’s ORDONNANCE DE LA MARINE BOOK II, TITLE SIXTH (1681); see 30 F. C. 1203, 1211-1214. See PARKS, *supra* note 107, at 5.

The earliest reference to a marine insurance policy in the English Court of Admiralty is found in *Broke v. Maynard* in 1547. See Selden Society, *SELECT PLEAS IN THE COURT OF ADMIRALTY* File 27, 1547-1602, No. 147 Vol. II, vol. XI (1897). Part of the decision is in Italian. PARKS, *supra* note 107 at 7 also notes that the insurance term “policy” is “. . . clearly derived from the Italian

In England, prior to the enactment of the Marine Insurance Act, 1906,¹⁰⁹ the law of marine insurance was part of the common law, and was developed largely by Lord Mansfield, Chief Justice of King's Bench from 1756 to 1788. That famous jurist referred frequently to the Continental ordinances and codes to find the legal principles enshrined in his judgments and he also made use of mercantile jurors.¹¹⁰

The 1906 statute was intended to be a codification of the common law without amendment, including recognized commercial usage.¹¹¹

Sect. 91(2) of the Marine Insurance Act 1906¹¹² clearly preserves the historic sources of marine insurance:

"The rules of the common law including the law merchant, save in so far as they are inconsistent with the express provisions of this Act, shall continue to apply to contracts of marine insurance."

The *lex mercatoria* therefore continues to play a significant role in this vital area of maritime law. In Canada, the Marine Insurance Act 1993¹¹³ is a virtual replica of the U.K. Act of 1906 and thus preserves and reinforces the *ius commune* underlying both enactments.

In the United States, where marine insurance is still uncodified, there is a conscious effort by the U.S. Supreme Court to keep American decisions on marine insurance in line with the general principles of English law on marine insurance,¹¹⁴ thus safeguarding the *ius commune* character of that law.

polizza, meaning a promise or undertaking", and that the wording of the old English form of marine insurance policy is similar to that of the Ordinance of Florence (1523).

In 1601, the English Parliament enacted the first statute relating to marine insurance, An Act concerning matters of assurances used among merchants, 40 Eliz. I, ch. 12 (Eng.), establishing a special court composed of the Admiralty Judge, the Recorder of the City of London, two doctors of the civil law, two common lawyers and eight "grave and discreet merchants", for the trial of insurance causes. See PARKS, *supra* note 107, at 7.

109. Marine Insurance Act, 1906, 6 Edw. 7, ch. 41 (U.K.).

110. PARKS, *supra* note 107, at 11.

111. *Id.* at 11, citing Chalmers (draftsman of the Marine Insurance Act, 1906) in the first edition of his digest relating to the Act, 1901.

112. Marine Insurance Act, 1906, 6 Edw. 7, ch. 41 (U.K.). See also the related provision of the Canadian Marine Insurance Act, S.C., ch. 22, § 90 (1993)(Can.), which reads:

Any right, duty or liability that arises under a contract by implication of law, or that is established by this Act and may be lawfully modified by the parties to a contract, *may be negated or varied by express agreement or by usage of the trade if the usage binds both parties to the contract.* (Emphasis added)

113. Canadian Marine Insurance Act, S.C., ch. 22 (1993)(Can.).

114. LESLIE J. BUGLASS, MARINE INSURANCE AND GENERAL AVERAGE IN THE UNITED STATES 4 (3rd ed. Cornell Maritime Press 1991).

See, e.g., Standard Oil Co. of New Jersey v. U.S., 340 U.S. 54, 59, 1951 AMC 1, 5 (1950); Queen Ins. Co. v. Globe & Rutgers Fire Ins. Co., 263 U.S. 487, 493, 1924 AMC 107, 109 (1924); Calmar S.S. Corp. v. Scott, 345 U.S. 427, 443, 1953 AMC 952, 965 (1953).

3) *Pre-judgment interest*

Interest has always been an integral part of damages in Admiralty, following its civil law tradition, as Sir Robert Phillimore stated in 1869 in *The Northumbria*:

“The principle adopted by the Admiralty Court has been that of the civil law, that interest was always due to the obligee when payment was not made, *ex mora* [out of delay] of the obligor; and that, whether the obligation arose *ex contractu* or *ex delicto*.”¹¹⁵

The Supreme Court of Canada, in *Canadian General Electric v. Pickford & Black Limited*, reiterated the point:

“It is thus well settled that there is a clear distinction between the rule in force in the common law courts and that in force in admiralty with respect to allowing a claim for interest as an integral part of the damages awarded.”¹¹⁶

The above rule, founded on the civilian principle of *restitutio in integrum*, has resulted in a tendency of courts to award pre-judgment interest as an integral part of damages in maritime cases in the U.K.,¹¹⁷ Canada,¹¹⁸ and the U.S.¹¹⁹

115. *The Northumbria*, (1869) L.R. 3 A. & E. 6, 10 (High Ct. of Adm.).

116. *Canadian General Electric v. Pickford & Black Limited*, [1972] S.C.R. 52, 57, (1971) 20 D.L.R.3d 432, 436.

117. *The Dundee*, (1827) 2 Hagg. 137, 144, 166 Eng. Rep. 194, 196 (High Ct. of Adm.); *The Gazelle*, (1844) 2 W. Rob. 279, 281, 166 Eng. Rep. 759, 760 (High Ct. of Adm.); *The Hebe*, (1847) 2 W. Rob. 530, 536-537, 166 Eng. Rep. 855, 858 (High Ct. of Adm.); *The Northumbria*, (1869) L.R. 3 A. & E. 6, 10; *The Joannis Vatis*, (No. 2) [1922] P. 213, 223; *The Berwickshire*, [1950] P. 204, 209 (Eng. C.A.).

118. *Canadian Brine Ltd. v. The Scott Misener and her Owners* [1962] Ex. C.R. 441, 452; *Canadian General Electric Co. Ltd. v. Pickford & Black Ltd.*, [1972] S.C.R. 52, 57, (1971) 20 D.L.R.3d 432, 436; *Drew Brown Ltd. v. The Orient Trader*, [1974] S.C.R. 1286, 1309, (1973) 34 D.L.R.3d 339, 355; *Bell Telephone Co. v. The Mar-Tirenno*, [1974] 1 F.C. 294, 311, (1975) 52 D.L.R.3d 702, 715 (F. Ct. of Can.), *aff'd* [1976] 1 F.C. 539, (1977) 71 D.L.R.3d 608 (F. Ct. of App.); *Davie Shipbuilding v. The Queen* [1984] 1 F.C. 461, 471, (1984) 4 D.L.R.4th 546, 554 (F. Ct. of App.); *Carling O'Keefe Breweries v. CN Marine Inc.*, [1990] 1 F.C. 483, 505, 1990 AMC 997, 1015 (F. Ct. of App.); *Ontario Bus Industries v. The Federal Calumet*, (1993) 150 N.R. 149, 150 (F. Ct. of App.); *Canastrand Industries Ltd. v. The Lara S.*, [1993] 2 F.C. 553, 618 (F. Ct. of Can.).

119. *The Maggie J. Smith*, 123 U.S. 349 at 356 (1887). In the U.S., pre-judgment interest is generally available in admiralty, except where “peculiar circumstances” exist. See *The President Madison*, 91 F. 2d 835, 847, 1937 AMC 1375, 1395 (9th Cir. 1937); *Inland Oil Transport Co. v. Ark-White Towing Co.*, 696 F. 2d 321, 327 (5th Cir. 1983); *Reeled Tubing Inc. v. M/V Chad G.*, 794 F. 2d 1026, 1028 (5th Cir. 1986); *In re P. & E. Boat Rentals, Inc.*, 872 F. 2d 642, 654-55, 1989 AMC 2447, 2465 (5th Cir. 1989); *Mid-America Transportation Co. v. Rose Barge Line, Inc.*, 477 F. 2d 914, 916, 1973 AMC 2251, 2253 (8th Cir. 1973); *United States v. M/V Gopher State*, 614 F. 2d 1186, 1190 (8th Cir. 1980). See generally, David Gray Douglas, *The Current Status of the Availability of Prejudgment Interest in Admiralty*, 17 TUL. MAR. L.J. 283 (1993).

4) *Salvage*

While its true origins are unknown, salvage law is of ancient origin in the maritime world. Browne saw it as a "quasi-contract" related to the civil law concept of *negotiorum gestio*.¹²⁰ The remuneration of a successful salvor at sea is referred to at arts. IV, XXIX and XXX of the later versions of Rôles of Oléron¹²¹ and Chapter CCXLV of the *Consolato del Mare*.¹²² Salvage in England developed differently, however, being based upon the "no-cure-no-pay" principle, under which unsuccessful efforts were not rewarded, as compared to the principle of "assistance" in civil law jurisdictions, under which the salvor is remunerated even if his efforts are unsuccessful. The 1910 Salvage Convention,¹²³ to which most maritime nations are parties, although worded to include both "assistance" and "salvage", really constituted the victory of the common law "no cure no pay" principle over the civilian "assistance" doctrine.

Salvage liens in the U.K., U.S. and Canada have their origin in the general maritime law,¹²⁴ but are now also mentioned in statutes.¹²⁵

5) *Bottomry and Respondentia*

Bottomry (the pledge of the ship and/or its apparel by the master away from the home port) is another maritime law institution of venerable age. Article I of the Rôles of Oléron authorized the master to

120. 2 ARTHUR BROWNE, A COMPENDIOUS VIEW OF THE CIVIL LAW AND OF THE LAW OF THE ADMIRALTY 122 (1802). See also CHARLES ABBOTT (LORD TENTERDEN), A TREATISE OF THE LAW RELATIVE TO MERCHANT SHIPS AND SEAMEN 320 (1st ed. 1802): "All foreign codes of maritime law, both ancient and modern, contain provisions and enactments on this head [salvage]."

121. 30 F. C. 1171, 1172 and 1183. See also 2 TWISS, BLACK BOOK OF THE ADMIRALTY 437 (art. IV), 461 (art. XXVI), and 463 (art. XXVII)(1873). Art. XXIX (30 Fr. C. 1183) provides, for example, that "there may be a remuneration or consideration for salvage to such as take pains therein, according to right reason, a good conscience, and as justice shall appoint". Art. XXX (30 F. C. 1183) authorizes the distribution of the goods saved "according to the hazard run, and to pains taken therein". It is interesting to compare these ancient provisions with those of the 1910 Salvage Convention, September 23, 1910, (adopted at Brussels), art. 7, second para., art. 8a.

122. PARDESSUS, COLLECTION DES LOIS MARITIMES ANTÉRIEURES AU DIX-HUITIÈME SIÈCLE 49 (Tome II, Paris, 1828). See also, TETLEY, MARITIME LIENS AND CLAIMS 134 (Yvon Blais, Montreal, 1985).

123. Adopted at Brussels, September 23, 1910.

124. 30 F. C. 1171. 2 SIR TRAVERS TWISS, BLACK BOOK OF THE ADMIRALTY 211 (London, 1873); TETLEY, *supra* note 122, at p. 9. Francesco Berlingieri, *Lien holders and mortgagees: who should prevail?* [1988] LMCLQ 157, 160-161, points out that although neither the ORDONNANCE DE LA MARINE (1681) nor the FR. CODE DE COMMERCE (1807) conferred a privilege for salvage, such a privilege was generally thought to exist in France at least as of 1809. Moreover, salvage was mentioned at art. 754 of the German Commercial Code.

125. See the Supreme Court Act, 1981, ch. 54, § 20(2)(j) (U.K.); 46 U.S. Code § 31301(5)(F) and the Federal Court Act, R.S.C. 1985, ch. F-7, § 22(2)(j); Law No. 67-5 of January 3, 1967 (France) at art. 31(4).

pledge the ship's equipment, upon the advice of the crew, if he required money for the expenses of the ship.¹²⁶

The Rôles of Oléron, at art. III, refer to *respondentia*, the pledge of the ship's cargo.¹²⁷

Bottomry and *respondentia* are very civilian concepts, because they are basically pledges, although they too are now contemplated by statutory jurisdictional provisions in the U.K.¹²⁸ and Canada.¹²⁹

Bottomry and *respondentia*, although still found in modern statute law, are never practiced today. Nevertheless, recently in Montreal, when a shipowner of a bankrupt steamship company disappeared, a bottomry bond was contemplated by the master who wished to complete the voyage.

X. THE MODERN LEX MARITIMA - COMMON FORMS, TERMS & PRACTICES

Besides the historic general maritime law referred to above, a modern *lex maritima* exists in international bill of lading and charterparty forms and in universal terms and practices throughout the shipping world. A voyage charterparty entered into in any country in the world has terms with common meanings. For sample voyage charterparty forms, see the Amwelsh Form, the Baltimore Form, the C(Ore) 7 Form, the Gencon Form, the Norgrain Form, the Sugar Charter-Party Form and the Asbatankvoy Form¹³⁰. Well-known time charterparty forms are also in widespread use around the world, including, among others, the New York Produce Exchange Form (NYPE), the Baltic and International Maritime Conference Uniform Time-Charter (Baltime) and the STB

126. 4 TWISS, *supra* note 13, at 278 (1876); TETLEY, *supra* note 4, at p. 12; 30 F. C. 1189, 1193. See also, The Laws of the Hanse Towns, art. LX, 30 F. C. 1197, 1201. The Laws of Wisbuy, at art. XLV, also refer to bottomry (see 30 F. C. 1189, 1193), as does the ORDONNANCE DE LA MARINE, Book II, Title Fifth (see 30 F. C. 1203 at pp. 1210-1211). The claim of the lender for repayment under a bottomry bond was secured by a privilege in the ORDONNANCE DE LA MARINE (1681) of Louis XIV (Book I, Title XIV, art. XVI) and under art. 191 of the French CODE DE COMMERCE (1807). It was adopted as part of the commercial codes of the Kingdom of Sardinia, Italy, Spain, Brazil, Argentina, Chile and Germany. England also granted a maritime lien for bottomry. See The Tobago (1804) 5 C. Rob. 218, 165 Eng. Rep. 754; *The Rhadamanthe* (1813) 1 Dods. 201, 165 Eng. Rep. 1283; The Great Pacific (1869) L.R. 2 P.C. 216. The United States also conferred a lien for bottomry. See GILMORE & BLACK, THE LAW OF ADMIRALTY 690 (Foundation, Mineola, N.Y., 2 ed., 1975). See also Francesco Berlingieri, *Lien holders and mortgagees: who should prevail?* [1988] LMCLQ 157, 158.

127. 3 TWISS, *supra* note 13, at 4-5 (1874); TETLEY, *supra* note 4, at 9.

128. Supreme Court Act, 1981, ch. 54, § 20(2)(r) (bottomry) (U.K.).

129. Federal Court Act, R.S.C. 1985 ch. F-7, § 22(2)(c) (bottomry or *respondentia*).

130. COOKE, KIMBALL ET AL., VOYAGE CHARTERS 853-903 (Lloyd's, London, 1993).

Form of Tanker Time Charter.¹³¹ The Uniform Rules for Sea Waybills 1990¹³² of the Comité Maritime International (CMI) and the Voyage Charterparty Laytime Interpretation Rules 1993¹³³ are additional examples of modern *lex maritima* documents, reflecting a consensus on basic rules and definitions of legal terms among various participants in the world shipping community.¹³⁴ They exist without any national or international legislation.

Similarly, many bill of lading forms have been adopted for international use, with internationally accepted meanings, without the benefit of any intervention by national or international governments.¹³⁵

XI. ARBITRATION AND A MODERN LEX MERCATORIA

1) Introduction

Is there a modern *lex mercatoria* or *jus gentium* in international arbitration, i.e. a modern, transnational commercial law, not adopted in any national statute or code, which arbitrators may apply in arbitrating international commercial disputes? The debate is well-known and it is not intended in the present article to settle the dispute, but to rather offer one explanation as to why the controversy exists.

131. For the texts of the NYPE, Baltimore and STB time charterparties, see WILFORD, COGHLIN & KIMBALL, *TIME CHARTERS* 1-20 (3rd ed. Lloyd's 1989).

132. Adopted by the CMI at Paris in 1990.

133. Issued jointly by the Baltic and International Maritime Conference (BIMCO), the Comité Maritime International (CMI), the Federation of National Associations of Ship Brokers and Agents (FONASBA) and the General Council of British Shipping (GCBS). For text, see *CMI Newsletter* No. 3 (1993), at 2-4.

134. The Uniform Customs and Practice for Documentary Credits, 1993 Revision, is a modern example of the codification of *lex mercatoria*. See *ICC Publications* No. 500.

135. See, e.g., "Liner Bill of Lading", code name "Conlinebill," of the Baltic and International Maritime Conference (BIMCO). See also "Combined Transport Bill of Lading", code name "Combiconbill", also of BIMCO.; Even within the United States, Michael Conant, in *The Commerce Clause, the Supremacy Clause and the Law Merchant: Swift v. Tyson and the Unity of Commercial Law*, 15 J. MAR. L. & COM. 153, 178 (1984), has expressed the view that the Uniform Commercial Code should be applied by U.S. federal courts as "the national law merchant" and that the Code should be interpreted "using the principles of the Civil Law." See also U.C.C. § 1-105, cmt. 3, 1 U.L.A. 53 (1989):

"Application of the Code in such circumstances may be justified by its comprehensiveness, by the policy of uniformity, and by the fact that it is in large part a reformulation and restatement of the law merchant and of the understanding of a business community which transcends state and even national boundaries."

See also Friedrich K. Juenger, *Afterword: The Lex Mercatoria and the Conflict of Laws*, in *LEX MERCATORIA AND ARBITRATION* 213, 219 (Thomas Carbonneau ed., Transnational Juris Publication 1990): "In substance . . . the Code, as its framers realized, reflects an American law merchant."

2) *The authorities - a divided view*

Certain authorities, including Lando,¹³⁶ Goldman,¹³⁷ Lew,¹³⁸ Schmitthoff,¹³⁹ Lowenfeld¹⁴⁰ and Kahn,¹⁴¹ Fouchard,¹⁴² Francescakis,¹⁴³ Oppetit,¹⁴⁴ Robert,¹⁴⁵ Carbonneau,¹⁴⁶ Berman and Dasser¹⁴⁷ believe in the existence of a *lex mercatoria* in international commercial arbitration.

136. Ole Lando, *The Lex Mercatoria in International Commercial Arbitration* (1985) 34 INT'L & COMP. L.Q. 747; Ole Lando, *Conflict of Law Rules for Arbitrators* in Festschrift für Konrad Zweigert (Mohr, Tübingen 1981).

137. Berthold Goldman, *La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives* in CLUNET 1979, 425, also published in THE INFLUENCE OF THE EUROPEAN COMMUNITIES UPON PRIVATE INTERNATIONAL LAW OF THE MEMBER STATES 209 (F. Rigaux ed., 1981). See also Goldman, *Frontières du droit et lex mercatoria* in ARCHIVES DE PHILOSOPHIE DU DROIT 177 (1964); *Les Conflits de lois dans l'arbitrage international de droit privé*, 109 R.C.A.D.I. 347 (1963-II); Goldman, *Introduction I* in LEX MERCATORIA AND ARBITRATION xv (Thomas E. Carbonneau ed., 1990); Goldman, *The Applicable Law: General Principles of Law - The Lex Mercatoria* in CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION 113 (Julian D.M. Lew ed., 1986).

138. JULIAN D.M. LEW, APPLICABLE LAW IN INTERNATIONAL COMMERCIAL ARBITRATION 436-437, para. 343 (Oceana 1978); CONTEMPORARY PROBLEMS IN INTERNATIONAL ARBITRATION (Julian D.M. Lew ed., 1986).

139. Clive M. Schmitthoff, *The Law of International Trade, Its Growth, Formulation and Operation*, in SOURCES OF THE LAW OF INTERNATIONAL TRADE 3 (Stevens 1964); Schmitthoff, *International Business Law, A New Law Merchant in 2* CURRENT LAW AND SOCIAL PROBLEMS 129 (R.St.J. Macdonald ed., 1961); SCHMITTHOFF, COMMERCIAL LAW IN A CHANGING ECONOMIC CLIMATE (2d ed., Sweet & Maxwell 1981); Schmitthoff, *International Trade Usages*, Institute for International Business Law and Practice, I.C.C. Publication No. 440/4; SCHMITTHOFF, EXPORT TRADE 655-656 (5th ed. Stevens 1990).

140. Andreas F. Lowenfeld, *Lex Mercatoria: An Arbitrator's View* 6(2) ARB. INT'L 133 (1990), also published in LEX MERCATORIA AND ARBITRATION 37 (Thomas E. Carbonneau ed., 1990); ANDREAS LOWENFELD, INTERNATIONAL LITIGATION AND ARBITRATION (West 1993).

141. PHILIPPE KAHN, LA VENTE COMMERCIALE INTERNATIONALE (1961); Philippe Kahn, *La Lex Mercatoria: point de vue français après quarante ans de controverses* 37 McGill L.J. 413 (1992); Philippe Kahn, *Les principes généraux du droit devant les arbitres du commerce international* in CLUNET 1989, 305.

142. PHILIPPE FOUCHARD, L'ARBITRAGE COMMERCIAL INTERNATIONAL 420 (1965). See also Fouchard, *L'arbitrage international en France après le décret du 12 mai 1981* in CLUNET 1982, 374, 396.

143. PHOCION FRANCESCAKIS, DROIT NATUREL ET DROIT INTERNATIONAL PRIVÉ; MÉLANGES OFFERTS À JACQUES MAURY 113 (1960, tome 1).

144. BRUNO OPPETIT, DROIT DU COMMERCE INTERNATIONAL 14-15 (Presses universitaires de France 1977).

145. JEAN ROBERT, L'ARBITRAGE. DROIT INTERNE ET DROIT INTERNATIONAL PRIVÉ 284-288, paras. 328-329 (5th ed., 1983). See also FILALI OSMAN, LES PRINCIPES GÉNÉRAUX DE LA LEX MERCATORIA (Librairie générale de droit et de jurisprudence 1992).

146. Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in LEX MERCATORIA AND ARBITRATION I (Thomas E. Carbonneau ed., 1990); CARBONNEAU, ALTERNATIVE DISPUTE RESOLUTION 59-104 (U. of Illinois Press 1989).

147. Harold J. Berman and Felix J. Dasser, *The 'New' Law Merchant and the 'Old': Sources, Content, and Legitimacy*, in LEX MERCATORIA AND ARBITRATION 21 (Thomas E. Carbonneau ed., 1990).

Others, including Mann,¹⁴⁸ Mustill and Boyd,¹⁴⁹ Mustill¹⁵⁰ and Rogers,¹⁵¹ Kassis,¹⁵² Lagarde,¹⁵³ Delaume,¹⁵⁴ and Klein¹⁵⁵ question whether there is such a *lex mercatoria*, while yet others are ambiguous on the question.¹⁵⁶ The debate is far from over.

There are also slightly different views as to the scope of the new law merchant, even among scholars who believe in its existence. Some authors see it as restricted to international trade usages and commercial customs, as well as certain general principles of law recognized by the world mercantile community. Others define the *lex mercatoria* more widely, to include also certain international conventions and even na-

148. F.A. Mann, *England Rejects 'Delocalized' Contracts and Arbitration* 33 INT'L & COMP. L.Q. 193, 196-197 (1984); Mann, *Private Arbitration and Public Policy*, 4 CIVIL JUSTICE QUARTERLY 257, 264 (1985); Mann, *Lex facit arbitrum*, in LIBER AMICORUM FOR MARTIN DOMKE 157 (Nijhoff 1967); Mann, *Introduction II*, in LEX MERCATORIA AND ARBITRATION XIX (Thomas E. Carbonneau ed., 1990).

149. MUSTILL AND BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 81 (2d ed. Butterworths 1989).

150. Michael J. Mustill, *The New Lex Mercatoria: The First 25 Years*, in LIBER AMICORUM FOR THE RIGHT HONORABLE LORD WILBERFORCE (Clarendon Press 1987) and 4 ARB. INT'L 86, 110-114 (1988); see also *Contemporary Problems in International Commercial Arbitration: A Response*, 17 INT'L BUS. L. 161 (1989).

151. Andrew Rogers, *Contemporary Problems in International Commercial Arbitration*, 17 INT'L BUS. L. 154, 159 (1989).

152. ANTOINE KASSIS, *THÉORIE GÉNÉRALE DES USAGES DU COMMERCE. DROIT COMPARÉ, CONTRATS ET ARBITRAGE INTERNATIONAUX, LEX MERCATORIA* 501 (Librairie Générale de Droit et de Jurisprudence 1983).

153. Paul Lagarde, *Approche critique de la lex mercatoria*, in LE DROIT DES RELATIONS ECONOMIQUES INTERNATIONALES: ÉTUDES OFFERTES À BERTHOLD GOLDMAN 125 (Librairies Techniques 1982).

154. Georges R. Delaume, *Comparative Analysis as a Basis of Law in State Contracts: The Myth of the Lex Mercatoria*, 63 TUL. L. REV. 575 (1989), also published in modified form as *The Myth of the Lex Mercatoria and State Contracts*, in LEX MERCATORIA AND ARBITRATION 77 (Thomas E. Carbonneau ed., 1990).

155. Klein, *De l'autorité et de la loi dans les rapports commerciaux internationaux*, in INTERNATIONAL LAW AND ECONOMIC ORDER, ESSAYS IN HONOUR OF F.A. MANN 617 (Beck 1977).

156. EUGEN LANGEN, *TRANSNATIONAL COMMERCIAL LAW* (Sijthoff 1973); Lando, *The Lex Mercatoria in International Commercial Arbitration* 34 INT'L & COMP. L.Q. 747, 752 (1985) (points out that *lex mercatoria* is "still a diffuse and fragmented body of law", although Lando believes that it does exist). In both 2 BATIFFOL & LAGARDE, *DROIT INTERNATIONAL PRIVÉ* 287-288, para. 578 (7th ed. L.G.D.J. 1983) and PIERRE MAYER, *DROIT INTERNATIONAL PRIVÉ* 22-23, para. 25, 439-440, para. 700 (4th ed. Montchrestien 1991) limitations of the *lex mercatoria*, as well as its lack of reception amongst the French judiciary, are pointed out. The extent of their criticism seems to be less than that to be found in the writings of Mustill or Mann, for instance. See also Roy Goode, *The Adaptation of English Law to International Commercial Arbitration* 8 ARB. INT'L 1(1992); Keith Hight, *The Enigma of the Lex Mercatoria*, 63 TUL. L. REV. 613 (1989), also published in LEX MERCATORIA AND ARBITRATION 99 (Thomas E. Carbonneau ed., 1990). See also William W. Park, *The Lex Loci Arbitri and International Commercial Arbitration* 32 INT'L & COMP. L.Q. 21 (1983); Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in LEX MERCATORIA AND ARBITRATION 109 (Thomas E. Carbonneau ed., 1990).

tional laws relating to international economic relations.¹⁵⁷ This debate is also a continuing one.

3) *Amiables compositeurs*

Certainly, where arbitrators have the authority of *amiables compositeurs*, they may settle the dispute according to legal principles they believe just.¹⁵⁸ This is true under art. 28 of the UNCITRAL Model Law on International Commercial Arbitration 1985,¹⁵⁹ which particularly refers to *amiables compositeurs*. In the same way, *amiable compositeur* clauses are permitted, in both internal and international arbitration, in

157. Berthold Goldman, *Introduction I*, in *LEX MERCATORIA AND ARBITRATION* xvii-xviii (Thomas E. Carbonneau ed., 1990). For an expansive view of the content of the new *lex mercatoria*, see Ole Lando, *The Lex Mercatoria in International Commercial Arbitration* 34 INT'L COMP. L.Q. 747, 748-751 (1985). See also Bernard Audit, *The Vienna Sales Convention and the Lex Mercatoria*, in *LEX MERCATORIA AND ARBITRATION* 139 (Thomas E. Carbonneau ed., 1990).

158. French courts have held, however, that the *lex mercatoria* is not merely equity, but is an authentic source of law. Accordingly, it has "juridicité" (legal character), so that arbitrators who render awards based on the *lex mercatoria* are not deciding as *amiables compositeurs*. See the Fougerolles case, *Cour de Cassation*, December 9, 1981, in *CLUNET* 1982, 931 (3e esp.), note B. Oppetit, *Dalloz*, 1983,238, note J. Robert, *J.C.P.* 1983.II.19971, note P. Level. The Austrian Supreme Court, in its decision in the Norsolor case, rendered on November 18, 1982 (*Revue de l'arbitrage* 1983, 513), upheld an I.C.C. arbitral award based on *lex mercatoria*, and the *Cour de Cassation* in France subsequently allowed the enforcement of that award. See (1985) 74 *Rev. cr. dr. int. pr.* 551 (2e espèce), note Dutoit, *Revue de l'arbitrage* 1985,431, note Goldman, *CLUNET* 1985, 680, note Ph. Kahn, *Dalloz*, 1985,101, note J. Robert. See also the Polish Ocean Line case, *Cour de Cassation*, March 10, 1993, in *CLUNET* 1993, 360, note Ph. Kahn. See also *Cour de Cassation*, February 5, 1991, *DMF* 1991, 292, note R. Achard, upholding an unreported decision of the *Cour d'appel de Versailles* of May 19, 1988, which held that seven Institute clauses (including the Institute Cargo clauses, War clauses and War Cancellation clauses) in a marine cargo insurance policy were: "a compilation of often ancient maritime usages, developed by the community of merchants without distinction of nationality, a true *lex mercatoria* to which marine transportation professionals ordinarily refer; . . ." (translation). Arbitrators empowered to decide *ex aequo et bono* in effect rely frequently on general principles of law and international trade usages, so that *amiable composition* clauses implicitly designate *lex mercatoria*. See B. Goldman, *La lex mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspectives* in *CLUNET* 1979, 481. See also generally E. LOQUIN, *L'AMIABLE COMPOSITION EN DROIT COMPARÉ ET INTERNATIONAL: CONTRIBUTION À L'ÉTUDE DU NON-DROIT DANS L'ARBITRAGE COMMERCIAL* (Librairies Techniques 1980).

159. Adopted June 21, 1985. See also UNCITRAL Arbitration Rules, adopted April 29, 1976, at art. 33(2) and the Rules of Procedure of the Inter-American Commercial Arbitration Commission, amended and in effect January 1, 1978, at art. 33(2). See also The European Convention on International Commercial Arbitration, 1961, art. VII (2) (Geneva)(which permits arbitrators to act as *amiables compositeurs* if the parties have agreed and if the law applicable to the arbitration permits). See also The Convention on the Settlement of Investment Disputes between States and Nationals of other States, March 18, 1965, art. 42(3)(Washington, D.C.) (allowing the Tribunal to decide a dispute *ex aequo et bono* if the parties so agree). On equity and *amiable compositeur* clauses in civil and common law and under the UNCITRAL Model Law, see also John E.C. Brierley, 'Equity and Good Conscience' and *Amiable Composition* in *Canadian Arbitration Law*, 19 *CAN. BUS. L.J.* 461 (1991).

most civilian jurisdictions. See arts. 1474 and 1497 of the New Code of Civil Procedure (France)¹⁶⁰ and art. 944.10 of the Code of Civil Procedure (Québec).¹⁶¹

In common law jurisdictions, such clauses are often called "equity clauses" and are suspect.¹⁶²

Arbitrators empowered by contract to decide disputes on "general principles of law" or "equitable considerations" will frequently base their awards on the *lex mercatoria*.¹⁶³

4) *The dilemma*

Whether *ordinary* arbitrators may step *totally* outside the properly applicable law in search of a modern, transnational, commercial common law is another matter. Many international commercial arbitrators believe, nevertheless, that a *lex mercatoria*, in the form of generally accepted, uncodified, international commercial usages and trade practices, seems to be building up, because of the power of arbitrators to avoid procedural niceties during the arbitration proceedings. This is certainly so in international maritime arbitration. This practice seems to spill over into the substance of the dispute and is beginning to generate a body of arbitral case law, in much the same way as the common law was originally formed.¹⁶⁴

160. *Nouveau Code de Procédure Civile* (N.C.P.C.).

161. In force November 11, 1986.

162. MALCOM A. CLARKE, *THE LAW OF INSURANCE* 16-17 (Lloyd's 1989). See, however, *Eagle Star Insurance Co. Ltd. v. Yuval Insurance Co. Ltd.*, [1978] 1 Lloyd's Rep. 357, 361 (C.A.) (where Lord Denning upheld an "equity clause" on the ground that it did no more than oust "technicalities and strict constructions."). See also *Overseas Union Insurance Ltd. v. AA Mutual International Insurance Co. Ltd.* [1988] 2 Lloyd's Rep. 63, 72 (1988); *Home and Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd.* [1989] 1 Lloyd's Rep. 473, 485, 487, 488 (C.A.).

163. Willam Park, *Control Mechanisms in the Development of a Modern Lex Mercatoria*, in *LEX MERCATORIA AND ARBITRATION* 131 (Thomas E. Carbonneau ed., 1990).

164. Certain French decisions have upheld the direct application by arbitrators of the *lex mercatoria* as the law governing the substance of the dispute, in cases where the parties to the contract failed to stipulate an applicable law and where it was impossible to ascertain with which of the competing national laws the dispute was most closely connected. See the Polish Ocean Line case, *Cour de Cassation*, March 10, 1993, in *CLUNET* 1993, 360, note Ph. Kahn. See also the Valenciana case, *Cour d'appel de Paris*, July 13, 1989, *Revue d'arbitrage* 1990,663, note P. Lagarde, in *CLUNET* 1990, 431, note Goldman, aff'd by the *Cour de Cassation*, October 22, 1991, (1992) 81 *Rev. cr. dr. int. pr.* 113, note B. Oppetit, in *CLUNET* 1992, 177, note B. Goldman. The *lex mercatoria* has been similarly directly applied to the merits of the dispute, in the absence of a clearly applicable national law, in litigation (as opposed to arbitration). See *Tribunal de Commerce de Nantes*, July 11, 1991, in *CLUNET* 1993, 330, note Ph. Boulanger. It appears that Swiss and German authors are undecided as to whether to allow application of *lex mercatoria* in arbitration, but that Austria and the Scandinavian countries are generally more open to doing so. See Ole Lando, *The Lex Mercatoria in International Commercial Arbitration*, 34 *INT'L & COMP. L.Q.* 747,

There would appear to be at least three reasons why international arbitration awards refer to international trade usages and practices:¹⁶⁵ 1) arbitrators are often familiar with the usage of particular trades from their own personal experience; 2) many modern arbitration laws and private arbitration rules require arbitrators to take account of relevant trade usages, regardless of what law governs the dispute;¹⁶⁶ and 3) arbitrators enjoy broad discretion to apply rules of law, including rules chosen by the parties and non-national law such as the *lex mercatoria*.¹⁶⁷

Those who support a *lex mercatoria* usually have difficulty in outlining what the content of that law is. It is surprising, therefore, that Lord Mustill, who has been generally understood to oppose the concept, has even provided (albeit with mirth and scepticism) a list of possible rules!¹⁶⁸

5) *An explanation of the lex mercatoria debate - U.S. v. U.K. arbitration*

Why is the existence of a modern *lex mercatoria* generally recognized in U.S. and French arbitration theory and practice and generally opposed in the U.K.? The answer is seen in the different attitudes of these jurisdictions towards arbitration and law in general.¹⁶⁹

In the U.K., arbitral awards are usually *secret* and are usually not *published*, while *reasons* are not necessarily given,¹⁷⁰ unless one or other party insists. As a consequence, no body of arbitral jurisprudence

757 and 759-760 (1985).

165. Harold J. Berman & Felix J. Dasser, *The 'New' Law Merchant and the 'Old': Sources, Content, and Legitimacy*, in *LEX MERCATORIA AND ARBITRATION* 33 (Thomas E. Carbonneau ed., 1990).

166. See, for example, The European Convention on International Commercial Arbitration, 1961, art. VII (1); the UNCITRAL Model Law on International Commercial Arbitration, 1985, art. 28(4); the *Nouveau Code de Procédure civile* (France) at art. 1496(2); the I.C.C. Arbitration Rules, 1988, art. 13(3); the UNCITRAL Arbitration Rules, 1976, art. 33(3).

167. e.g. I.C.C. Arbitration Rules, 1988, art. 13(3); *NOUVEAU C. PR. CIV.* (France), art. 1496.

168. Lord M.J. Mustill, *The New Lex Mercatoria: The First Twenty-Five Years*, in *Liber Amicorum for the Right Honorable Lord Wilberforce* 149, 174-177 (Clarendon Press 1987), reprinted in Philippe Kahn, *La lex mercatoria: point de vue français après quarante ans de controverses*, 37 *MCGILL L.J.* 411 (1992). See also B. Goldman, *La Lex mercatoria dans les contrats et l'arbitrage international: réalité et perspectives* in *CLUNET* 1979, 485-497.

169. M.M. Cohen, *A New Yorker Looks at London Maritime Arbitration*, [1986] *LMCLQ* 57; see also H.C. Wodehouse, *New York Arbitration as Seen By a Londoner*, [1986] *LMCLQ* 43.

170. MUSTILL & BOYD, *THE LAW AND PRACTICE OF COMMERCIAL ARBITRATION IN ENGLAND* 24, 373 (2d ed. Butterworths 1989). Under § 1(6)(a) of the Arbitration Act, 1979, U.K. 1979 ch. 42, one of the parties to the reference may give notice to the arbitrator or umpire, before the arbitral award is rendered, that a reasoned award will be required, if that party intends to appeal to the High Court on a question of law. The "reasons" concerned are, however, findings of fact on which the arguments of law will be based, rather than the grounds on which the arbitrator has arrived at these findings. *Id.* at 24.

is building up.

Arbitration, in England, is connected to the courts; it is not a true substitute for litigation.¹⁷¹ Thus arbitration was defined by Mustill & Boyd in *The Law and Practice of Commercial Arbitration in England* as follows:

"The law of private arbitration is concerned with the relationship between the courts and the arbitral process."¹⁷²

In the U.S. and France, on the other hand, arbitration is a procedure organized and conducted apart from the courts. A *lex mercatoria* is thus being created, because many arbitral awards are collected, collated, analysed and published. There is a new jurisprudence, a *ius commune*.¹⁷³ And appeals to the courts are generally possible only in cases

171. Appeals on points of law are often taken in London. Note, however, that § 3 of the Arbitration Act 1979, U.K. 1979 ch. 42, permits parties to an international agreement to exclude judicial review of any arbitral award. In disputes relating to a question or claim in Admiralty, or arising out of an insurance or commodity contract, however, such exclusion agreements are permitted only where the parties have expressly agreed to subject their disputes to a law other than that of England or Wales or if the exclusion agreement is made after the commencement of the arbitration (sect. 4). In *Marine Contractors Inc. v. Shell Petroleum Development Co. of Nigeria Ltd.*, [1984] 2 Lloyd's Rep. 77 (C.A.), it was held that agreement by the parties to I.C.C. arbitration operated as an advance exclusion agreement, because the I.C.C. Rules prohibit appeals to the courts. On the English approach to arbitration generally, see THOMAS E. CARBONNEAU, *ALTERNATIVE DISPUTE RESOLUTION 72-75* (U. of Illinois Press 1989). The French position is also clearly outlined. *Id.* at 68-72.

172. *Supra* note 170, at 3. This results in appeals to the courts. See M.M. Cohen, *Excluding Appeals to the Courts in Maritime Arbitration*, [1992] LMCLQ 1.

173. In France, extracts of arbitral awards in international commercial disputes, rendered by the International Chamber of Commerce, have been published annually in the *JOURNAL DU DROIT INTERNATIONAL*, more commonly known as "Clunet". Since 1976, similar publishing has been done annually by the International Council for Commercial Arbitration in the *Yearbook of Commercial Arbitration*. Y. Derains, Secretary-General of the Court of Arbitration of the International Chamber of Commerce, has noted the growing tendency of I.C.C. arbitrators to refer to previous awards in rendering their decisions. See CLUNET 1981, 913 at p. 914. See also Thomas Carbonneau, *Rendering Awards with Reasons: The Elaboration of a Common Law of International Transactions*, 23 COLUM. J. TRANSNAT'L. L. 579, (1985) (who notes at p. 587 that the practice of rendering reasoned awards has already emerged, to some degree, in maritime arbitration.) See also Jan Paulsson, *La Lex Mercatoria dans l'Arbitrage C.C.I.*, [1990] *Revue de l'arbitrage* 55, 56-57 (noting that I.C.C. arbitrators frequently refer to prior arbitral awards in deciding on conflict of laws questions and on the scope of their own jurisdiction, and that lawyers increasingly tend to invoke "arbitral jurisprudence" in their factums and pleadings. See also RENÉ DAVID, *L'ARBITRAGE DANS LE COMMERCE INTERNATIONAL*, (Economica 1982). For an example of a reference by French maritime arbitrators to the modern *lex mercatoria*, see Award No. 835 of February 26, 1992, rendered by the *Chambre arbitrale maritime de Paris*, DMF 1993, 189, 191 and in which a prior C.A.M.P. arbitral award (No. 529 of April 30, 1984) was referred to. Arbitral jurisprudence also seems to be increasing in the U.S. As of January 1, 1993, no less than 2935 maritime arbitral awards had been published by the Society of Maritime Arbitrators (SMA) in the U.S. About 1500 awards discuss or distinguish prior awards or court decisions. See Manfred W. Arnold, *Voyage Charters*, 25 J. MAR. L. & COMM. 153, 154 (1994) (book review).

equivalent to fraud, not error or even gross error.¹⁷⁴

It is also true that, in this century at least, the English judges have been far from imaginative or daring (with a few notable exceptions like Lord Denning).¹⁷⁵ The common law of England, which was created by decisions of the courts, is now hardened into very fixed rules. Inventiveness is supplied not by the courts, but by legislation such as the Unfair Contracts Terms Act,¹⁷⁶ which provides the doctrine of fundamental breach in certain cases, and in order to counteract the decision of the House of Lords in the *Photo Production Ltd. v. Securicor Transport Ltd.*¹⁷⁷ In the same way, it required legislation in the Carriage of Goods by Sea Act 1924,¹⁷⁸ to permit waybill holders, endorsees of bills of lading and others with an interest in the goods, to sue the carrier in contract, in order to circumvent the decision of the House of Lords in *The Aliakmon*¹⁷⁹. Nor have U.K. legislators been particularly foresighted with respect to arbitration.¹⁸⁰

The *ius commune*, historically as well (as pointed out above), is really a civilian concept, which many common law courts have diffi-

174. *Nouveau C. Pr. Civ.* (France), arts. 1481, 1482, 1484 and 1502; *Code of Civil Procedure* (Québec), arts. 946.4, 947 and 950. In the U.S., arbitral awards are not ordinarily overturned by reason of errors of law made by arbitrators, unless such errors are tantamount to a "manifest disregard" of the law. See *San Martine Compania de Navegacion S.A. v. Saguenay Terminals Ltd.* 293 F. 2d 796, 801, 1962 AMC 333, 339-340 (9 Cir. 1961), referring to *Wilko v. Swan* 346 U.S. 427, 436 (1953) and *Bernhardt v. Polygraphic Co.* 350 U.S. 198, 203 (1956). See also *Andros Compania Maritima S.A. v. Marc Rich & Co.*, A.G. 579 F. 2d 691, 1978 AMC 2708 (2 Cir. 1978); *Sobel v. Hertz, Warner & Co.* 469 F. 2d 1211 (2 Cir. 1972); *Trafalgar Shipping Co. v. Int'l Mill Co.* 401 F. 2d 568 (2 Cir. 1968); *I/S Stavborg v. National Metal Converters, Inc.* 500 F. 2d 424, 430, 1974 AMC 1021, 1030 (2 Cir. 1974). See also R. Glenn Bauer, *Manifest Disregard of the Law* [1979] LMCLQ 142; Jack Berg, *Manifest Disregard of Law and the United States Arbitration Act* [1975] LMCLQ 129; John D. Kimball, *Vacating Maritime Arbitration Awards. Is it really possible?*, 13 J. MAR. L. & COM. 71 (1981).

175. See also the decision rendered by Sir John Donaldson, M.R., in *Deutsche Schachtbau-und Tiefbohrgesellschaft mbH v. Ras al-Khaima National Oil Co.*, [1987] 3 W.L.R. 1023, 1035, [1987] 2 Lloyd's Rep. 246, 254 (C.A.), where the Court of Appeal enforced an I.C.C. arbitral award rendered in Geneva, which had failed to apply any national system of law to the dispute but had rather applied "internationally accepted principles of law governing contractual relations". The Court of Appeal refused to strike down the award as contrary to English public policy. In *Home & Overseas Insurance Co. Ltd. v. Mentor Insurance Co. (U.K.) Ltd.*, [1989] 1 Lloyd's Rep. 473, 489 (C.A.), Lloyd, L.J. was prepared to enforce not only a foreign, but also an *English*, arbitral award, where the contract was governed by "a system of law which is not that of England or any other state or is a serious modification of such a law".

176. 1977 U.K. ch. 50.

177. [1980] A.C. 827 (H.L.). See also *Malvern Fishing Co. Ltd.* [1983] 1 W.L.R. 964 (H.L.).

178. 1992 U.K. ch. 50.

179. *Leigh and Sullivan Ltd. v. Aliakmon Shipping Co. Ltd.*, [1986] 2 Lloyd's Rep. 1 (H.L.).

180. See Goode, *supra* note 156, calling for the adoption in England of the UNCITRAL Model Law.

culty in understanding and accepting.¹⁸¹

6) Conclusion

A *lex mercatoria* is being created in international arbitration in the U.S. and on the Continent. In the U.K., it is being resisted but this is perhaps a rear-guard action.

XII. IUS GENTIUM (IUS COMMUNE) IN THE CONFLICT OF LAWS

1) Teleological approach

In the United States recently, the "teleological" approach has gained some prominence as a theory in the conflict of laws. This can be seen, in recent writings of Luther L. McDougal III and F.K. Juenger.

2) L.L. McDougal III

McDougal is the author of the "best rule of law", which he defined as the rule ". . . that best promotes net aggregate long-term common interests."¹⁸² In his latest writings, however, McDougal suggests a substantive, teleological solution to conflicts - "the development and application of transnational laws"¹⁸³ to accommodate "transnational community policies",¹⁸⁴ a "*ius gentium*"¹⁸⁵, to solve transnational disputes, when choice of law rules cannot properly take account of the policies applicable to transnational problems.¹⁸⁶

McDougal recommends that both interstate and international conflicts be resolved by seeking out the law that best responds to "contemporary socioeconomic policies".¹⁸⁷

181. See Thomas E. Carbonneau, *The Remaking of Arbitration: Design and Destiny*, in *LEX MERCATORIA AND ARBITRATION* 15 (Thomas E. Carbonneau ed., 1990):

"It is not surprising that the strongest advocates of the new law merchant are from civil law jurisdictions where general legal principles constitute the primary source of law and specialized courts have long handled commercial disputes at an intermediary level of the legal system. Nor is it astonishing that the most virulent critics of *lex mercatoria* and delocalization are steeped in the common law tradition of narrow rules and holdings, where decisional law is the foremost source of law and courts are its oracles."

182. L.L. McDougal III, *Toward Application of the Best Rule of Law in Choice of Law Cases*, 35 *MERCER L. REV.* 483, 484 (1984).

183. L. L. McDougal III, '*Private* International Law: *Ius Gentium* versus Choice of Law Rules or Approaches' 38 *AM. J. COMP. L.* 521, 521 and 537 (1990).

184. *Id.* at 531, 532 and 537.

185. *Id.* at 521.

186. *Id.* at 537.

187. L.L. McDougal III, *The Real Legacy of Babcock v. Jackson: Lex Fori Instead of Lex Loci Delicti and Now It's Time For A Real Choice Of Law Revolution*, 56 *ALB. L. REV.* 795, 805 (1993) ("Courts could resolve transstate and transnational cases in the same manner that they do domestic cases: ascertain which law makes the best socioeconomic sense in contemporary society

3) *F.K. Juenger*

Friedrich K. Juenger, another American professor, has debunked classical conflicts of law, the multilateralists,¹⁸⁸ the unilateralists¹⁸⁹ and the American conflicts revolution,¹⁹⁰ to arrive, as well, at a teleological or substantive approach - that the proper law should be chosen by result-oriented conflict rules, thus attaining a just solution ("stability and fairness").¹⁹¹

Juenger (much like McDougal) calls for "multistate justice" . . . to be "dispensed everywhere",¹⁹² . . . "a new *ius commune*".¹⁹³ Juenger and his followers also plead strongly that we should recognize that many U.S. courts are already applying the substantive approach in the conflict of laws.¹⁹⁴ Juenger believes that just as merchants have benefitted from the rebirth of the *lex mercatoria*, there is now a need for a new *ius gentium* to provide "quality" solutions to transnational disputes in non-commercial fields.¹⁹⁵

Juenger invokes, as historical precedents for his "substantive law approach", "the *lex mercatoria* . . . and the practice of English admiralty courts, which pieced together an international maritime law from such disparate sources as the mythical law of Rhodes, the *usatges* of Barcelona and the *rôles d'Oléron*".¹⁹⁶

and apply that law to resolve the cases." McDougal's approach is somewhat reminiscent of Arthur Taylor von Mehren's call for special "substantive rules" of law for true conflicts cases involving two or more jurisdictions, designed to achieve a balance between "aptness" and "uniformity" of decisions.) See von Mehren, *Special Substantive Rules for Multistate Problems: Their Role and Significance in Contemporary Choice of Law Methodology*, 88 HARV. L. REV. 347 (1974). It also resembles Schmitthoff's ideas in *The Unification or Harmonisation of Law by means of Standard Contracts and General Conditions*, 17 INT'L & COMP. L.Q. 551 (1968).

188. F. K. JUENGER, CHOICE OF LAW AND MULTISTATE JUSTICE 86-87 (Martinus Nijhoff Dordrecht 1993).

189. *Id.* at 159-160. See also Juenger, *American and European Conflicts Law*, 30 AM. J. COMP. L. 117, 121 (1982) (noting that most European conflicts scholars have abandoned unilateralism "for well over a century" in favour of multilateralism.)

190. F. K. Juenger, *supra* note 188, at 88 *et seq.*

191. *Id.* at 86.

192. *Id.* at 236.

193. *Id.* at 193.

194. See Patrick J. Borchers, *The Choice-of-Law Revolution: An Empirical Study*, 49 WASH. & LEE L. REV. 357, 383-384 (1992). Juenger's theory has, of course, been criticized. See Robert A. Sedler, *Professor Juenger's Challenge to the Interest Analysis Approach to Choice-of-Law: An Application and a Response*, 23 U.C. DAVIS L. REV. 865 (1990). See, however, Juenger's response in *Governmental Interests and Multistate Justice: A Reply to Professor Sedler*, 24 U.C. DAVIS L. REV. 227 (1990).

195. Juenger, *Afterword: The Lex Mercatoria and the Conflict of Laws*, in LEX MERCATORIA AND ARBITRATION 213, 224 (Thomas E. Carbonneau ed., 1990).

196. F.K. Juenger, *American and European Conflicts Law*, 30 AM. J. COMP. L. 117, 120-121 (1982).

L'Heureux-Dubé J. of the Supreme Court of Canada in *Chartwell Shipping v. Q.N.S. Paper Co.*,¹⁹⁷ noted that the "venerable tradition in maritime law: the search for a *ius commune*" was primarily aimed at interpreting properly the maritime law itself (rather than promoting equity).

4) Conclusion

I have the greatest respect for McDougal and Juenger and their writings, but is this approach the creation of a *ius commune*? Is it not the absence of rules - either of substance or of conflict of laws? Is it possible to have conflict of law rules when the basic rule is equity or what is just - the "just solution" or "stability and fairness"? The theory of the *ius commune* in conflict of laws seems very similar to the *lex fori* rule of conflicts championed by Cook and Ehrenzweig, which can also be seen as the antithesis of conflict of laws, because it does not seek out the applicable law between two possible laws, but on every occasion imposes a single law, in the case of Cook & Ehrenzweig, the law of the forum.

Similarly, in each conflict under the teleological approach, one does not decide what is the applicable law, but rather what is the best solution. One does not seem to have created a conflict of laws rule, but rather a substantive rule of universal equity. Nevertheless, it is strongly argued that the American courts would seem to be moving in this direction.¹⁹⁸ One wonders, however, whether this new approach is not overly simple, as Lowenfeld has said.¹⁹⁹

XIII. CONCLUSION - THE GENERAL MARITIME LAW

Is there a *lex mercatoria* in the twentieth century? The answer must be "yes" in maritime law, it being the general maritime law in such countries as the U.K., the U.S. and Canada (the *lex maritima*), derived from the *lex mercatoria*, the Rôles of Oléron, the merchants' and admiralty courts, going as far back as the twelfth century. It also exists in various international documents and understandings which have no legal authority, national or international, such as BIMCO bills of lading, standard form charterparties, the CMI's Uniform Rules for Sea Waybills

197. *Chartwell Shipping v. Q.N.S. Paper Co.*, [1989] 2 S.C.R. 683, 725.

198. Borchers, *supra* note 194.

199. Andreas Lowenfeld, *Juenger's Choice of Law and Multistate Justice*, 88 AM. J. COMP. L. 802 (1993) (book review). See also P.E. Nygh, Book Review, 67 AUSTRALIAN L.J. 802 (1993) (commenting at p. 803 that "... one person's better law, may be the other's poison" and expressing concern about the "lottery approach" for judges and juries.)

1990 and the York/Antwerp Rules 1994 on general average.

A new *lex mercatoria* would also appear to exist in international commercial arbitration, particularly maritime arbitration, and is slowly being added to by reported awards of arbitrators. These awards are based increasingly on international trade usages and custom and on general principles of law recognized and accepted by the international community of merchants. Moreover, such arbitral awards are beginning to form a real arbitral jurisprudence to which subsequent awards refer for support.

Finally, American conflict of laws has a new body of teleological thinking, which presumably promotes a result-oriented *ius commune*, aiming primarily at justice and equity. This may have implications for maritime law, although it has yet to be applied overtly in that field by the courts.

