The concept of *lex petrolea* from a dispute resolution perspective: when further development is not possible

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1. Introduction

The international oil and gas industry remains one of the largest by revenues and foreign direct investment, despite a very sharp decline in 2014-2015.[1] The very substantial infrastructure costs at stake, typically long project implementation time with specific technical and economic logistics of the industry, unique interests of petroleum host states as represented via specific host government contracts etc., have allegedly led to the emergence of *lex petrolea*, the *lex mercatoria* of the petroleum industry,[2] a reflection of the common law of the international petroleum industry.[3]

Notably, there has not been any universal academic agreement regarding the nature, scope or even sources of *lex petrolea* with different authors approaching the issue of delimitation of *lex petrolea*'s parameters from different standpoints. Whilst the majority of scholars seem to agree that it derives its roots from the concept of *lex mercatoria*, the scope of *lex petrolea* remains a heatedly debated subject. A number of distinguished authors have argued that it comprises relevant international petroleum industry norms of traditional customary international law between nation states, including common principles of law and/or clauses found in host government contracts and in model industry contracts between oil companies.[4] Some further add the norms, principles and standards of industry associations, including principles concerning human rights, indigenous rights and environmental protection.[5]

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[1] See generally T Childs, 'The Current State of International Oil and Gas Arbitration' (2018) 13 (1) TJOGEL 1, 3-4.

[2] A Wawryk, 'Petroleum Regulation in an International Context: the Universality of Petroleum Regulation and the Concept of *Lex Petrolea*' in T Hunter (ed), *Regulation of the Upstream Petroleum Sector: A Comparative Study of Licensing and Concession Systems* (Edward Elgar Publishing 2015) 6-7, 23.

[3] K Talus, S Looper and S Otillar, '*Lex Petrolea* and the Internationalization of Petroleum Agreements: Focus on Host Government Contracts' (2012) 5 (3) JWELB 181, 189.

[4] See, *inter alia*, N Tabari, *Lex Petrolea and International Investment Law: Law and Practice in the Persian Gulf* (Routledge 2016) 38, 130; Talus, Looper and Otillar; D Saidov, 'The Standardisation of Oil and Gas Law: Transnational Layers of Governance' (2017) National University of Singapore Centre for Maritime Law Working Paper 2017/017.

Moreover, there are also somewhat polarising proposals ranging from the recognition of *lex petrolea* as a completely autonomous legal system (separate from national and international legal systems as well as *lex mercatoria* itself)[6] to the denial of the whole concept due to its uselessness for the further development of a transnational petroleum law framework.[7]

Interestingly, *lex petrolea* is not the only subset of *lex mercatoria* that has generated considerable interest in academic literature. Thus, in this article the author will critically compare the concept of *lex petrolea* with similar branches of *lex mercatoria* in the maritime industry, sport, trade finance and domain names/Internet regulation. The comparison will be made using three criteria elaborated on the basis of an analysis of relevant scholarly contributions discussing the branches of the modern law merchant and recognition of their existence/emergence, namely:

a) the availability of industry-specific principles, customs and usages relevant to a particular area;

b) the presence of a leading private industry association, which develops (codifies) and promotes such industry-specific principles, customs and usages and has unconditional support from states and the international community for such activities; and

c) the availability of a leading industry-specific dispute resolution authority in the relevant area that possesses relevant features in order to ensure consistent and coherent application of the branch of *lex mercatoria*, such as reliance on past precedents, publication of dispute

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[5] See, *inter alia*, T Martin, '*Lex Petrolea* in International Law' in R King (ed), *Dispute Resolution in the Energy Sector: A Practitioner's Handbook* (Globe Law and Business 2014); C O Garciá-Castrillón, 'Reflections on the Law Applicable to International Oil Contracts' (2013) 6 Journal of World Energy Law and Business 129.

[6] A De Jesús, 'The Prodigious Story of the *Lex Petrolea* and the Rhinoceros. Philosophical Aspects of the Transnational Legal Order of the Petroleum Society' (2012) 1 (1) Transnational Petroleum Law Institute Series on Transnational Petroleum Law, 11-19. Regarding the relationship between *lex mercatoria* and *lex petrolea,* De Jesús argues that, despite sharing a number of important similarities, *lex petrolea* is not a subset of *lex mercatoria* and stands on an equal footing.

[7] T Daintith, 'Against '*Lex Petrolea*'' (2017) 10 (1) JWELB 1. Nevertheless, Daintith does not disagree with the unique nature of the oil and gas industry and its specific legal regulation.

outcomes, significant dependence on existing and the development of new industry-specific principles, customs, usages and/or practices.

The analysis will reveal a number of aspects in which *lex petrolea* differs from other alleged branches of the modern law merchant, resulting in its rather peculiar standing among them in terms of its lack of industry-oriented distinctiveness. Notably, the most important difference lies in the manner of dispute resolution under *lex petrolea*, which considerably constrains the concept's further development. In this context it should be noted that the vast majority of *lex petrolea* proponents have strongly argued that alternative dispute resolution, in particular arbitration, in international energy/petroleum disputes is considered to be of a crucial importance for the development of the concept. In fact, even the term '*lex petrolea*' itself emerged from the landmark arbitration case of *the Government of the State of Kuwait v American Independent Oil Co (AMINOIL)*,[8] where it was argued that it constituted 'a particular branch of a general *lex mercatoria*' consisting of customary rules appropriate to the petroleum industry.[9] Despite such argument being rejected by the tribunal, it has ever since eagerly been taken on board by academics.[10]

Indeed, many consider the launching of a comprehensive academic discussion of *lex petrolea* to be in 1997, when Bishop used the concept in his article titled 'International Arbitration of Petroleum Disputes: Development of a "*Lex petrolea*"'.[11] However, back then he concluded that arbitral awards involving petroleum issues were not numerous and *lex petrolea* had not yet created a mature set of legal regulations.[12] Nevertheless, nearly 15 years later Childs stated that the amount of published awards and the variety of issues they addressed was sufficient to create *lex petrolea.*[13] As rightly questioned by Cameron and confirmed in

[8] Award dated 24 May 1982.
[9] See also Martin, '*Lex Petrolea* in International Law' (n5) 95.
[10] See D Bishop, 'International Arbitration of Petroleum Disputes: The Development of a *Lex Petrolea'* (1997) XXIII Yearbook of Commercial Arbitration 1131; see also Wawryk (n2) 20, 23.
[11] Bishop (n10).
[12] ibid.

subsequent analysis hereinafter, this claim was made too early. [14]

This article will be structured as follows. Section 2 will discuss the theory of modern *lex mercatoria* and its fragmentation into different branches along with the required criteria for recognition of a separate branch of *lex mercatoria.* Section 3 will explore the first such criterion, namely industry-specific principles, customs and usages. Following this, the discussion in Section 4 will focus on the issue of a leading private industry association responsible for the development and promulgation of the above industry-specific principles, customs and usages, which formulates the second criterion. Finally, in Section 5 the argument will be made that, unlike other branches of modern *lex mercatoria*, within *lex petrolea* there is no leading industry-specific dispute resolution authority that possesses relevant features for ensuring its consistent and coherent application and its further development.

2. Modern *lex mercatoria*: its fragmentation into different branches and criteria for their recognition

Any analysis on *lex petrolea* needs to start with the discussion on the revival of the theory of medieval *lex mercatoria* in the mid-20th century. Such revival is largely attributed to studies by Berthold Goldman and Clive Schmitthoff.[15] According to them, the state cannot be the sole social framework which creates and authorises law, thus suggesting a movement from the territorial to a more functional approach to law.[16] Pursuant to the theoretical basis of *lex mercatoria*, it is of a dynamic nature,[17] customary and spontaneous, and is frequently

[13] T Childs, 'Update on *Lex Petrolea*: the Continuing Development of Customary Law Relating to International Oil and Gas Exploration and Production' (2011) 4(3) JWELB 214, 259; see also Martin, '*Lex Petrolea* in International Law' (n5) 99. However, see Tabari (n4) 39, in which it is argued that *lex petrolea* is "well on its way to become a mature subset of law operating alongside municipal laws and international investment law in the pluralistic framework of applicable law to foreign direct investment in oil and gas enterprises".

[14] P Cameron, *International Energy Investment Law: The Pursuit of Stability* (2nd edn, OUP 2021) 13.

[15] G Cuniberti, 'Three Theories of *Lex Mercatoria*' (2014) 52 CJTL 379; I Turley, '*Lex Mercatoria*: *Quo Vadis*?' (1999) SALJ 455-463.

[16] A Goldstaijn, 'The New Law Merchant Reconsidered' in C Schmitthoff and F Fabricius (eds) *Law and International Trade: Recht und Internationaler Handel* (Frankfurt: Athenäum Verlag, 1973); J Dalhuisen, 'The Operation of the International Commercial and Financial Legal Order: The *Lex Mercatoria* and its Application – Moving from the Theories of Legal Positivism and Formalism to the Practicalities of Legal Pluralism and Dynamism' (2008) 19 (5) EBLR 985.

expressed in practices that might be changed overnight if business logic or market forces so require, as opposed to the existing legal positivist (*i.e.* formalistic and nationalistic approach to what actually constitutes law) perception of law, which views law as being of a rather static, nationalistic and domestic nature along with the rejection of dynamism as a self-creating legal force.[18]

It is important to emphasise that this revived *lex mercatoria* is not exactly the mere representation of its medieval predecessor, primarily because of the changed circumstances such as the range and variety of available commercial activities, the pace and quality of technological progress, a previously unseen level of globalisation of business and, perhaps most importantly, the role and power of the state.[19] Therefore, it is a much more complex concept.[20] Most importantly, a significant number of scholars have been indicating that unlike its medieval predecessor, modern *lex mercatoria* is fragmented and consists of several branches depending on the industry or field where its norms apply. In particular, there is a considerable array of literature available regarding specific branches of *lex mercatoria* in the maritime industry,[21] sport,[22] trade finance,[23] domain names/Internet regulation,[24] and

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[17] L Trakman, 'From the Medieval Law Merchant To E-Merchant Law' (2003) 53 UTLJ 282-283.

[18] Dalhuisen (n16) 986-987; F La Spada, 'The Law Governing the Merits of the Dispute and Awards ex Aequo et Bono' in G Kaufmann-Kohler and B Stucki (eds) *International Arbitration in Switzerland: A Handbook for Practitioners* (Alphen aan den Rijn: Kluwer Law International, 2004); B Goldman, 'The Applicable Law: General Principles of Law – The *Lex Mercatoria'* in J Lew (ed) *Contemporary Problems in International Arbitration* (Dordrecht: Springer-Science+Business Media, 1987).

[19] H Ciurtin, 'A Quest for Deterritorialisation: The "New" Lex Mercatoria in International Arbitration' (2019) 85(2) Arbitration 123, 123-125; G Sauptelli, 'The European Union, The Member States, and the *Lex Mercatoria*' (2018) 8 (2) NDJICL 3-5.

[20] In fact, some writers even claim that there are so many differences between the challenges that are addressed by medieval law merchant and modern *lex mercatoria* that, in essence, they are two distinct regimes and it was it was merely for legitimacy purposes that an old romanticised label was attached to a new type of regime which emerged in the second half of the 20th century, *i.e.* if modern *lex mercatoria* "was to have any future, it had to recommend itself as stemming from a respectable past", see G Bamodu, 'Exploring the Interrelationships of Transnational Commercial Law, "The New *Lex Mercatoria*" and International Commercial Arbitration' (1998) 10 AJICL 31-45; Ciurtin (n19) 123-126; see similar discussion in R Michaels, 'Response Legal Medievalism in *Lex mercatoria* Scholarship' (2012) 90 TLR 261-265.

[21] A Maurer, *Lex Maritima, Grundzüge eines Transnationalen Seehandelsrechts [Lex maritima. The Main Features of a Transnational Maritime Law]* (Tübingen: Mohr Siebeck, 2012); W Tetley, 'The General Maritime Law – *The Lex Maritima'* (1994) 20 SJILC 105.

[22] See R Siekmann and J Soek (eds), *Lex Sportiva*: *What is Sports Law?* (The Hague: T.M.C. Asser Press, 2012); K Foster '*Lex Sportiva* and *Lex Ludica*: the Court of Arbitration for Sport's Jurisprudence' (2006) 3 (2) ESLJ 1; R Siekmann 'What Is Sports Law? *Lex Sportiva* and *Lex Ludica*: A Reassessment of Content and Terminology' (2011) 3-4 ISLJ 3; B Kolev '*Lex Sportiva* and *Lex Mercatoria*' (2008) 1-2 ISLJ 57.

international oil and gas industry.[25] Naturally, with a number of scholars arguing for the existence of a particular branch of new *lex mercatoria* relative to a specific industry, there is a need to design a comprehensive approach towards the criteria for recognition of any such alleged branches.

Elsewhere in his research the present author conducted a comprehensive analysis of relevant academic literature regarding the branches of modern *lex mercatoria* in order to identify criteria used by scholars for the recognition of a separate branch of the modern law merchant.[26] It was established that apart from the availability of unique principles, customs and usages relevant to a particular area or industry, academic studies failed to produce any meaningful explanation as to what forms the basis for recognition of a separate branch of *lex mercatoria*. Obviously, it is rather unconvincing and implausible to assert the existence of a separate branch merely on the basis of some unique industry-specific principles, customs and usages.

When looking for further criteria the present author analysed scholarly contributions of authors arguing for the existence of a specific branch of *lex mercatoria* relevant to a certain industry in order to explore the similarities among different branches of modern *lex mercatoria.* The conducted analysis revealed several other criteria which should be present for the recognition of a branch of the law merchant. Taken together, the non-exhaustive criteria for a branch of *lex mercatoria* to be recognised are as follows:

a) the availability of industry-specific principles, customs and usages relevant to a particular

[23] A Zharikov, 'Self-regulation in trade finance: a new branch of *lex mercatoria* and its practical relevance' (2022) JBL [forthcoming]. See also J Horst, 'Lex Financiaria. Das transnationale Finanzmarktrecht der International Swaps and Derivatives Association (ISDA)' (2015) 53(4) Archiv des Völkerrechts 461; J Horst, *Transnationale Rechtserzeugung: Elemente einer normativen Theorie der Lex Financiaria* (Mohr Siebeck, 2019); Thomas Cottier, John Jackson and Rosa Lastra, *International Law in Financial Regulation and Monetary Affairs* (OUP 2012) 423.

[24] Trakman (n17); F Marrella and C Yoo 'Is Open Source Software the New *Lex Mercatoria*?' (2007) 47 (4) VJIL 807; A Mefford '*Lex Informatica*: Foundations of Law on the Internet' (1997) 5 IJGLS 211; J Reidenberg '*Lex Informatica*: The Formulation of Information Policy Rules through Technology' (1998) 76 TLR 553.

[25] T Martin, '*Lex Petrolea* in International Law' (n5); Childs, 'Update on *Lex Petrolea*' (n13); Bishop (n10).

[26] Zharikov (n23).

area;

b) the presence of a leading private industry association, which develops (codifies) and promotes such industry-specific principles, customs and usages and has unconditional support from states and the international community for such activities; and

c) the availability of a leading industry-specific dispute resolution authority in the relevant area that possesses relevant features in order to ensure consistent and coherent application of the branch of *lex mercatoria*, such as reliance on past precedents, publication of dispute outcomes, significant dependence on existing and the development of new industry-specific principles, customs, usages and/or practices.

These criteria are explained, discussed in the context of the branches of *lex mercatoria* and specifically applied in relation to *lex petrolea* below.

3. First criterion: industry-specific principles, customs and usages

Due to the diversity of modern commercial activities, each of the new branches of the modern law merchant have their own unique principles, customs and usages as well as other sources,[27] while general principles of *lex mercatoria* (for example, *pacta sunt servanda*, good faith, etc.)[28] are being applied too. Importantly, many of these industry-specific principles, customs and usages are being developed through and applied in the process of dispute resolution.

For example, commentators on *lex maritima* often indicate that maritime law was classified as a distinct legal system with its own specific principles and regulation of the sale of ships, the hiring of vessels via standards forms (charterparties), bailment, marine insurance, etc.[29]

[27] A Maniruzzaman, 'The *Lex Mercatoria* and International Contracts: A Challenge for International Commercial Arbitration?' (1999) 14 AUILR 668-669.
[28] See, for example, LJ Mustill 'The New *Lex Mercatoria*: The First Twenty-Five Years' (1988) 4 Arbitration International 110-112; Dalhuisen (n16) 1038-1040.

Tetley mentions the attachment, maritime liens and general average as examples of the medieval *lex maritima* which survived through the centuries up until modern times,[30] while others add abandonment in shipowners' limitation of liability, proportionate fault in marine collisions and the awarding of prejudgment interest as an integral part of damages from the date of the casualty.[31] These customs and principles are often applied by maritime dispute resolution services (see section 5 below).

Similarly, there are a number of unique principles relevant to the regulation of sport (*lex sportiva*), most of which are actively applied by the Court of Arbitration for Sport (the CAS). Most notably such principles include fair play, the strict liability principle in doping cases, unchallengeable match decisions and the existence of the "sporting nationality" concept as distinct from the legal definition of nationality.[32]

In trade finance there are two well-established and recognised unique principles that are at the core of trade finance documentary instruments' functioning: the independence (autonomy) principle and the principle of strict compliance.[33] The first provides that a documentary instrument constitutes a separate transaction which is in no way affected by the underlying contract, whilst the second emphasises that the issuing bank's undertaking to honour the credit is effective only upon presentation of complying documents which are stipulated in the respective documentary instrument. These two principles have been strongly embedded into trade finance regulation and their practical application has further elaborated a number of adjacent principles and relevant exceptions to them (for example, the fraud exception to the

[29] V Battistella, 'Maritime Law Courts and Judiciary Creation of Law: Effects on Civil Law Courts' *The Judicial Creation of Law and Dialogue Between Judges, Universitat Autònoma de Barcelona* (6 July 2017), available at https://ddd.uab.cat/pub/poncom/2017/179895/Vincenzo_Battistella_Maritime_Law_Courts_and_Judiciary_creation_of_Law..pdf.

[30] Tetley (n21) 107; see also G Potter, 'The Sources, Growth and Development of the Law Maritime' (1902) 11 (3) YLJ 146.

[31] Battistella (n29).

[32] R Parrish, '*Lex Sportiva* and EU Sports Law' (2012) 37 (6) ELR 719-720; L Casini, 'The Making of a *Lex Sportiva* by the Court of Arbitration for Sport' (2011) 3-4 ISLJ 21, 24; Foster (n22) 2.

[33] A Davidson, 'The Evolution of Letters of Credit Transactions' (1995), 3 Journal of International Banking and Financial Law 128129; M Khademan 'Documentary Letters of Credit and Related Rules Under International Trade Law: A Case For Action' (PhD Thesis, University of Glasgow, 1996) 25.

autonomy principle). Notably, when Lord Denning discussed the principle of autonomy, he famously stated that if any court in any country disregards this principle, it would strike at the very heart of that country's international trade.[34]

Furthermore, the proponents of *lex informatica* rightly point out to online dispute resolution,[35] specifically domain name dispute resolution under the Uniform Domain Name Dispute Resolution Policy (UDRP). Notably, UDRP Panels have developed a number of unique principles relevant to domain name registration and holding via interpretation of the UDRP policy provisions.[36]

However, when one looks at *lex petrolea*, the situation is not straightforward. Most academic literature on the subject of *lex petrolea* relies on the notion that there are some specific principles and customs in the petroleum industry.[37] However, upon closer examination it is clear that the authors seldom provide any examples of such principles or name specific customs.[38] Even if any principles or customs are mentioned, they are of an essentially general legal nature and it is argued that the application of general principles of law to petroleum contracts constitutes the uniqueness of *lex petrolea*.[39] Perhaps the only relative unique

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[34] *Power Curber International Ltd v National Bank of Kuwait SAK* [1981] 1 W.L.R. 1233 at 1242.

[35] See, for example, A Patrikios, 'Resolution of Cross-Border E-Business Disputes by Arbitration Tribunals on the Basis of Transnational Substantive Rules of Law and E-Business Usages: The Emergence of the Lex Informatica' (2006) 38 UTLR 271; U Kacker and T Saluja 'Online Arbitration for Resolving E- Commerce Disputes: Gateway to the Future' (2014) 3 (1) IJAL 31; E Katsh 'Online Dispute Resolution: Some Implications for the Emergence of Law in Cyberspace' (2006) 10 (3) Lex Electronica 1.

[36] D Wotherspoon and A Cameron 'Reducing Inconsistency in UDRP Cases' (2003) 2 CJLT 72-73. See, for example, Oki Data principles regarding the legitimate interest of a reseller/distributor of trademarked goods in a domain name which contains such trademark (*Oki Data Americas, Inc. v. ASD, Inc*. Case No. D2001-0903, WIPO Administrative Panel Decision dated 6 November 2001) and the principle of passive holding as bad faith domain usage (*Telstra Corporation Limited v. Nuclear Marshmallows Case No. D2000-0003,* WIPO Administrative Panel Decision dated 18 February 2000).

[37] Talus, Looper and Otillar (n3) 189-190; see generally De Jesús (n6).

[38] See generally the appropriate criticism expressed in Daintith (n7) 4 with regards to the works of Bishop, Childs, De Jesus and others. One may also note the possible recourse to good international petroleum industry practices or good oilfield practice, but their understanding differs considerably depending on the jurisdiction, see M Al-Najjar and M Maniruzzaman, 'The Legal, Environmental and Social Prospects of the Term 'Good Oilfield Practice' within the Onshore Upstream Oil Industry: Law in the Making?' (2020) 18(5) Oil, Gas & Energy Law. See also 'Good International Industry Practices' as approved by the Indian Ministry of Petroleum and Natural Gas in 2016.

[39] See examples in J Bowman, '*Lex Petrolea*: Sources and Successes of International Petroleum Law' (*King & Spalding*, 13 February 2015), available at https://www.kslaw.com/blog-posts/lex-petrolea-sources-successes-international-petroleum-law. Bowman rightfully questions this approach by asking whether such customs and practices arose in the international oil industry or in the international arbitration industry.

practice in *lex petrolea* is the extensive use of stabilisation provisions in host government contracts.[40] Due to the fact that host government contracts are usually for a significant duration, stabilisation clauses are often included to freeze the provisions of respective national regulation at the time of the execution of the contract, thus aiming to ensure that the concessions would be operative for the full term provided in the contract.[41]

Quite often, the proponents of *lex petrolea* aim to address such lack of unique petroleum industry principles, customs or practices with the reference to rendered arbitral awards in the area. Indeed, it is widely acknowledged that *lex petrolea* is primarily intended to assist arbitrators in resolving petroleum disputes.[42] Furthermore, according to such authors, the distinct feature of *lex petrolea*, is that investment arbitration disputes, not commercial ones, constitute its major source. In this regard, it is noteworthy that in his work published in 1997 Bishop argued that *investment awards* in the area of the petroleum industry "developed the beginnings of a *lex petrolea*".[43] However, a closer analysis of Bishop's work reveals that he made this ambitious statement on the basis of only 11 arbitral awards. Writing in 2011 Childs argued that the number of published awards and the variety of issues they address is sufficient to create *lex petrolea*.[44] He reached such conclusion following examination of 26 arbitral awards since 1998. As Bishop before him, Childs mostly studied investment arbitration awards due to their wider availability. However, his analysis also includes two reported commercial arbitration awards.

One might wonder as to whether 37 arbitration awards (with 35 being investment arbitration awards) mentioned by Bishop and Childs is sufficient to justify the claim for the existence of *lex petrolea*, especially given that the arbitral tribunal in one of these awards specifically

[40] Bowman (n39).
[41] Bishop (n10).
[42] P Roberts, *Petroleum Contracts: English Law and Practice* (2nd edn, OUP 2016) 403; Tabari (n4) 131.
[43] Bishop (n10) 64.
[44] Childs, 'Update on *Lex Petrolea*' (n13) 259.

rejected such claim. However, this quantitative criticism is not the most serious drawback of Bishop's and Childs' statements: it is actually the content of these arbitral awards. Thus, the analysis of arbitrations mentioned by Bishop reveals that despite involving disputes within the oil and gas industry, the subject matter of such disputes relates either to a breach of general contract obligations and associated contract law issues[45] or procedural issues concerning the functioning of international commercial arbitration in general.[46] In fact, even the well acknowledged arbitral decision in *the Government of the State of Kuwait v The American Independent Oil Company (Aminoil)*, wherein Kuwaiti counsel argued the existence of *lex petrolea*, concerned nationalisation and determination of the appropriate amount of compensation.

With regards to the arbitral awards mentioned by Childs, they primarily deal with contract law issues,[47] breach of obligation under the contract,[48] taxation,[49] export restrictions and

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[45] *LIAMCO v. The Government of the Libyan Arab Republic,* award dated 12 April 1977; *BP Exploration Company (Libya) Limited v. The Government of the Libyan Arab Republic,* award dated 10 October 1973*; Texaco Overseas Petroleum Co. and California Asiatic Oil Company v. The Government of the Libyan Arab Republic,* award dated 19 January 1979*; AGIP S.p.A. v. People's Republic of the Congo,* ICSID Case No. ARB/77/1, Award dated 30 November 1979*; Amoco International Finance v. the Islamic Republic of Iran,* Iran-US Claims Tribunal, award dated 14 July 1987; *Phillips Petroleum Co. Iran v. the Islamic Republic of Iran, Iran-US Claims Tribunal,* award dated 29 June 1989; *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran,* Iran-US Claims Tribunal, award dated 30 March 1989.

[46] *Elf Aquitaine Iran (France) v. National Iranian Oil Company,* award dated 14 January 1982, *JOC Oil v. Sojuznefteexport,* USSR Chamber of Commerce and Industry, Award in Case No. 109/1980 dated 9 July 1984.

[47] *F-W Oil Interests, Inc v Republic of Trinidad & Tobago*, ICSID Case No. ARB/01/14, Award dated 20 February 2006; *RSM Production Corporation v La Republique Centrafricaine*, ICSID Case No. ARB/07/02, Award dated 7 December 2010; *RSM Production Corporation v Grenada*, ICSID Case No. ARB/05/14, Award dated 11 March 2009; *Joint Venture Yashlar v Government of Turkmenistan*, ICC Case No. 9151, Interim Award dated 8 June 1999; *Bridas SAPIC v Government of Turkmenistan*, ICC Case No. 9058, Partial Award dated 25 June 1999; *EnCana Corporation v Republic of Ecuador*, LCIA Case UN3481, Award dated 3 February 2006; M*ohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability dated 2 September 2009; *Occidental Petroleum Corporation v Republic of Ecuador*, ICSID Case No ARB/06/11, Decision on Provisional Measures dated 17 August 2007; *Trans-Global Petroleum, Inc v Hashemite Kingdom of Jordan*, ICSID Case No ARB/07/25, Decision on Respondent's Objection Under Rule 41(5) of the ICSID Arbitration Rules dated 12 May 2008.

[48] *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability dated 2 September 2009; *ICC Case No. 11663,* Award (2003); *Bettis Group Inc v Profco Resources Ltd*, AAA Case No 77-T-168-00228-98, Award dated 9 September 2000; *Joint Venture Yashlar v Government of Turkmenistan*, ICC Case No. 9151, Interim Award dated 8 June 1999; *Chevron Corporation v Republic of Ecuador*, PCA Case No 2007-2, Partial Award on the Merits dated 30 March 2010; *Frontera Resources Azerbaijan Corporation v State Oil Company of the Republic of Azerbaijan,* award dated 16 January 2006; *Caratube International Oil Company LLP v Republic of Kazakhstan*, ICSID Case No. ARB/08/12, Decision Regarding Claimant's Application for Provisional Measures dated 31 July 2009.

[49] *City Oriente Limited v. Republic of Ecuador and Empresa Estatal Petróleos del Ecuador,* ICSID Case No ARB/06/21, Decision on Provisional Measures dated 19 November 2007; *Perenco Ecuador Ltd. v. The Republic of Ecuador and Empresa Estatal Petróleos del Ecuador,* ICSID Case No ARB/08/6, Decision on Provisional Measures dated 8 May 2009; *Burlington Resources Inc. v. Republic of Ecuador,* ICSID Case No. ARB/08/5, Decision on Jurisdiction dated 2 June 2010; *Murphy Exploration and Production Company International v Republic of Ecuador*, ICSID Case No ARB/08/4, Award on Jurisdiction

change of monetary policy,[50] and nationalisation.[51] Some of the awards mentioned by Childs have a rather vague link to the petroleum industry and its regulation. For example, in *Chevron Corporation v Republic of Ecuador*[52] the issue before the arbitral tribunal concerned the suspension of enforcement of a court judgment imposing a fine on a petroleum company for certain breaches of environmental obligations. Therefore, the awards mentioned by Bishop and Childs are only representative examples of arbitral cases in the oil and gas industry, which do not provide for the use or development of industry-specific principles, customs and/or usages. At best such awards include some limited evidence of how general legal principles and customs are specifically applied in oil and gas industry disputes, such as with regards to the standing of shareholders to sue in arbitration, internationalization of contracts, the protection of an investor's legitimate expectations, methods of quantifying damages and determination of appropriate compensation for expropriation in long-term projects.[53] But these principles and customs are long-established and well-known and would be applied with certain peculiarities in other areas and fields of international commercial and investment law, which does not make them a distinct feature of *lex petrolea*.[54] It is notable that, whilst not referring to or elaborating on any distinct features of *lex petrolea*, the arbitral tribunals in the aforementioned cases frequently refer to international customary law.[55] Thus,

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dated 15 December 2010; *El Paso Energy International Company v. The Argentine Republic,* ICSID Case No. ARB/03/15, Award dated 31 October 2011; *Pan American Energy LLC and BP Argentina Exploration Company v. The Argentine Republic, ICSID Case No. ARB/03/13,* Decision on Preliminary Objections dated 27 July 2006*; BP America Production Company, Pan American Sur SRL, Pan American Fueguina, SRL and Pan American Continental SRL v. The Argentine Republic,* ICSID Case No. ARB/04/8, Decision on Preliminary Objections dated 27 July 2006*; Wintershall Aktiengesellschaft v Argentine Republic,* ICSID Case No ARB/04/14, Award dated 8 December 2008; *Total S.A. v. The Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability dated 27 December 2010; *EnCana Corporation v Republic of Ecuador*, LCIA Case UN3481, Award dated 3 February 2006; *Occidental Exploration and Production Company v Republic of Ecuador*, LCIA Case No UN 3467, Final Award dated 1 July 2004.

[50] *Total S.A. v. The Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability dated 27 December 2010.

[51] *Mobil Corporation v Bolivarian Republic of Venezuela*, ICSID Case No. ARB/07/27, Decision on Jurisdiction dated 10 June 2010.

[52] PCA Case No 2009–23.

[53] M Stadnyk, 'Global Geopolitics and International Energy Arbitration: a Report from the 4th Annual ITA-IEL-ICC Joint Conference' (Kluwer Arbitration Blog, 7 March 2017) available at http://arbitrationblog.kluwerarbitration.com/2017/03/07/global-geopolitics-and-international-energy-arbitration-a-report-from-the-4th-annual-ita-iel-icc-joint-conference/.

[54] Saidov (n4) 4-5. However, here Bowman makes one important reservation concerning stabilisation clauses, arguing that this is a quite unique feature of the petroleum sector, see Bowman (n39).

it seems that today *lex petrolea*'s standing and value in dispute resolution is very weak (see further discussion in section 5 below).

In his updated study in 2018, Childs also added six new arbitral awards (two of which are commercial arbitration awards) that deal with nationalisation and determination of appropriate compensation,[56] applicable law and breach of contract, including force majeure,[57] and expropriation.[58] Perhaps, closer analysis by Childs of the facts and contents of these awards and respective criticism expressed by some authors of his 2011 study[59] resulted in him modifying his firm position on the existence of *lex petrolea* by stating that the rulings in the referred arbitration awards have created, *or at least begun to create*, *lex petrolea*, but this *lex petrolea does not comprise a set of legal rules which displace host government contract or the applicable law*.[60]

The absence of unique industry practices within *lex petrolea* (both in the academic literature and dispute resolution practice) raises significant issues as to the very existence of this branch. This is striking in comparison with other branches which have a number of distinct and well-established industry-specific principles, customs and usages at their core.

4. Second criterion: a leading private industry association responsible for

[55] See, for example, *Texaco Overseas Petroleum Co. and California Asiatic Oil Company v. The Government of the Libyan Arab Republic,* award dated 19 January 1979; *Sedco, Inc. v. National Iranian Oil Company and The Islamic Republic of Iran,* Iran-US Claims Tribunal, award dated 30 March 1989; *Amoco International Finance v. the Islamic Republic of Iran,* Iran-US Claims Tribunal, award dated 14 July 1987; *Total S.A. v. The Argentine Republic,* ICSID Case No. ARB/04/01, Decision on Liability dated 27 December 2010; *EnCana Corporation v Republic of Ecuador*, LCIA Case UN3481, Award dated 3 February 2006; *Mohammad Ammar Al-Bahloul v Republic of Tajikistan*, SCC Case No. V (064/2008), Partial Award on Jurisdiction and Liability dated 2 September 2009; *Chevron Corporation v Republic of Ecuador*, PCA Case No 2007-2, Partial Award on the Merits dated 30 March 2010.

[56] *Venezuela Holdings, B.V., et al. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/27, Award dated 9 October 2014 (partially annulled by Decision on Annulment dated 9 March 2017); *ConocoPhillips Petrozuata B.V. v. Bolivarian Republic of Venezuela,* ICSID Case No. ARB/07/30, Award dated 3 September 2013.

[57] *Phillips Petroleum Co. Venezuela Ltd. v. Petroleos de Venezuela, S.A.,* ICC Case No.16848/JRF/CA, Final Award dated 17 September 2012; *Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated 21 February 2017; *Mobil Cerro Negro, Ltd. v. Petroleos de Venezuela, S.A.,* ICC Case No. 15416/JRF/CA, Final Award dated 23 December 2011; *Gujarat State Petroleum Corporation Limited v. the Republic of Yemen and the Yemen Ministry of Oil and Minerals,* ICC Case No. 19299/MCP, Final Award dated 10 July 2015.

[58] *Ampal-American Israel Corporation and others v. Arab Republic of Egypt,* ICSID Case No. ARB/12/11, Decision on Liability and Heads of Loss dated 21 February 2017.

[59] See generally Daintith (n7).

[60] Childs, 'The Current State of International Oil and Gas Arbitration' (n1) 19.

development and promulgation of industry-specific principles, customs and usages

The second criterion for the recognition of a separate branch of *lex mercatoria* is the direct outcome of globalisation trends, technological improvements and greater landscape of available commercial activities, which has resulted in sophisticated organisation into industry associations.[61] Whilst technically operating under state laws, these industry associations have played an important role in setting industry standards, clarifying existing and developing new practices or sometimes even influencing states to adopt certain sets of regulations on the basis of their own issued legal instruments.[62]

Perhaps one of the most significant benefits of these private associations is that they undertake careful analysis of existing practices and usages in the field to produce a reliable and up-to-date instrument representing the current state of affairs in a particular industry and addressing the most common aspects. These industry associations are naturally better placed than governments to observe the respective business developments in their specialised field.[63]

Nevertheless, private regime-issued regulations cannot function independently of the state.[64] This is especially visible in such aspects as recognition and enforcement of certain privately developed regulations as these to a large extent need to conform to general rules set by the state.[65] At the same time, private industry associations have developed a vast array of legal instruments which significantly aid commercial parties in carrying out their relations,

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[61] R Cooter, 'The Theory of Market Modernization of Law' (1996) 16 (2) IRLE 147; O Volckart and A Mangels, 'Are the Roots of the Modern *Lex Mercatoria* Really Medieval?' (1999) 65 (3) SEJ 427.

[62] E Ip, 'Globalization and The Future of The Law of The Sovereign State' (2010) 8 (3) IJCL 637.

[63] F Moslein, 'Regulatory Competition between Public and Private Rules' in H Eidenmuller (ed.) *Regulatory Competition in Contract Law and Dispute Resolution* (London: Hart Publishing, 2013) 151.

[64] B Cremades and S Plehn, 'The New *Lex Mercatoria* and The Harmonization of The Laws of International Commercial Transactions' (1984) 2 BUILJ 317, 329-330, 347.

[65] D Wielsch, 'Global Law's Toolbox: How Standards Form Contracts' in H Eidenmuller (ed) *Regulatory Competition in Contract Law and Dispute Resolution* (London: Hart Publishing, 2013) 103; Moslein (n59) 150; H Collins, 'Regulatory Competition in International Trade: Transnational Regulation through Standard Form Contracts' in H Eidenmuller (ed) *Regulatory Competition in Contract Law and Dispute Resolution* (London: Hart Publishing, 2013) 122; Cremades and Plehn (n60) 333-335.

regularly referred to by arbitral tribunals and national courts and which are widely recognised by states and the international community, even when not formally being validated by them.

It is also worth mentioning that not every private industry association can be regarded as an effective developer of private regulation for the sector. Naturally, the norms produced by such an association (and, consequently, its authority) should be followed and respected by the relevant community of private actors. However, for the new *lex mercatoria* it is also vitally important that such norm-making activity receives support from states and the international community. The states, having recognised the benefits of private industry law-making, nonetheless exercise the ultimate control as to which privately developed norms can be approved (or, at least, permitted to exist) and which should be rejected.[66] Therefore, state support, acceptance and non-interference in the norms produced by private industry associations in certain areas is an important indication of recognition of the modern law merchant, its effectiveness and robustness.

Remarkably, in many of the branches of modern *lex mercatoria* there is such an association, which is chiefly responsible for the development of authoritative non-state regulation in the field and which enjoy the support of states and the international community for its activities.

The most illustrative example of the established efficient autonomous private regulation alongside state regulation is *lex sportiva*. The modern sports industry has a sufficient institutional organisation, which is transnational in nature and is structured pyramidically with the international sport federations for each sport and the International Olympic Committee (the IOC), the supreme authority within the Olympic Movement, at the top.[67] The IOC is an international non-governmental not-for-profit organisation, of unlimited duration, in the form of an association with the status of a legal person.[68] The status and mission of the

[66] R Michaels, 'The Re-State-Ment of Non-State Law: the State, Choice of Law, and the Challenge From Global Legal Pluralism' (2005) 51 WLR 1209, 1228-1235.
[67] R Siekmann, *Introduction to International and European Sports Law* (The Hague: T.M.C. Asser Press, 2012) 16.

IOC is quite unique and not typical for a non-governmental organisation: whilst being privately funded, it is a by-product of the state system with its affiliates being of both public and private, state and non-state origin, and claims authority over a broad movement that transcends traditional boundaries in a global society.[69]

Curiously, there is another notable example of self-governing private organisation within sport which is a direct result of state and non-state cooperation, namely the World Anti-Doping Agency (WADA). WADA is the international, independent organisation monitoring the global fight against doping in sport whose main responsibility is to be a custodian of the WADA Code. WADA is considered by many as a clear example of a hybrid institution: while formally being a private law organisation, it performs several important functions relative to public authorities.[70] Within its structure it holds equal representation from the Olympic Movement and governments.[71]

It is interesting that within academic literature on the status, structure and unique position of the IOC and WADA the authors often make a comparison to another organisation, namely the Internet Corporation for Assigned Names and Numbers (ICANN), an internationally organised, non-profit corporation.[72] ICANN was established to provide regulation solely in one area: to perform technical coordination and regulation of the domain name system in the Internet. Although it may seem that regulation of domain names is only one aspect of the Internet functioning, it is arguably the most important aspect.[73]

ICANN is a private organisation, but its functions are of public law origin; the organisational structure of ICANN includes state and non-state actors; and its role is of international

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[68] Olympic Charter, Art 15(1).
[69] T Nelson and P Cottrell, 'Sport Without Referees? The Power of the International Olympic Committee and the Social Politics of Accountability' (2016) 22(2) EJIR 444.
[70] L Casini, 'Global Hybrid Public-Private Bodies: The World Anti-Doping Agency (WADA)' (2009) 6 IOLR 436.
[71] 'Governance' *WADA* (no date), available at https://www.wada-ama.org/en/governance.
[72] See, for example, Nelson and Cottrell (n65) 453; Casini (n70) 438.
[73] L DeNardis, *Protocol Politics: The Globalization of Internet Governance* (Cambridge: MIT Press, 2009) 14. See also M Froomkin, 'Almost Free: an Analysis of ICANN's 'Affirmation of Commitments' (2011) 9 JTHTL 187.

significance as it manages unique resources of global importance.[74] As in the case of the IOC and WADA, the ICANN represents an effort to establish an institution of a hybrid nature which results in the subsequent creation of a hybrid regime under which self-regulation and state regulation intertwine and complement each other in order to achieve greater efficiency.[75]

Notably, the trade finance industry also has a private association of a similar standing: the International Chamber of Commerce (the ICC). The ICC was established in 1919 when there was no world system of rules to govern trade, investments, and financial or commercial related issues,[76] and documentary instruments were governed solely by banking practices and trade usages.[77] The ICC assumed responsibility for the codification of trade finance customs, practices and usages and has been developing these codifications ever since (such as the Uniform Customs and Practice for Documentary Credits [UCP], Uniform Rules for Collections [URC] or Uniform Rules for Demand Guarantees [URDG], etc.).[78] Today the ICC claims to have a global network of over 6 million members in more than 100 countries[79] and is strongly supported in its activities by the international community and by states, at least in the trade finance sector. For example, in December 2016 the ICC became the first ever private organisation to acquire Observer Status at the United Nations.[80] Fundamentally, the cooperation between the ICC and the United Nations Commission on International Trade Law (UNCITRAL) has resulted in the endorsement of several UNCITRAL conventions by the former[81] and ICC uniform rules in the area of trade finance by the latter[82], which has

[74] E Weitzenboeck, 'Hybrid Net: the Regulatory Framework of ICANN and the DNS' (2014) 22 (1) IJLIT 68-71.
[75] Ibid 73.
[76] 'History' *ICC* (no date), available at https://iccwbo.org/about-us/who-we-are/history/. See also G Ridgeway, *Merchants of Peace: the History of the International Chamber of Commerce* (Boston: Little, Brown and Company, 2nd edn, 1959).
[77] P Ellinger and D Neo, *The Law and Practice of Documentary Letters of Credit* (Hart Publishing 2010).
[78] H Alavi, 'Documentary Letters of Credit, Legal Nature and Sources of Law' (2016) 17 (31) JLS 106, 110.
[79] ICC, 'Who We Are' *ICC* (no date), available at https://iccwbo.org/about-us/who-we-are/.
[80] 'Business and the United Nations' *ICC* (no date), available at https://iccwbo.org/global-issues-trends/global-governance/business-and-the-united-nations/.
[81] 2014 – the UNCITRAL Convention on the Assignment of Receivables in International Trade 2001; 2006 – the United Nations Convention on the Use of Electronic Communications in International Contracts 2005; 1999 – the UNCITRAL Convention on Independent Guarantees and Stand-by Letters of Credit 1995.

undoubtedly enhanced harmonisation in the field. Furthermore, the ICC-developed uniform rules have significantly influenced national and international trade finance law-making: they are often referred to in local statutes, cited and applied by courts.

Within the maritime industry there is a plethora of associations, which produce regulatory instruments for certain aspects of sea trade business.[83] Nevertheless, there are at least two maritime associations which exercise a significant influence on the sector by producing regulations concerning a variety of aspects of maritime regulation on a global scale. Firstly, the Baltic and International Maritime Council (BIMCO) which has gradually grown into the world's largest international shipping association.[84] Although states are not represented in BIMCO, the organisation maintains a close dialogue with governments and diplomatic representatives, including through being a consultative member of the International Maritime Organization (IMO).[85] BIMCO's main aim is the production of standard forms of maritime contracts:[86] it develops one document for each niche of shipping (at the time of writing, the BIMCO database contains around 200 standard contract forms and 130 standard clauses to complement the contracts)[87] and thus covers a variety of aspects of shipping.[88] Today BIMCO is the dominant provider of standard form contracts[89] and, since a specific feature of the maritime industry is that standard form contracts are used for nearly all maritime transactions,[90] BIMCO's role is very influential in the sector.

Secondly, the International Chamber of Shipping (the ICS), which consists of the national

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[82] 2017 – Uniform Rules for Forfaiting 800 (2012); 2010 – URDG 758 (2010); 2010 – INCOTERMS 2010; 2007 – UCP 600 (2007); 1998 - International Standby Practices (1998).
[83] For more general information on these bodies see P Mukherjee and M Brownrigg *Farthing on International Shipping* (New York: Springer, 4th edn, 2013).
[84] 'About Us' *BIMCO* (no date), available at https://www.bimco.org/about-us-and-our-members/about-us.
[85] Mukherjee and Brownrigg (n79) 28. In fact, BIMCO states that it "was the first organisation to see the *benefit in joining forces with other countries* to secure better deals and standard agreements in shipping", see BIMCO (n80).
[86] G Hunter, 'BIMCO Contracts and Clauses: Uniformity, Diversity and the Ethical Dimension' (2017) 23 (6) JIML 403.
[87] 'Contracts and Clauses' *BIMCO* (no date), available at https://www.bimco.org/contracts-and-clauses.
[88] F Lorenzon, 'Harmonization of European Contract Law: Friend or Foe to the Shipping Industry?' (2004) 10 (6) JIML 513.
[89] G Calliess and A Klopp '*Lex Maritima*: Vanishing Commercial Trial – Fading Domestic Law?' (2015) ZenTra Working Paper in Transnational Studies No. 56/2015, 8.
[90] Ibid.

shipowners' associations whose membership comprises shipping companies that control over 80% of the world's merchant tonnage.[91] It is considered as the principal international trade association for the shipping industry, representing shipowners and operators in all sectors and trades, and was the first shipping industry association to be granted consultative status in the IMO in 1961.[92] The ICS often releases publications on best practice and regulatory compliance as an essential complement to international regulations, including those issued by the IMO.[93]

Like in the maritime industry, there is also a variety of private associations functioning in the petroleum industry and, similarly, such associations have also largely concentrated on the development of a model or standard form contracts.[94] However, in contrast to the maritime industry, where despite a number of private associations each of them covers a specific aspect of shipping on a global scale, petroleum associations often represent geographical regions (see, for example, the United Kingdom Petroleum Industry Association, the Dutch Petroleum Industry Association, the Canadian Association of Petroleum Landmen, the American Association of Petroleum Landmen, the Offshore Energies UK, the Canadian Association of Oilwell Drilling Contractors, etc.).[95] Moreover, model contracts developed by these associations frequently have subject matters that overlap.[96] This does not promote uniformity in the area and results in the development of differentiating practices over similar aspects. For instance, in his study Martin gave examples of 18 types of model contracts commonly used in

[91] ICS 'The International Chamber of Shipping (ICS): Representing the Global Shipping Industry' *ICS* (2007), available at https://www.ics-shipping.org/docs/default-source/about-ics/the-international-chamber-of-shipping-ics-representing-the-global-shipping-industry.pdf?sfvrsn=18.

[92] ibid.

[93] See, for example, Bridge Procedures Guide (2016), Guidelines on the Application of the IMO International Safety Management (ISM) Code (2010), Tanker Safety Guides (2018), etc.

[94] See Saidov (n4) 13; Talus, Looper and Otillar (n3) 184; Wawryk (n2) 14.

[95] See more examples in T Martin and J Park, 'Global Petroleum Industry Model Contracts Revisited: Higher, Faster, Stronger' (2010) 3 (1) JWELB 4.

[96] See, for example, the variety of model joint operating agreements issued by several associations, such as the American Association of Professional Landmen, the Association of International Petroleum Negotiators, the Australian Mining Petroleum Law Association, the Canadian Association of Petroleum Landmen, the Oil and Gas UK, the Norwegian Petroleum Directorate, etc. See more details in Roberts (n42) 50-58.

the international petroleum industry covering a number of important issues.[97] At the same time, in an updated version of the same study Martin and Park specified 20 petroleum industry associations and organisations which in total have produced over 200 model contracts and forms.[98]

The variety of regional private petroleum associations (each of which issues its own guidance) without any leading organisation in the industry to develop and promote new industry-specific norms does not contribute to standardising and unifying the petroleum industry regulation. Moreover, it effectively precludes recognition of non-state norm-making on a global basis, i.e. impedes the development of *lex petrolea*. Again, this is in striking contrast to other alleged branches of *lex mercatoria*.

5. Third criterion: a leading industry-specific dispute resolution authority that possesses relevant features for ensuring consistent and coherent application of the branch of *lex mercatoria* and its further development

Due to the significance of dispute resolution to the theory of *lex mercatoria*, the availability of a leading dispute resolution authority in a particular industry sector should be considered as a vitally important pre-requisite for a branch of the modern law merchant. Moreover, such a dispute resolution centre should have certain features which would allow for the development of a consistent and coherent body of law.

It has been noted that industry-specialised dispute resolution is very different in comparison with general private conflict resolution. Firstly, industry-specialised dispute resolution is designed to provide greater comfort for the users due to the fact that disputes are resolved by specialists in the particular field and under the rules of dispute resolution which are specifically tailored for a particular area.[99]

[97] T Martin, 'Model Contracts: a Survey of the Global Petroleum Industry' (2004) 22 (3) JERL 284.
[98] Some of which cover highly technical matters, see Martin and Park (n95).

Secondly, the transparency of specialised dispute resolution proceedings is usually much greater. The difference is especially relevant to arbitration: for decades it was deemed that confidentiality was the main attraction of the arbitral process as opposed to the public nature of litigation. However, recent studies have revealed that confidentiality is no longer perceived as the main advantage of arbitration.[100] In fact, as early as in 1982 Lew argued that systematic publication of arbitral awards would bring substantial benefits to all interested parties.[101] These include increased certainty and predictability of the process for businesses (thus influencing their commercial practices), provision of arbitrators with reliable guidance with regards to how similar situations have been resolved in past cases, and, additionally, facilitation of the commercial world's knowledge and acceptance of *lex mercatoria*.[102] Wider publication of arbitral awards has certainly contributed to the emergence of a specific body of law consisting of arbitral panels' positions expressed with regards to certain aspects.[103] This is especially relevant to industry-specialised dispute resolution, wherein often the parties have a very specific or technical issue in dispute which is not covered, at least directly, by any applicable legal norm. Thus, frequently the task of a decision-maker is to interpret all relevant sources, from international conventions and national laws to trade standards, usages and practices, in order to justify his/her approach.

Thirdly, as a result of greater transparency, the industry-specialised dispute resolution

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[99] Ł Gembiś, 'Are We Dealing with the Trend of Specialised Arbitration?' (*Kluwer Arbitration Blog*, 9 May 2016) available at http://arbitrationblog.kluwerarbitration.com/2016/05/09/are-we-dealing-with-the-trend-of-specialised-arbitration/

[100] White & Case and Queen Mary University of London, '2018 International Arbitration Survey: The Evolution of International Arbitration' (9 May 2018) available at https://www.whitecase.com/sites/whitecase/files/files/download/publications/qmul-international-arbitration-survey-2018-19.pdf

[101] J Lew, 'The Case for the Publication of Arbitration Awards' in Jan Schultsz and Albert Jan Van Den Berg (eds), *The Art of Arbitration: Essays on International Arbitration Liber Amicorum Pieter Sanders* (Kluwer Law and Taxation Publishers 1982) 232.

[102] ibid; see also R Sali, 'Chapter 4. Transparency and Confidentiality: How and Why to Publish Arbitration Decisions' in Alberto Malatesta and Rinaldo Sali (eds), *The Rise of Transparency in International Arbitration: the Case for the Anonymous Publication of Arbitral Awards* (Juris 2013)84-85.

[103] A Mourre, 'Chapter 3. The Case for the Publication of Arbitration Awards' in Alberto Malatesta and Rinaldo Sali (eds), *The Rise of Transparency in International Arbitration: the Case for the Anonymous Publication of Arbitral Awards* (Juris 2013) 59.

providers have developed the practice of allocating a precedential value to their rendered decisions. This sort of precedential value cannot be truly compared to the *stare decisis* doctrine as practised by courts in common law jurisdictions, because such a requirement of mandatory use of previously rendered decisions is absent in the procedural rules of the specialised dispute resolution providers. However, either through the wish of such industry-specialised dispute resolution centres to enhance uniformity and predictability in their services, or through the practice of the users who want to use every means and argument to support their position in a case, or both, referencing to the positions expressed in previous cases has become an inherent feature of specialised dispute resolution. Kaufmann-Kohler[104] identified such practice as a persuasive precedent close to the concept of *jurisprudence constante*,[105] whilst Béguin called it a *de facto precedent*.[106] Consequently, a constant flow of decisions on a specific issue has resulted in a consistent body of legal norms in relation to some very specific industry aspects, which forms the basis of a claim for the existence of the branches of *lex mercatoria* in some industries.

Notably, many branches of new *lex mercatoria* have such leading industry-specific dispute resolution centres with relevant features for the development of consistent and coherent regulation.

The CAS, which is the central dispute resolution authority in sport,[107] and its jurisprudence have been regarded as the most illustrative example of such practice.[108] Despite there being no obligation to follow the preceding decisions of other panels in the Code of Sports-related

[104] G Kaufmann-Kohler, 'Arbitral Precedent: Dream, Necessity or Excuse?' (2007) 23 (3) Arbitration International 357.
[105] A civil law doctrine pursuant to which a series of previous decisions applying a particular legal principle or rule is highly persuasive but not decisive in subsequent cases dealing with similar or identical issues of law.
[106] N Béguin, 'The Rule of Precedent in International Arbitration' (2009) Jusletter 5, 7. See also N Ridi, 'The Shape and Structure of the 'Usable Past': An Empirical Analysis of the Use of Precedent in International Adjudication' (2019) 10 (2) JIDS 200, 245-247.
[107] M Mitten, 'The Court of Arbitration for Sport and its Global Jurisprudence: International Legal Pluralism in a World without National Boundaries' (2014) 30 OSJDR 9; Casini, 'The Making of a *Lex Sportiva'* (n32) 24; S Boyes, 'Sports Law: Its History and Growth and the Development of Key Sources' (2012) 12 (2) LIM 91
[108] Parrish (n32) 719; J Nafziger, *International Sports Law* (New York: Transnational Publishers, 2nd edn, 2004) 48–61; Casini, 'The Making of a *Lex Sportiva'* (n32) 22; J Nafziger, 'The Future of International Sports Law' (2006) 42 WLR 876.

Arbitration, in practice CAS panels frequently refer to such jurisprudence by citing CAS case law.[109] Regarding publication of these awards, my analysis revealed that in 2012-2016 the average percentage rate of published appeal awards amounted to 36.7%, *i.e.* more than one in three appeals were published. The CAS often refers to *lex sportiva* in its jurisprudence[110] with new CAS awards expanding the concept by adding more and more principles, such as the strict liability principle in doping cases or the existence of the "sporting nationality" concept as distinct from the legal definition of nationality.[111]

Arbitration is a preferred dispute resolution mechanism in the maritime industry but only few arbitral seats are popular for resolving maritime disputes[112] as approximately 90% of total worldwide maritime arbitration takes place in two specialised institutions: the London Maritime Arbitrators Association (LMAA)[113] and the Society of Maritime Arbitrators (the SMA)[114] in New York.[115] Notably, both the LMAA and the SMA publish arbitral awards, albeit under different procedures. Whilst the LMAA's publishing procedure is somewhat restrictive (until 2021 it was only upon recommendation by the arbitrator, with the agreement of both parties and if such awards carry general public interest),[116] the SMA has a very straightforward approach towards publication of rendered awards: by default the SMA publishes all rendered awards, unless both parties request otherwise.[117] This has resulted in a

[109] Some studies concluded that since 2003 nearly every award has contained at least one reference to earlier CAS awards, see Kaufmann-Kohler (n104). This author's analysis of CAS awards published in 2016-2017 confirmed that more than 80% of all CAS awards referred to previous case law.

[110] The roots of the concept can be traced to the CAS award in *AEK Athens and SK Slavia Prague v. Union of European Football Associations (UEFA)* CAS 98/200, award dated 20 August 1999 in which the panel recognised the specific unwritten principles applicable in the area of sport, *i.e. lex sportiva*, which is: a) comparable to *lex mercatoria* in the specific area, *i.e.* constitutes its branch; b) being developed and consolidated through arbitration; c) exists without authorisation from national or sporting bodies and does not require any formalisation; and d) limited only by the ordre public.

[111] Parrish (n32) 719-720; Casini, 'The Making of a *Lex Sportiva*' (n32) 24; Foster (n22) 2.

[112] L Mistelis, 'Competition of Arbitral Seats in Attracting International Maritime Arbitration Disputes' in M Goldby and L Mistelis (eds) *The Role of Arbitration in Shipping Law* (Oxford: OUP, 2016) 136 at 8.04.

[113] 'The London Maritime Arbitrators Association' *LMAA* (no date), available at http://lmaa.org.uk/.

[114] 'The Society of Maritime Arbitrators' *SMA* (no date), available at http://www.smany.org/.

[115] Maurer (n21) 205; M Goldby, 'The Performance of the Bill of Lading's functions under UNCITRAL's Draft Convention on the Carriage of Goods: Unequivocal Legal Recognition of Electronic Equivalents' (2007) 3 (13) JIML 181; see also P Tassios, 'Choosing the Appropriate Venue: Maritime Arbitration in London or New York?' (2004) 21 (4) JIA 355.

[116] Compare article 28 of the LMAA Terms 2017 and article 29 of the LMAA Terms 2021.

[117] See SMA Maritime Arbitration Rules, Section 1.

considerable number of such arbitral awards: according to the SMA, there have been over 4,200 such awards published since the SMA was established.[118] Moreover, my analysis of the SMA awards revealed that *all* of the rendered awards in 2013-2018 were published, thus achieving a remarkable figure of 100% publishing.

Furthermore, the SMA specifically states that whilst its arbitrators are not absolutely bound by arbitral precedents, "in an effort to maintain consistency, panels do take prior awards into consideration".[119] My analysis of published SMA awards showed that a reference to previous SMA award is made in approximately every tenth award, either by a tribunal or by a party to a dispute. Remarkably, within the SMA arbitration process not only previous SMA awards are cited, but also awards made by other arbitral bodies, most notably by the LMAA.[120]

Whilst not directly referring to *lex maritima*, both the LMAA and the SMA often deal with maritime customs and practices in the decision-making process. Indeed, there are a number of cases in which the LMAA and SMA tribunals allocated a significant, and sometimes a decisive, role to a certain custom or commercial practice.[121]

The ICANN promulgated its Uniform Domain Name Dispute Resolution Policy (the UDRP) as the global instrument for dispute resolution with regards to domain name regulation. The UDRP provides for publication of all their decisions in full online[122] (over 100,000 by mid-2021). Whilst the UDRP does not provide for a strict doctrine of binding precedent, for the sake of the overall credibility of the system and reasonable anticipation of the same result from similar facts and circumstances, the UDRP panels strive for consistency with prior

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[118] 'SMA Award Service' *SMA* (no date), available at http://www.smany.org/award-service-main.html; 'The Arbitrator' *SMA* (no date) available at http://www.smany.org/publications-the-arbitrator.html.

[119] Ibid.

[120] See, for example, *SMA Award No. 3846* dated 31 May 2004, *SMA Award No. 3443* dated 28 April 1998, *SMA Award No. 3311* dated 11 October 1996, *SMA Award No. 2868* dated 31 March 1992, *SMA Award No. 2737* dated 20 December 1990 and *SMA Award No. 2618* dated 22 December 1989 (here the award from Chambre Arbitrale Maritime De Paris was also mentioned).

[121] See, for example, *SMA Award No. 2771* dated 11 July 1991*, London Arbitration 8/06 (2006) 688 LMLN 2* dated 27 March 2006 *or London Arbitration 18/98 (1998) 492 LMLN 2* dated 15 September 1998.

[122] UDRP, Para 4(j) and Rules for the UDRP, Para 16(b).

decisions.[123] A couple of small-scale studies with regards to the use of precedents in the proceedings under the UDRP showed consistent results: previous UDRP decisions have been cited in nearly 80% of cases with an average of 6.2-6.4 decisions per citing case.[124]

Furthermore, an empirical study conducted by Simon showed, *inter alia*, that most often no reference to any national law is made and cases are resolved on the basis of the UDRP interpretation.[125] It is through such interpretation that the UDRP panels develop new industry specific principles (for example, Oki Data principles regarding the legitimate interest of a reseller/distributor of trademarked goods in a domain name which contains such trademark[126] or the principle of passive holding as bad faith domain usage).[127] Thus, the UDRP not only provides for procedural guidance, but also forms the applicable substantive law for dispute resolution within its limited scope.[128]

The ICC established Documentary Instruments Dispute Resolution Expertise (DOCDEX), a unique platform for resolving trade finance-related matters, not on the basis of national law, but via interpretation of the express terms of a documentary instrument, soft law regulations, trade usages and customs, and the application of international standard trade finance practice. Every DOCDEX Decision is numbered and published.[129] DOCDEX Rules do not provide for the use of precedents, but, similarly to other industry-specialised dispute resolution providers discussed above, due to the publication of DOCDEX decisions the parties and panels have started to cite previous DOCDEX decisions. In their decision-making DOCDEX Panels not

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[123] See 4.1 at WIPO Overview of WIPO Panel Views on Selected UDRP Questions, Third Edition (WIPO Jurisprudential Overview 3.0) [2017] available at https://www.wipo.int/amc/en/domains/search/overview3.0/.

[124] See Kaufmann-Kohler (n104) 367; A Christie, 'Online Dispute Resolution – The Phenomenon of the UDRP' (2014) University of Melbourne Legal Studies Research Paper No. 681.

[125] D Simon, 'An Empirical Analysis of Fair Use Decisions Under the Uniform Domain-Name Dispute-Resolution Policy' (2012) 53 BCLR 65.

[126] *Oki Data Americas, Inc. v. ASD, Inc*. Case No. D2001-0903, WIPO Administrative Panel Decision dated 6 November 2001.

[127] *Telstra Corporation Limited v. Nuclear Marshmallows Case No. D2000-0003,* WIPO Administrative Panel Decision dated 18 February 2000.

[128] J Hornle, 'The Uniform Domain Name Dispute Resolution Procedure: Is Too Much of a Good Thing a Bad Thing' (2008) 11 SMUSTLR 254.

[129] DOCDEX Rules, Art 12(1).

only interpret relevant ICC rules and apply trade finance principles, but also develop new trade finance practices and standards in situations wherein neither the ICC-developed rules nor international trade finance practice have any clear guidance with regards to a certain aspect and its practical application.[130]

Regarding the petroleum industry, it is typical to resolve disputes through arbitration. However, the position of *lex petrolea* is somewhat peculiar because, unlike other branches of *lex mercatoria*, it is not possible to identify any leading specialised dispute resolution authority in the area. Notably, academic literature on the subject of *lex petrolea* frequently points to investment arbitration as the primary forum wherein the concept is used. Oil and gas disputes are indeed one of the largest areas in investment arbitration.[131] However, it is unlikely that investment arbitration can be viewed as the unique and particular specialised platform which provides for dispute resolution services for petroleum industry actors. There are several reasons for this.

Despite the requirement to follow previous cases being absent in investment arbitration rules, in practice investment arbitrators often refer to previous arbitral awards in order to provide a more solid basis for and establish increased legitimacy of their awards.[132] This, to some extent, ensures consistency of investment arbitration awards in similar issues. However, the problem is that today a number of institutions provide investment arbitration dispute resolution services. The International Centre for Settlement of Investment Disputes (the ICSID) and the Permanent Court of Arbitration (the PCA) are two major players in the market, but several commercial arbitration institutions, such as the ICC, the London Court of International Arbitration (the LCIA) or the Arbitration Institute of the Stockholm Chamber of Commerce (the SCC),[133] have also been active in the attraction of investment disputes in

[130] See, for example, DOCDEX Decisions No. 215 and 242.
[131] According to the official ICSID Caseload statistics, Oil, Gas and Mining disputes constitute around 24% of all disputes and Electric Power and Other Energy have a share of 17%.
[132] Martin, '*Lex Petrolea* in International Law' (n5) 96.

recent years. Therefore, there is a need to develop consistency in the treatment of case law from different investment arbitration service providers, akin to that present between the SMA and the LMAA within *lex maritima*. Whilst several studies have shown that there is a clear trend of recognition of precedential value of previous cases at least within the ICSID arbitration,[134] the question remains open as to whether investment arbitration centres will treat cases rendered by other investment arbitration providers, often competitors in the market, as valid precedents and in a harmonious manner.

Furthermore, investment arbitration is concerned with resolving disputes between foreign investors and host states. If one considers investment arbitration as the main platform for *lex petrolea* dispute resolution, the application of the concept is thereby limited solely to those disputes wherein there is any involvement of a state.[135] Indeed, it is true that significant involvement of a state is one of the distinct features of the petroleum industry. Yet, disputes between commercial parties active in the oil and gas area should not be ruled out of the scope of *lex petrolea*, because otherwise the assumption is that *lex petrolea* exists specifically in the public investment domain and applicable exclusively when a state (or a state entity) is involved.[136]

Moreover, there is a legitimate claim that the number of investment arbitration awards in the area of oil and gas is marginal in comparison with the amount of arbitral disputes resolved by commercial arbitration.[137] Some authors support such claim by reference to respective

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[133] Whilst the share of investment disputes carried out by such institutions is marginal compared to the caseload of the ICSID or the PCA, it is nonetheless quite substantial if combined. For example, as of 2021 the SCC has administered 116 investment disputes and the ICC another 43.

[134] See, for example, Ridi (n106); Kaufmann-Kohler (n104); T-H Cheng, 'Precedent and Control in Investment Treaty Arbitration' (2006) 30(4) FILJ 1014; although see I Cate, 'The Costs of Consistency: Precedent in Investment Treaty Arbitration' (2012) Marquette Law School Legal Studies Paper No. 12-26.

[135] In fact, the studies of Childs and especially Bishop are unconsciously suggesting this by mentioning only a handful of commercial arbitration awards.

[136] See similar discussion in Cameron (n14) 13-15.

[137] The number of investment arbitration awards with regards to the oil and gas industry is around 70 since 1972, see Childs, 'The Current State of International Oil and Gas Arbitration' (n1) 4-5; T Martin, 'Dispute Resolution in the International Energy Sector: an Overview' (2011) 4 (4) JWELB 332.

statistics from the leading arbitral centres.[138] However, two important factors should be borne in mind which might significantly undermine this disposition.

First, generally, commercial arbitration awards are rarely published, at least at present. Therefore, one may wonder as to what potential use such awards represent in practice if their availability is restricted. Of course, the counterargument might be that, in any event, there is a pool of (arbitration) experts in the area of petroleum disputes that are aware of many commercial arbitral awards in the area and share them among themselves.[139] But then the question arises as to what general use such restricted knowledge can be put by the commercial parties active in the petroleum industry. The answer will be none, except, of course, for that closed pool of experts, who can generate additional income from consulting, advising or deciding disputes in the area of oil and gas.

Second, the statistics issued by the leading arbitration centres represent sectors rather than actual issues resolved. While the number of such disputes seems to be quite significant, there is a high probability that the overwhelming majority of the matters presented before commercial arbitral tribunals do not concern specifics or distinct principles of petroleum practice (see the discussion above in section 3). Additionally, in many arbitration institutions reference is made to general energy disputes, which are not limited exclusively to the oil and gas sector, but also include such categories as alternative energy, mining, climate change, etc.[140] Since *lex petrolea* is associated specifically with the petroleum industry, these disputes, becoming more numerous over the last decade, may constitute a large proportion of the energy sector disputes and therefore create a false impression of oil and gas disputes

[138] See, for example, Maxi Scherer (ed), *International Arbitration in the Energy Sector* (OUP 2018) 3; Childs, 'The Current State of International Oil and Gas Arbitration' (n1) 4. For example, according to the ICC and the LCIA, energy disputes were the largest categories in their 2020 caseload.

[139] De Jesús (n6) 25-26; Wawryk (n2) 32.

[140] See, for example, S Manner and T Niedermaier, 'Renewable Energy Disputes' 86-106, R Heffron, 'Mining Disputes' 132-152 and A Magnusson, 'Climate Disputes and Sustainable Development in the Energy Sector: Bridging the Enforceability Gap' 384-401, all in Maxi Scherer (ed), *International Arbitration in the Energy Sector* (OUP 2018).

domination in commercial arbitration.

At the same time, it is not clear as to whether the petroleum community (or the wider energy community) is in favour of the establishment of a specialised arbitration institution in the area. On the one hand, there is a view that a specialised arbitration forum would not significantly raise the efficiency in dispute resolution of energy disputes.[141] Such view may be supported by references to subject matters of the disputes in the petroleum industry, which, for the most part, concern general legal issues (see the discussion above in section 3). Thus, there is no need to establish a specialised institution if the disputes submitted for its consideration would concern general legal issues arising out of a contract.

However, in the last couple of years there have been efforts to establish such a specialised arbitral institution, albeit not in petroleum, but in the wider energy area.[142] Therefore, the idea of specialised energy arbitration has not been set aside. In addition, there is some strong evidence that suggests that parties to energy disputes prefer such disputes to be resolved by a person with specialised technical knowledge in the field.[143]

Nonetheless, at the time of writing there is no identifiable industry-specialised dispute resolution authority in the petroleum sector, which significantly precludes the consistent and coherent development of *lex petrolea*. For the reasons shown above, investment arbitration cannot qualify as an industry-specific forum for petroleum disputes. Thus, *lex petrolea*

[141] Stadnyk (n53).

[142] See, for example, the Energy Disputes Arbitration Center (Turkey) which was established in October 2020, the Perth Centre for Energy and Resources Arbitration (Australia) which was established in November 2014 and the International Centre for Energy Arbitration (Scotland) which was formally established in 2013, but at the time of writing still has not developed its own rules for arbitration. It also worth mentioning the Energy Arbitration Court (Hungary), which was established in 2008 and initially dealt with disputes exclusively between Hungarian parties, but in 2015 expanded its reach to international disputes as well. However, on 31 December 2018 this court was terminated and its competency was transferred to the Arbitration Court attached to the Hungarian Chamber of Commerce and Industry.

[143] See, for example 'Dispute Resolution in the Energy Sector' (Initial Report by the International Centre for Energy Arbitration 2015) 8, in which the expertise of the decision maker was chosen as the most important factor in the dispute resolution process in the energy field; 2018 International Arbitration Survey (n100) 29-31, where the majority of respondents argued that publicly available rosters of arbitrators with specialist industry/sector experience and more industry/sector-specialised arbitral institutions would make international arbitration more appropriate for energy disputes. Also, see the Energy Arbitrators List maintained by the International Centre for Dispute Resolution.

functions without a sector-specialised dispute resolution authority and hence does not satisfy the essential criteria for recognition as a separate branch of the modern *lex mercatoria*.

6. Conclusions

It is suggested in this article that *lex petrolea* does not qualify as a separate branch of *lex mercatoria*. The academic literature and dispute resolution practice have not provided for any specific principles, customs and usages which are used in the petroleum industry. In fact, the authors arguing for the existence of such principles and customs often list general principles of law as applied in the context of the petroleum industry. In addition, there is a variety of private industry associations which provide guidance towards certain aspects of petroleum industry regulation, but there is no leading body in the area, which would develop and promote new industry-specific norms. However, the most evident factor as to why *lex petrolea* cannot constitute a separate branch of the modern law merchant is the absence of a specialised dispute resolution institution that resolves disputes on the basis of *lex petrolea* and ensures its consistent development. Thus, the lack of published commercial awards and scarcity of distinct matters in petroleum disputes which would involve elaboration and application of specific principles and customs relative to the oil and gas field present significant problems for the claimed existence of *lex petrolea*. It seems that in practice the concept's usage is tenuous and does not have any notable effect in dispute resolution. Even if it is assumed that *lex petrolea* does exist, it is unlikely to have any further effective development and consistent application in the absence of a specialised dispute resolution institution in the sector. It is also not beneficial to the proponents of the existence of *lex petrolea* that, due to the significant number of investment arbitration forums, arbitral awards from different institutions are likely to contradict each other, thus effectively preventing any harmonisation in the application of certain norms (here it would be appropriate to use the comparison of the LMAA and the SMA which not only seem to have similar approaches in

the vast majority of cases, but also often refer to the awards rendered by each other). Moreover, a considerable portion of commercial arbitral awards in the petroleum industry is not published at all. Therefore, based on the above, the absence of a specialised dispute resolution platform which could ensure continuous and coherent elaboration, application and interpretation of petroleum principles and customs, effectively makes *lex petrolea* a tenuous branch of *lex mercatoria*. In fact, the frequent reference to international customary law rather than any distinct principles of the petroleum industry in reported arbitral awards is more representative of the application of *lex mercatoria* rather than its specific branch. Until a specialised dispute resolution forum for petroleum matters is established that publishes its outcomes and provides for active reliance on previous cases, there is little prospect for further academic and practical development of the concept of *lex petrolea*.