THE DEVELOPMENT OF LEX MERCATORIA IN THE CONTEXT OF GLOBALISATION

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ABSTRACT

This paper takes a deep dive into the evolution and current importance of lex mercatoria in the context of economic globalization. It looks at how this international commercial law system has adapted to the needs of today's global trade. The research traces the journey of merchant law from its medieval roots to its resurgence in the late twentieth century, showing how globalization has driven the creation of independent legal frameworks that go beyond national borders.

The study also explores how digital technologies and e-commerce are opening up new avenues for the development of merchant law, while considering the ongoing tension between the push for uniform commercial standards and the need to maintain national legal sovereignty.

This paper sheds light on how legal systems adapt to the realities of economic integration, showing that lex mercatoria is more than just a relic of the past; it's a living, breathing response to the practical demands of global trade. The research wraps up by highlighting that while lex mercatoria isn't a complete substitute for state-based legal systems, it plays a crucial role as a complementary tool that enhances international trade. It does this by offering predictable, efficient, and business-friendly ways to resolve disputes. These insights are valuable for legal professionals, policymakers, and scholars who are trying to navigate the complex relationship between law, commerce, and globalization in today's interconnected world.

INTRODUCTION

The globalization of commerce, information, and various aspects of life presents challenges that echo those faced by ancient Roman merchants and English tradesmen, who navigated their own hurdles with the establishment of Lex Mercatoria. In today's world of global electronic commerce, we see the borderless nature of cyberspace colliding with the geographically defined national jurisdictions of sovereign states. The achievements of constitutionalism, the nation-state, and the rule of law have their limits in a global marketplace.

Private regulatory frameworks are emerging in a manner reminiscent of how Lex Mercatoria became a reality, whether in legal, commercial, or sociological contexts. On the Internet, we find self-regulation manifesting as 'netiquette' and other efforts aimed at fostering an environment of trust and stability that benefits e-commerce[1]. However, the issue of global regulation remains significant. Most governments are unlikely to view self-regulation as an adequate method for taxing electronic businesses. Given the considerable challenges associated with global regulation, the OECD, reflecting a broad consensus among its member countries, aims to support the private sector in developing effective, market-driven self-regulatory mechanisms. Today, regulation and self-regulation are no longer seen as opposing forces; instead, a more integrated approach is preferred, with the key question being how to strike the right balance.

The historical journey of Lex Mercatoria reveals that transnational, nongovernmental frameworks can be both effective and fruitful. Today's Lex Mercatoria encompasses the harmonization of various legal fields, the establishment of standards through codes of conduct, and the promotion of self-regulation in our evolving communication landscape. Around the world, we're witnessing the fading of traditional divides between national and international law, as well as between public and private law, and the interplay of politics and law. The role of the sovereign state as the primary lawmaker for international business transactions is diminishing, while the importance of private "bottom-up" rulemaking often referred to as "private governance" is on the rise. This shift is driven by non-governmental organizations like the International Chamber of Commerce (ICC) and the business community itself. These businesspeople continue to rely on standard forms and similar contract clauses (like those addressing "force majeure") to manage the unique risks associated with their cross-border

1 Toth, The Lex Mercatoria in Theory and Practice, OUP 2014

dealings. All of these trends contribute to a global movement towards standardization and unification in legal practices. What sets these transnational principles and rules apart is their ability to adapt to the genuine needs and practices of businesses operating across borders.

A key driver behind this development is how international arbitral tribunals make decisions. Both Goldman and Schmitthoff have recognized their crucial role in shaping transnational commercial law. Nowadays, international arbitrators are seen as the go-to judges for international commerce[2]. The success of the 1958 New York Convention on the Recognition and Enforcement of Foreign Arbitral Awards, along with the UNCITRAL Model Law on International Commercial Arbitration, shows that international arbitral tribunals are now regarded as "private courts." Their authority is widely accepted by domestic courts, lawmakers, and international agencies, putting them on par with domestic judges[3]. However, unlike their domestic counterparts, international arbitrators often take a comparative approach when resolving disputes that arise from international commercial transactions. They frequently reference transnational rules or general principles of law, whether to resolve the case at hand or to enhance the persuasiveness of their decision, which is rooted in domestic law, for the parties involved in the dispute.

Beyond the practical challenges, legal pluralism has laid the groundwork for these changes, which arise from the realities of our modern world and the complexities of cross-border business and commerce. Unlike the traditional, rigid, and state-focused view of legal sources, supporters of legal pluralism believe that our understanding of legal sources needs to adapt to these new developments. They recognize that law isn't solely the domain of governments (domestic law) or states (international law) and that legal theory shouldn't be confined to the old binary framework of "public/private" and "domestic/international.[4]" Instead, in contrast to the conventional legal approach that centers almost entirely on the state, legal pluralism embraces the diverse ways in which private entities create rules within the international business community, including the contracts themselves, as valid sources of law[5]. For

2 G. Tcubner," Global Bukowina': Legal Pluralism in the World Society", in G. Teubner(ed) Global Law Without a State (Aldershot: Dartmouth. 1997), pp. 3-30, 3.
3 B. Goldman Lex Mercatoria: Lecture (The Netherlands: Kluwer Law and Taxation Publishers, 1983), pp. 3-4.
4 U. Draetta, R.B. Lake and V.P. Nanda, Breach and Adaptation of Inte rnational (ontracts: An Introduction to Lex Mercatoria (Salem. NH: Butterworth Legal Publishers, 1992) and R. Goode, "Symposium New Developments in the Law of Credit Enhancement: Domestic andInternational: Abstract Payment Transactions*. Brooklyn.1 ofIntl L 22 (1996), p. 1
5 L.E. Trakman. The La Merchant: Evolution of Commercial Law (Littleton, CO: Fred B. Rothman & Company, 1983), p. 2.

pluralists, the emerging Lex Mercatoria shouldn't be dismissed as law just because it isn't tied to a specific nation.

While these transnational legal frameworks are increasingly being utilized in international contracts and arbitration today, there are still several hurdles to overcome for the New Lex Mercatoria to gain wider acceptance. Some of these challenges stem from legal theory and methodology, while others relate to the practical application of this relatively new system of transnational law[6]. A global survey conducted by the Center for Transnational Law (CENTRAL) between 1998 and 2000 highlighted that a significant barrier to the broader acceptance of the New Lex Mercatoria is the general lack of understanding about its principles and content.

In the opening section of the well-known book 'Global Law Without a State', Gunther Teubner argues that lex mercatoria, which pertains to Transnational Corporations (TNCs), stands as the 'most successful example of global law without a state.' However, this assertion overlooks the fact that TNCs, as complex entities, are deeply intertwined with and reliant on states throughout their legal existence. Lex Mercatoria traces its roots back to 11th century Europe, where it was initially known as 'ley merchant' in England, 'droit des Jbires' in France, and 'jus mercatorium' in other regions.

The fundamental idea here is that, in the absence of an international legislator, parties involved often turn to self-regulation, supported by experts and transnational organizations. This concept isn't unique to commerce; we see it in sports as well. Transnational non-governmental associations regulate various sports, and events like world championships adhere to detailed procedures based on rules that, while not formal laws requiring national lawmakers, still hold significant authority. In fact, the private governance of a global network of sports associations wields undeniable power over the rules of their respective games.[7]

The Lex Mercatoria was brought back into the spotlight in the 1960s by Berthold Goldman, Clive Schmitthoff, and a few others. This revival is rooted in the legal frameworks that started to take shape in the global economy before World War I, particularly through the standardization of contract clauses for sales and maritime transport contracts. Goldman and

6 H.W. Baade. "Codes of Conduct lor Multinational Enterprises", in N. Horn (ed) Problems of Codes of Conductfor Multinational Enterprises (The Netherlands: Deventer, 1980), pp. 407-444,
7 B. Goldman, Lex Mercatoria: Lecture (The Netherlands: Kluwer Law and Taxation Publishers, 1983), p. 4 .

Schmitthoff were both working on reviving the concept of medieval merchant law, with Goldman in Dijon and Schmitthoff in London. However, they had different views on how far the transnationalization of commercial law should go, especially regarding its independence from domestic law. Goldman saw the New Lex Mercatoria as a separate, autonomous legal system that stood alongside domestic laws and public international law. In contrast, Schmitthoff believed that transnational law only existed within the limits of party autonomy, which he considered a principle of domestic law. Despite these nuanced differences, they both agreed that a transnational set of legal principles and rules was gradually forming from the natural practices of the international business community (as noted by Goldman) and the various efforts of international agencies working towards the harmonization and unification of international trade law (as pointed out by Schmitthoff).

Today, transnational commercial law plays a crucial role in addressing the challenges posed by globalization. Several factors contribute to the slow development of a system of "a-national," or transnational, legal principles and rules: the growing movement of people, capital, goods, information, and communication across national borders, which has led to a deeper economic interconnectedness among states, including Italy. This evolution can be traced back to the jus gentium of Ancient Rome, which was seen as a distinct source of law governing the economic interactions (commercium) between citizens and foreigners (peregrini).[8]

Merchants came up with the concept of lex mercatoria to fill the gaps left by local commercial laws that struggled to handle issues arising from doing business across different regions. Over time, state-based laws took over the role of governing commercial activities, pushing lex mercatoria to the sidelines. When it came to doing business in Europe, merchants crafted their own legal framework. They established merchant courts during the medieval period to resolve disputes between corporations. Seasoned merchants took on the role of judges in these cases, and the majority of the legal principles were rooted in equity. The proceedings unfolded in a structured manner:

8 Draetta. Lake and Nanda, p. 13; 0. Lando,"The Lea Mlieratoria in lnternationalArbitration-, Intl and Comparative LQ 34 (1985), pp. 747, 749-751; and K.S. Weinberg., “Equity in International Arbitration: How Fair is 'Fair-? A Study of Lex Mercatoria and Amiable Composition", Boston U Intl L .!12 (1994), p. 227.

> "….Adjudication was essentially oral. Formal testimonies, written affidavits, and extensive judgments were generally dispensed with as a matter of course. Commercial adjudicators took judicial notice of trade customs and business practice, and they avoided the delays that would otherwise arise from the administration of oaths, the tedious cross-examination of witnesses, and the lengthy adjournment proceedings."[9]

One of the key benefits of merchant courts was their quick decision-making. Traders often had limited time in ports and needed courts that could act swiftly. Many experts believe that the decline of lex mercatoria was due to the growth of commercial transactions that became increasingly influenced by cultural and political differences, along with the emergence of the nation-state. In this context, Draetta, Lake, and Nanda point out: 'In its original form, the medieval law merchant could not adapt to the significant shifts in economics or politics. As trade grew, the conditions surrounding it changed constantly. Traders encountered various customs because of the increasing diversity among trading communities.' According to these scholars, the decline of lex mercatoria stemmed from the growing variety of merchant cultures. This system was initially designed to facilitate dispute resolution among a community that shared similar cultural and normative views. However, this perspective overlooks the cultural diversity present among medieval merchants[10]. Diverse merchant communities have always been a hallmark of international trade. Throughout history, merchants from different cultural backgrounds have engaged in commerce with each other. For example, the Roman Empire spanned a vast area, and there is a long-standing record of trade among African, Asian, and European merchants. However, the rise of the nation-state as the center of commercial decision-making changed how merchants interacted with one another. With the advent of the nation-state, lex mercatoria began to be integrated into national laws.

In the latter part of the twentieth century, we saw a surge in the number of nation-states. At the same time, transnational corporations (TNCs) grew so influential that many people now see these companies as creating their independent legal frameworks. This has led some commentators to suggest that a revival of lex mercatoria is in progress.

During the 1960s, scholars began focusing on the legal dimensions of modern commercial law. In 1964, Berthold Goldman proposed bringing back the term itself. This updated lex mercatoria

9 E. Langen, TransnationalCoumnercialL aw (Leiden: AW Sijthoff, 1973), p. 10.
10 R. David, 'Introduction', in: K. Zweigert and U. Drobnig (eds.), International Encyclopedia of Comparative Law, Vol. 2, The Legal Systems of the World – Their Comparison and Unification (1981)

encompasses various legal systems: public international law, uniform laws, general principles recognized by commercial nations, rules from international organizations, customs and practices, standard contracts, and arbitration award reports. The case for applying lex mercatoria to today's international economic landscape hinges on the idea that business norms are increasingly shaping the international legal framework. Commentators argue that this grassroots approach is overtaking the traditional top-down methods initiated by states.

The argument suggests that these norms were initially crafted and legally established by TNCs, even as the international legal community remained somewhat uncertain. For example, Langen points out,

> "…Given the spontaneous and rapid growth of economic law, the business world could scarcely let the matter rest as courts have done. The
>
> > More it organized itself in large industrial or regional associations, the more it was inclined to take into its own hands the ordering of the legal questions which most closely concerned it - a tendency which explains the flourishing of the state of international arbitration…"[11]

As the laws governing international business became more established, we saw a rise in international legal intervention. It's often said that this law 'responded to, not displaced the business order,' meaning that international business law developed as a supportive framework rather than a compulsory set of rules. Essentially, what merchants are expected to do based on business practices often shapes their legal obligations.[12] A look into the history of transnational corporations (TNCs) in developing nations highlights the challenges of relying solely on a reactive state model. While TNCs frequently influence public law, a broader view shows that these regulations are often the result of negotiation.

As we've discussed, thinkers like Teubner have proposed that globalization could lead to a new lex mercatoria. However, our understanding of the role of compound corporations suggests otherwise. This new lex mercatoria wouldn't resemble the grassroots version from medieval times at all. Instead, it appears to be something imposed from above by oligarchic

11 Cutler, Private Power and Global Authority. Transnational Merchant Law in the Global Political Economy (2003), at 108ff
12 R. David, 'Introduction', in: K. Zweigert and U. Drobnig (eds.), International Encyclopedia of Comparative Law, Vol. 2, The Legal Systems of the World – Their Comparison and Unification (1981).

states in various forms, utilizing compound corporations. It's important to note that, like oligarchic states, compound corporations have evolved in different ways over the centuries. Yet, the pattern has consistently been top-down. This was evident during colonial times and remains true today.[13] Therefore, we must consider the current landscape of globalization and transnational commerce through this lens.

Colonial compound corporations have transformed into complex transnational corporations (TNCs), and the traditional model of lex mercatoria just doesn't fit them anymore. These entities are primarily structured from the top down, rather than emerging from grassroots efforts. While the capabilities of states can differ significantly, we should approach the idealized notion of lex mercatoria with a healthy dose of skepticism. Given the intricate and changing dynamics between states and businesses, it's crucial to focus on the specific ways public and private sectors interact.

Over the last thirty years, transnational commercial players have been busy creating their own institutions. This institution-building has unfolded along two interconnected paths. First, there's been a concerted push to 'unify' or standardize the core principles of a stable, 'a-national' contract law, leading to the growing use of various standardized model contracts. Second, a strong network of private, competing transnational arbitration bodies has emerged, offering traders multiple options for resolving contract disputes without having to go through state courts.[14] As a result, national courts and lawmakers have adjusted their approaches, notably by limiting their authority over both contracting and arbitration. Through these developments, the new Lex Mercatoria has gained a significant (though not complete) independence from traditional sources of law, like national statutes and public international law, although the nature of this autonomy is still a topic of active discussion.

DIVERSITY OF RULES: A CASE OF LEX MERCATORIA

The idea that there are multiple rules and norms isn't exactly new. In fact, it's quite common in how different communities and nations across America, Europe, Africa, and Asia handle regulation. Take global trade law, for instance, lex mercatoria is a prime example of how trade can operate outside of state control. This concept, known as the Law Merchant, was developed

13 Teubner, 'Foreword' as well as "Global Bukowina': Legal Pluralism in the World Society', in: Teubner (ed.), 'Global Law Without a State' (1997).
14 Berger, 'The New Law Merchant and the Global Market Place - A 21st Century View of Transnational Commercial Law', in: Berger (ed.), The Practice of Transnational Law (2001), at 6ff.

by traders to meet the needs of international commerce way back in the 12th and 13th centuries, and it has continued to evolve and be utilized by merchants ever since[15].

There are two key features that set lex mercatoria apart. First, it's important to note that the state or any authority had minimal involvement in shaping or enforcing these rules. Instead, lex mercatoria grew organically from trade customs, practices, and the decisions made by specialized merchant courts that dealt with international transactions. The second defining characteristic is its global nature[16]. The primary goal behind establishing this independent legal framework for trade was to create straightforward regulations that align with the expectations of the business community, while also allowing for universal application without relying on national laws.

This is why it's often linked to the idea of "global law without the state." So, it's no wonder that the globalization of trade and investment in the 20th century sparked a revival of global trade law, echoing the motivations of medieval merchants. Today's traders are similarly seeking alternative solutions to sidestep national laws in their dealings. However, lex mercatoria does face criticism for its vague set of rules, lack of official recognition from states, and issues with enforcement, which together create uncertainty and unpredictability.

Scholars and practitioners who support the ideals of lex mercatoria have offered a variety of responses to the criticisms it faces. G. Teubner, for instance, challenged the notion that states have a monopoly on regulation by describing lex mercatoria as a form of law that doesn't fit within the traditional law-making framework. Instead, he sees it as emerging from a "self-reproducing, worldwide legal discourse," with self-regulatory contracts at its core that create a private legal order claiming global validity, along with arbitral tribunals that oversee the external validation of these contracts. The supposed shortcomings of Law Merchant underwent significant empirical scrutiny between 1998 and 2000, when K. Berger and his team investigated the practice of transnational commercial law to provide, for the first time, reliable empirical data on its application in international legal practice[17]. Their studies and publications indicated that the new lex mercatoria, or transnational commercial law, shouldn't be viewed as a complete set of rules but rather as an "open-ended list" of general legal principles and rules

15 K.P. Berger, The Creeping Codification of the Lex Mercatoria (1999).
16 Dasser, 'Lex Mercatoria - Critical Comments on a Tricky Topic', in: Appelbaum, Felstiner, Gessner (eds.), Rules and Networks,The Legal Culture of Global Business Transactions (2001)
17 Berger (ed.), The Practice of Transnational Law (2001); Mertens, 'Lex Mercatoria: A Self- Applying System Beyond National Law?' in:Teubner (ed.), 'Global Law Without a State' (1997).

that evolve over time. Teubner insightfully pointed out that the critique regarding the incompleteness of lex mercatoria, its perceived softness, should actually be recognized as a defining characteristic, making it "more a law of values and principles than a law of structures and rules," which allows it to be more flexible and adaptable to changing circumstances.

According to the CENTRAL inquiry, concerns about incompleteness and enforcement really don't have a significant impact on legal practice. In fact, issues like blacklisting, scandals, and other market sanctions, along with state enforcement measures under the 1958 New York Convention on arbitration, effectively serve the enforcement role just like state mechanisms do. On the other hand, criticisms regarding vagueness, legal certainty, and completeness mainly stem from a general lack of information and experience with this set of rules[18]. The revival of these rules is closely tied to new regulatory practices, such as the codification of international commercial contract principles (UNIDROIT) and the rules governing international trade in goods (INCOTERMS). These recommended rules gain a binding nature through the contracts and agreements that include them, and they can even be applied by arbitrators as a common practice when parties can't agree on the applicable law. The growing trend of self-regulating business values, ethics, and rules through codes of conduct, social responsibility, and international collaboration on adopting global standards is paving the way for the development of a new lex mercatoria or transnational commercial law. All these changes can be seen as self-organized and self-regulatory processes within society that shape trade law, influencing the functioning of international law both directly and indirectly.

NEW LEX MERCATORIA TOWARDS CONTRACT LAW

These days, trade lawyers have the choice to opt for something like non-national contract law instead of sticking with national law to manage their relationships. They might do this partly to protect their contracts and any disputes that could come up from being under the influence of national judges[19]. The importance of Lex Mercatoria as a governing framework is somewhat supported by the gradual codification (Berger 1999; Ferrari 1998) of this law. The more that traders and those resolving disputes actually utilize this law, the more its independence from

18 Fischer- Lescano and Teubner, 'Regime-Collisions: The Vain Search for Legal Unity in the Fragmentation of Global Law', 25 Michigan Journal of International Law(2004) 999

19 Berger et al., 'The CENTRAL Enquiry on the Use of Transnational Law in International Contract Law and Arbitration',available at http://www.tldb.de/ (2006-09-20) also in: Berger (ed.), The Practice of Transnational Law (2001) 91-115, at 93.

national legal systems grows.

In recent years, there's been a surge in projects aimed at unifying and codifying transnational contract law. The most notable of these initiatives are led by independent groups of practitioners and academics who have crafted draft commercial codes that have both global and regional significance. For instance, starting in the 1970s, the International Institute for the Unification of Private Law began developing what would eventually become the UNIDROIT Principles of International Commercial Contracts, which aims to serve as a comprehensive code for international trade (Berger 1999: chs 3 – 4; Bonell 1998)[20]. This Code, which was adopted by the Governing Council in 1994, is structured into seven chapters and 119 articles, covering essential contract concepts like pacta sunt servanda, good faith and fair dealing, validity, interpretation, performance and non-performance, choice-of-law, and forum, among others. Notably, the Institute chose not to present the code to governments or intergovernmental organizations, fearing that lengthy treaty negotiations would alter it and prioritize state interests over those of traders. In Europe, various scholars have proposed projects to unify European private law, with the Lando Commission on European Contract Law being the most significant. The Lando Commission delivered its final report, in the form of a code, to EU bodies in 1999 and made it available online in 2002.

There are three key points about these codes that really stand out. First off, the creators of the UNIDROIT and European Code put a lot of emphasis on pinpointing and formalizing the general principles of contract law—principles they believed were shared among developed, or 'mature,' legal systems. They recognized that trying to create strict rules would be futile since that's the job of the lawyers representing the contracting parties. However, when contract disputes do come up, they usually revolve around interpreting negotiated rules in light of changing circumstances[21]. This is where those general principles come into play, guiding judges and arbitrators in their decisions. The drafters thought that arbitrators would benefit from having a set of general principles specifically designed for international trade, helping them avoid the tricky choices that come with conflicting laws. They also believed that national judges would be more inclined to uphold arbitral awards that relied on these familiar principles.

20 Berger, 'The Concept of the "Creeping Codification" of Transnational Commercial Law', available via http://www.tldb.de/.
21 Teubner, 'Global Bukowina', supra note 11, at 20-21.

On the flip side, critics of the Lex Mercatoria have raised doubts about whether these general principles can truly be considered law, at least in the way they understand it within their own legal systems. By their very nature, general principles can seem abstract, if not a bit vague; yet, this abstraction has its perks. National contract law, when viewed as a straightforward legal text, faces similar criticisms because so much of it is rooted in principles. However, codified private law has already been significantly shaped by judicial decisions, which is part of why it often falls short of meeting the demands of modern business. Moreover, general principles of contract law are practical for traders, as they allow private arbitrators the flexibility to customize arbitration according to the specific needs and preferences of the parties involved. Ultimately, through contracts, parties are essentially creating their own law; the Lex Mercatoria aims to provide a solid foundation for this law, rather than replacing it.

Second, the Lex Mercatoria is becoming a popular choice for traders and arbitrators when it comes to the governing law in contracts. The reason is pretty simple: having an international contract law can help reduce the bargaining and transaction costs associated with transnational business. This is especially useful in situations where neither party wants to agree on a specific national jurisdiction that the other prefers. Plus, they can easily find the necessary contractual tools in the digital realm of the Lex Mercatoria. Take the International Chamber of Commerce (ICC), for instance; they've been offering affordable model contracts in both booklet and floppy disk formats for quite some time. These contracts can be easily tailored to meet specific needs. In fact, the introductory remarks to the ICC's model international sale contract (International Chamber of Commerce 1997: 6) clearly state: 'Parties are encouraged not to choose a domestic law of sale to govern the contract.'

Let's take a closer look at what's happening in Europe right now. It's a bit of a reflection of what the U.S. went through in the past, and it also serves as a small-scale example of broader global trends. The UNIDROIT project was inspired by the unification of American contract law, which was driven by the efforts of the American Law Institute (ALI). This independent group of scholars and practitioners first introduced a Restatement of the Law of Contracts back in 1932, and they've kept it updated ever since. This Restatement, presented in a straightforward legal format, not only codifies existing laws, including established case law, but also offers innovative solutions to unresolved issues, all while navigating the complexities of conflict of laws. State courts frequently reference it. Additionally, the ALI played a key role in drafting the Uniform Commercial Code, which covers everything from sales and leases of goods to

secured transactions[22]. They encouraged states to adopt it as law, and today, every state except Louisiana has done so. This approach has helped harmonize the majority of laws governing contracts and interstate trade without needing federal intervention. Similar to the ALI, UNIDROIT, and the Lando Group employed comparative methods and functional analysis to align common trade challenges with effective solutions for codification.

NEW LEX MERCATORIA TOWARDS TRANSNATIONAL DISPUTE RESOLUTION

Traders are on the lookout for third-party dispute resolution that upholds the law they've chosen to govern their contracts, rather than a law that comes from outside their agreement. They find arbitration appealing compared to going through national courts, mainly because it helps them save on costs and time, and they value confidentiality—nobody wants their disputes aired out in public. This is why it's almost a given that transnational commercial disputes are kept out of the courts and away from local laws (Juenger 1998: 266). Nowadays, over 90 percent of transnational commercial contracts include an arbitration clause (Berger 1999: 111). The surge in international trade since the late 1950s has really driven this trend. As transnational activities have ramped up, so has the use of arbitration, leading to a gradual formalization of the processes involved. With the growth of global arbitration for private commercial disputes, the independence of the Lex Mercatoria has been further strengthened.

The tale of international arbitration shares a familiar storyline, featuring some of the same characters and ending much like the previous narrative about contracts. Back in the 1950s, UNIDROIT crafted a Draft Uniform Law of Arbitration. This initiative was soon followed by the UN Commission on International Trade Law (UNCITRAL), which introduced its Model Law on International Commercial Arbitration in 1985[23]. While there are some distinctions, both serve as model codes aimed at harmonizing national arbitration rules through their adoption as national legislation. They both highlight what transnational businesses seek most from the Lex Mercatoria: the freedom for private parties to enter contracts, select their arbitration methods and arbitrators, exercise discretion in applying the law to specific cases, ensure procedural fairness on terms that suit the traders, and limit national judicial review of arbitral awards. Some countries have incorporated elements of these model laws into their

22 Bonell, M. (1998) 'UNIDROIT principles and the Lex Mercatoria', in T.E. Carbonneau (ed.), Lex Mercatoria andArbitration: A Discussion of the New Law Merchant, Yonkers: Juris.
23 Bussani, M. and Mattei, U. (1997/98) 'The common core approach to European private law', Columbia Journal of European Law3: 339 – 56.

internal reforms of commercial transaction codes, a change that has become almost essential due to the surge in global trade. Moreover, the trading community has increasingly recognized these rules as part of the customary law that governs their interactions (Lex Mercatoria).

The number of arbitration centers dealing with international business disputes has skyrocketed over the years. Back in 1910, there were just ten arbitration houses; by 1985, that number had jumped to over 100, and today, we're looking at more than 150. In Europe, the major players include the ICC in Paris, the London Court of International Arbitration (LCIA), and the Stockholm Chamber of Commerce (SCC). The ICC, being the oldest and largest institution of its kind, saw traders file around 3,000 disputes for arbitration from the 1920s to the 1980s, over 3,500 in the 1990s, and a whopping 5,250 from 1996 to 2005. By 2004, the annual filings had surpassed 550, with more than 350 awards handed down each year. The ICC is also the most international of these houses: in 2005, it received 521 arbitration requests involving 1,422 parties from 117 different countries (about 10 percent of these parties were states or public authorities, while the rest were private entities). Notably, in 1996, the proportion of Western European parties dipped below 50 percent for the first time, while the shares of Latin American, Asian, and Eastern European parties increased. Roughly 70 percent of all cases involve 'inter-regional' contracts, where at least two parties in the dispute are from different continents. The SCC focuses on contract disputes among Scandinavian companies and is increasingly mediating between firms from Western Europe and those in the Baltic region and the former Soviet Union. Back in the 1970s, the SCC handled an average of eleven arbitrations per year, which grew to twenty-nine in the 1980s, and then jumped to 110 in the 1990s, with 169 cases processed in 2003 alone. The LCIA, which is primarily influenced by parties from the UK (about 30 percent), the USA, and the old EC-12, currently receives just over 100 arbitration requests each year.

From a trader's perspective, choosing to arbitrate within a well-established house is a smart move. Beyond the benefits we've already talked about, even a complicated arbitration can usually wrap up in about six months. Plus, you can tailor the service fees based on the financial stakes involved or how complex you want the arbitration process to be. Major arbitration houses are always on the lookout for ways to boost efficiency and draw in companies that might not find a full arbitration worth the cost compared to the amounts at stake. For instance, both the ICC and the SCC have rolled out various mediation options and speedy 'mini-trials.' They also assist in selecting mediators and arbitrators and maintain a roster of technical experts

across different business sectors for the parties and arbitrators to use, this is often seen as a more effective approach than having parties pay their own experts to testify. The revamped Venice House, now known as the Venice Chamber of International Arbitration, is aiming to attract European firms trading with the Middle and Far East by offering one-day arbitration services to its clients.

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