

Modern Perspectives to the Management of International Commercial Arbitration: Lex mercatoria

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Preamble

Globalization encourages harmonization of national laws. Cross border business communities has successfully built lex mercatoria as a supplement to substantive law underpinning its application. Hence applicability becomes the basis of a legal system achieved through system of conflict of laws. While international transactions are benefited, actors- arbitral tribunal, parties, courts have evolved and regulate their affairs inter alia, interpreting arbitration agreements according to trade practices. National legal system has adapted to lex mercatoria. Comparative law reveals challenges encountered by actors and how courts fill vacuums arising in lex mercatoria.

What is lex mercatoria?

Law of the merchant, which has made a mark within boundaries of law is defined as 'an autonomous source of law proper to the economic relations between citizens and foreigners'.¹ It comprises rules, trade usages, and practices evolved in international business. Proponents suggest it is based upon merchants' customs and sea laws. Hence lex mercatoria is deemed a customary law, sanctioned by States. Ancient scholars declare it as permanent, concurring with international law and trade traditions, without abrogation. Hence uniform application of such law is significant enabling parties to adapt modern commercial needs.

Since States possess own laws in full accord, a system of law like lex mercatoria may be skeptically regarded as whether it can arise spontaneously. However, commentators grant approval regarding benefits of harmonizing business. It has been deemed substantive law or staple law from yesteryears. Furthermore, merchandisers' pleas were decided by it. However, this notion may be challenged because in context of State contracts there are sophisticated laws. Critics may suggest it 'an effort to legitimize as law the economic interests of western corporations'.² Customs are heterogeneous in nature, since merchant communities follow different rules. Customs evolving via universal trade rules is questionable.

It is founded on 'spontaneous' features querying whether rules need to form part of legal order. It can be suggested that frequent usage of documentary credits can be codified into national laws or treaties enabling it to attain force of law.³ Hence 'New lex mercatoria' suggests analysis of what principles it embodies.

Impact of lex mercatoria on International Trade

Paucity of rules and discretion of participants of arbitral process enable arbitrators to cater proceedings precisely to characteristics, cultures and claims of arbitration. However, when Lex mercatoria is selected as applicable, if procedural unpredictability kicks in, arbitration will suffer. Hence modern arbitration, explained by commentators "refers to growthof procedural 'soft law'".⁴ It is realistic when procedural rules operate parallel with lex mercatoria guiding ascertaining applicable law. According to IBA, procedural matters are underpinned by procedural rules. However, arbitrators' reduced ability to impose their peculiarities and judicialisation of arbitration may result, yet accepted with reliance.⁵

Conflict rules may hinder applicability of lex mercatoria. Similar to France a sensible and logical approach may be adopted which omits reference to such rules. Direct approach where arbitrator chooses rules as appropriate in resolving dispute when parties are silent are endorsed authoritatively.⁶ Arbitrator should be guided by ethics - not adopting national conflict rules or choosing system of law as substantive law of Contract. However, to endorse party autonomy, parties should proactively agree on feasible rules of lex



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mercatoria, among many available choices, as applicable in their contract or at a reasonable time after dispute arises. Ultimum is to positively impact outcome of arbitration via choice of law- lex mercatoria both sound and feasible as applicable to substance of dispute.

¹ B. Goldman, 'LexMercatoria' Forum Internationale, (No.3, 1983)

² F.A. Mann, 'The proper Law in the Conflict of Laws' ICLQ, 1987, p. 448

³ UNCITRAL Rules, Article 33 (3) '.....arbitral tribunal shall take into account usage of trade applicable to the transaction'.

⁴ W. Park, 'The Procedural soft law of international arbitration: Non Government Instruments' Kluwer Law International, 2006, p. 148

⁵ G. Phillips, 'Is creeping legalism Infecting Arbitration', Dispute Resolution Journal, 2003, p. 37

⁶ WIPO Arbitration Rules, Article 59 (1)

