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The Foundations of Referring to Lex Mercatoria by Arbitrators in International Commercial Contracts

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Lex Mercatoria (transnational commercial law) has emerged and evolved as a spontaneous legal system beyond the legislative power of national governments, and today, nearly the entire international commercial community is well-acquainted with this self-sufficient legal framework. A review of some of the laws of leading countries in international trade, as well as model arbitration laws in the last decade, demonstrates the acceptance of Lex Mercatoria's applicability as the governing law of international contracts, especially when the parties have explicitly agreed to apply such rules. However, a matter that invites reflection is whether arbitrators are authorized to make decisions based on Lex Mercatoria when the parties have remained silent on the choice of governing law or even when they have selected a specific national law as the governing law of the contract. Generally, an examination of the decisions rendered in numerous cases adjudicated by international commercial arbitration tribunals reveals that arbitrators tend to apply the principles and rules of this transnational legal system even in the absence of Lex Mercatoria being chosen as the governing law of the contract.

Keywords: *Lex Mercatoria, international commercial arbitration, national law, international commerce.*

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1. Introduction

Contracts, not only in domestic law but also in foreign trade, are subject to private will, except in cases restricted by public order and mandatory rules. Thus, based on the principle of freedom of will, contractual terms must be enforced. Regarding the choice of governing law in international trade contracts, most legal systems have accepted the principle of party autonomy in determining the applicable law and have respected the parties' choice in this regard. One of the options proposed for governing international contracts in foreign trade is Lex Mercatoria, or transnational commercial law, which has been discussed in various articles concerning its concept and sources. Generally, in international commercial contracts, if the parties, instead of designating a specific national law as the governing law, use phrases like "general principles governing international trade" or "principles and rules accepted in international trade," most legal scholars and arbitration tribunals believe that the parties intend to apply transnational principles and rules such as Lex Mercatoria to their contractual relations rather than a specific national law. However, a question that has perhaps received less attention is whether, in the absence of a clause selecting the applicable law for the contract or when a specific national law has been chosen as the governing law, arbitrators are permitted to apply the principles of Lex Mercatoria. Alternatively, should

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arbitrators, in the absence of an express choice by the parties, merely apply conflict-of-law rules to select a national law, and in cases where a national law has been explicitly chosen, are they prohibited from applying Lex Mercatoria, as such an application would contradict the chosen law? To answer these questions, we will analyze the trend in international commercial arbitration and the reasons for the inclination to apply Lex Mercatoria in such scenarios.

2. The Concept of Lex Mercatoria

Over past decades, various authors have provided different definitions of Lex Mercatoria, and a unified definition accepted by all authors has yet to be found in the published works on international commercial law. In general, it has been emphasized that the international commercial community possesses the law-making power and can establish the necessary legal principles and rules to govern contractual relations beyond the territorial boundaries of any specific state, based on the common interests of private actors, without state intervention and away from the traditions of legal positivism (Karimi et al., 2022). This supranational legal system is known as Lex Mercatoria. Professor Goldman, a staunch advocate of Lex Mercatoria, defines it as a set of general principles and customary rules spontaneously referenced or developed within the framework of international trade, without being linked to any specific national legal system. According to Goldman's view, Lex Mercatoria is an independent, non-state legal system composed of spontaneous general principles and customary rules without legislative interference from states. Judge Mustill notes that the rules of Lex Mercatoria have normative value independent of any national legal system and, therefore, form an autonomous legal order (Piiparinen & Klabbers, 2013). Another author describes these rules as unwritten, uniform commercial norms created by the international trading community to meet the needs of international trade, while others refer to them as "transnational commercial rules," "general principles of international commercial law," "common principles across multiple legal systems," "international commercial customs," and "soft law rules" (Elcin, 2012). A common feature of all these definitions is, first, the acknowledgment of the transnational nature of Lex Mercatoria's principles and rules, and second, the emphasis on the adaptability of these principles and rules to the conditions and exigencies of international trade. These shared features have led to references to Lex Mercatoria in international commercial arbitration awards.

3. Non-Selection of the Governing Law and the Application of Lex Mercatoria

The most fundamental principle in contract law is the principle of autonomy of will. The basis of this principle is that, just as a contract is formed by the will of the parties, its content is also determined by their will, making the creation, performance, and outcome of the contract dependent on the parties' intentions. Consequently, contracts made within the domain of private law are agreements created in the sphere of private law, which, despite being a "free zone" compared to other legal domains, grants contracts a privileged status. In this "free zone," the legislator does not replace the parties; instead, the law merely supplements the parties' will in the absence of an agreement. Therefore, if the parties have agreed on the terms and performance of the contract in a manner they prefer, the contract is executed in accordance with those agreements (Shariat Bagheri, 2012). Accordingly, under the principle of party autonomy, when contracting parties have chosen the law of a specific country as the governing law, such a choice must be respected, except in exceptional circumstances like the provision in Article 968 of the Iranian Civil Code. Nevertheless, the persistent question is whether, in international trade contracts where the parties have either negligently or intentionally omitted a clause selecting the applicable law, an arbitrator or arbitral tribunal can apply Lex Mercatoria, which embodies principles and rules recognized in international trade. An analysis of arbitral awards indicates that, in multiple cases, arbitrators have shown a preference for applying Lex Mercatoria in the absence of an express choice of governing law, which we will further analyze in the following sections.

3.1. Analysis of the Implicit Will of the Contracting Parties

One argument for applying Lex Mercatoria in the absence of a governing law clause is the analysis of the parties' implicit will. In cases where the parties have not selected the law of a specific country to govern their contract, it is often inferred that they could not agree on a particular

national law, and, therefore, they have implicitly desired the application of Lex Mercatoria as a legal system whose principles and rules have a transnational character. In this regard, it should be noted that in transactions concluded within the realm of international trade, each party usually prefers to choose the law of their own country as the governing law of the contract. This preference arises because, first, they are more familiar with the principles and rules governing their national legal system; second, they do not need to spend time and resources learning the laws of a country with which they are unfamiliar; and third, choosing their own national law eliminates concerns about facing unexpected rulings or legal practices that might adversely affect their contractual interests. As a result, parties often refuse to accept the national law of the other party or even the law of a third country with which they are unfamiliar. Thus, they deliberately leave the governing law clause unspecified due to the lack of agreement on each other's laws or the law of a third country. Additionally, in some situations, economic reasons lead to this outcome, as the parties prefer to focus on negotiating substantive matters, such as the contract price, securing certain advantages like obtaining support services, or adjusting the duration of warranties, rather than on choosing the governing law, which does not yield immediate financial benefits.

An examination of international commercial arbitration practice indicates that, in the absence of a governing law clause, arbitrators increasingly tend to render awards based on Lex Mercatoria (Zumbansen, 2021). This approach has even been supported by national courts in some cases, which consider it part of the arbitrators' duties and have upheld it with various arguments (Zumbansen, 2020). For instance, in case number 7375, decided by the ICC Arbitration Court in 1996, the application of general principles of international commercial law was accepted in the absence of a governing law clause. In this case, which involved a contract between an American seller and a Middle Eastern buyer for specific goods, the parties had not chosen a governing law. The arbitral tribunal, analyzing the parties' implicit will, concluded that neither party wanted to accept the national law of the other or the national law of a third country. Consequently, the tribunal decided to apply the general legal principles widely accepted in the international commercial community (Bonell, 2009). Similarly, in award number 8261, also rendered by the ICC in 1996, involving a contract between an Italian party and a state agency from the Middle East without a governing law clause, the arbitral tribunal based its decision on the general principles of commerce found in Lex Mercatoria (Bonell, 2009).

As demonstrated, arbitral tribunals frequently prefer to apply this transnational legal system even when Lex Mercatoria has not been explicitly chosen as the governing law, reflecting the parties' implicit disfavor toward the application of domestic (national) laws in international trade contracts. However, this perspective has its critics. Opponents argue that Lex Mercatoria should only be applied when the parties have expressly agreed to govern their contract by it. In the absence of such an agreement, they contend, the arbitrator or tribunal should apply conflict-of-law rules to determine the applicable law. Another argument against the application of Lex Mercatoria in the absence of a governing law clause references Article 28(2) of the UNCITRAL Model Law on International Commercial Arbitration. Article 28(1) grants arbitrators the authority to apply Lex Mercatoria through the phrase "rules of law." Nevertheless, Article 28(2) emphasizes the use of conflict-of-law rules to select the applicable law. Therefore, under Article 28(2) of the UNCITRAL Model Law, in the absence of an express choice by the parties, the arbitral tribunal cannot base its decision on a non-national law like Lex Mercatoria.

Nonetheless, certain national and international legislations recognize the possibility of applying Lex Mercatoria in the absence of a governing law clause. For example, Article 1496(1) of the new French Code of Civil Procedure states: "The arbitral tribunal shall resolve the dispute in accordance with the rules of law chosen by the parties or, in the absence of such a choice, in accordance with the rules of law it deems appropriate." This provision is viewed as an implicit endorsement by the French legislator of the possibility of applying Lex Mercatoria, allowing arbitrators to apply the appropriate rules of law directly without referencing national conflict-of-law rules. The term "rules of law" instead of "national law" implies the applicability of Lex Mercatoria, enabling arbitrators to apply it directly to disputes referred to arbitration (Lynch, 2003).

According to Article 187(1) of the Swiss Private International Law Act, "The arbitral tribunal shall decide the case according to the rules of law chosen by the parties or, in the absence thereof, according to the rules of law with which the case has the closest connection." The Swiss legislator explicitly allows arbitrators to decide cases based on "rules of law" chosen by the parties, thereby recognizing the applicability of Lex Mercatoria in the absence of a chosen governing law. Additionally, Article 33(1) of the Swiss Arbitration Law, enacted in 2012, similarly provides that in the absence of a governing law clause, the arbitral tribunal shall apply "the rules of law with the closest connection to the dispute." The use of "rules of law" rather than "national law" in this legislation also indicates the possibility of referencing Lex Mercatoria.

In Iranian law, authors argue that the International Commercial Arbitration Act allows the parties to authorize arbitrators to render decisions not only based on legal principles and rules but also on what they deem fair and just or even in an ex aequo et bono manner. Article 27(3) of the Iranian International Commercial Arbitration Act provides: "The arbitrator may decide ex aequo et bono or as amiable compositeur if the parties have expressly authorized them to do so." When the Iranian legislator permits arbitrators, with the parties' agreement, to issue decisions based solely on fairness and equity, irrespective of legal conditions, it follows that the parties can also authorize arbitrators to render awards based on shared legal principles or international commercial law. Moreover, some past oil contracts between Iran and international oil companies designated the principles and rules of international law as the governing law. For instance, Article 22(2) of the concession agreement between Iran and the Anglo-Iranian Oil Company, dated April 29, 1933, states: "The arbitration award shall be based on the judicial principles mentioned in Article 28 of the Statute of the Permanent Court of International Justice and shall not be subject to appeal" (Shiravi, 2016).

Beyond the recognition of Lex Mercatoria in national laws, there is also a growing trend in model arbitration laws to acknowledge its applicability in the absence of a governing law clause. For example, Article 21 of the 2017 ICC Rules refers to "applicable rules of law" when no governing law is chosen, indicating the possibility of selecting Lex Mercatoria instead of a specific national law. According to Article 21, "The parties are free to agree on the rules of law to be applied by the arbitral tribunal to the merits of the dispute. In the absence of any such agreement, the arbitral tribunal shall apply the rules of law it deems appropriate."

The arbitration rules of the Arbitration Institute of the Stockholm Chamber of Commerce (SCC) also foresee the application of Lex Mercatoria as the general principles of international trade. Article 22 explicitly states: "The arbitral tribunal shall decide the merits of the dispute in accordance with the law or rules of law chosen by the parties. In the absence of such a choice, the arbitral tribunal shall apply the law or rule of law it considers most appropriate to the dispute." The use of "rule of law" in this article confirms the possibility of applying Lex Mercatoria when the parties have not agreed on the governing law.

3.2. The Transnational Nature of Lex Mercatoria Principles and Rules

Another reason arbitrators tend to apply Lex Mercatoria when parties have not specified a governing law in their contract is the transnational character of Lex Mercatoria principles and rules. These principles and rules represent norms widely accepted in the practices and customs of merchants and are reflected in most advanced legal systems dealing with foreign trade. Thus, they possess a transnational quality, making them more suitable for governing contracts concluded in international trade than the laws and regulations developed within the territorial boundaries of a specific national legal system. In other words, since arbitrators in international commercial disputes adjudicate conflicts at a transnational level, it is understandable that awards referencing globally accepted legal principles instead of a specific national law are more justified from the perspective of the international commercial community. Moreover, referring to transnational principles and rules like Lex Mercatoria, which are common across most national laws involved in international trade, provides solutions to disputes that transcend regional and national peculiarities of each party. This can lead to better outcomes and greater adaptability to the needs of international commercial arbitration (Baddack, 2005).

Additionally, given that Lex Mercatoria principles and rules are rooted in the customary practices of merchants, they are economically more efficient for merchants

compared to state legislation (Berger, 2010, p. 43). It should also be noted that the demands of globalization necessitate a new legal framework that is more flexible than national laws and attuned to the reasonable needs of the international community. Hence, the necessity of recognizing and validating Lex Mercatoria has become clearer than ever in today's era (Noussia, 2010).

Consequently, a strong perspective contributing to the acceptance of Lex Mercatoria in the international commercial community is its international nature. This characteristic has led international arbitrators, even when Lex Mercatoria is not explicitly chosen as the governing law, to favor its application in resolving disputes. For example, in the award dated December 10, 1997, issued by the Temporary Arbitration Court in Buenos Aires, Argentina, the tribunal addressed a case involving a share sale agreement between shareholders of an Argentine company and a Chilean company. The parties' contract did not contain a governing law clause, although they had based their claims on specific provisions of Argentine law. Despite this, the tribunal chose to apply the UNIDROIT Principles as a manifestation of Lex Mercatoria, declaring that these principles comprise "international commercial customs reflecting solutions from different legal systems and international contract practices" (Bonell, 2000).

The Paris Court of Appeal also, in a case where the arbitrator applied Lex Mercatoria in the absence of a governing law clause, stated that Lex Mercatoria rules "are inherently international and can be applied to resolve disputes of an international nature when no governing law is specified" (Goldman & Fouchard, 2000). The court justified the application of Lex Mercatoria by highlighting its transnational nature and deemed these rules appropriate for resolving international trade disputes.

In case number 9875 before the ICC Arbitration Court, the claimant, a French company, and the respondent, a Japanese company, had entered into a licensing agreement granting the claimant an exclusive license to produce, sell, and distribute the respondent's products in Europe. The contract did not specify a governing law, and when a dispute arose, the claimant argued for the application of French law, while the respondent requested Japanese law. Ultimately, the tribunal determined that Lex Mercatoria was the most suitable set of rules to apply, referring to it as "a body of international commercial rules and customs gradually clarified through various sources, including international trade actors, trade associations, decisions of international arbitration courts, and institutions like UNIDROIT and the recently published Principles of International Commercial Contracts."

In case number 5953, also heard by the ICC Arbitration Court, a contractual dispute arose between Valencia, a Spanish company, and Pre-Mari, an American company. Pre-Mari was obligated to deliver specific quantities of coal to Valencia's cement plant in Spain. The contract did not specify a governing law, and each party argued for the application of their respective national law. The arbitrator observed that the absence of a governing law clause was not accidental but rather reflected the parties' intent to avoid the application of any national law and instead submit to truly international law. The arbitrator found that applying Lex Mercatoria, which refers to a set of international commercial norms, best captured this truly international nature. Thus, when no shared will concerning an applicable national law exists, the only viable solution is to apply Lex Mercatoria (Elcin, 2012).

3.3. Arbitrators' Tendency Toward the Denationalization of Contracts in International Trade

The denationalization movement has focused on the laws governing arbitrations, which usually foresee the application of the law of the seat of arbitration to resolve disputes. However, similar discussions have arisen concerning the substantive law governing arbitrations or the legal relationships between the parties. All these discussions share a common question: Why should parties to an international arbitration select the substantive law of a specific state, given that such laws are more suited to governing domestic contracts rather than those concluded in international trade? Furthermore, why shouldn't the principle of party autonomy be interpreted in a way that allows the parties to govern their legal rights through customary commercial law, general legal principles, or transnational legal rules? (Moses, 2012). These questions, long pondered by international traders and commercial arbitrators, have fostered a practical shift toward the application of non-national or transnational laws. This shift has also been reflected in various model laws and international arbitration rules that permit the application of general principles of international trade,

such as Lex Mercatoria, instead of the national law of a specific country.

According to the theory of arbitration denationalization, arbitration law provides a legislative framework within which arbitration agreements are created by the parties, arbitrators are appointed, hearings are conducted, and awards are rendered. This idealistic theory suggests that arbitration is inherently self-sufficient, meaning that it is a consent-based system for resolving disputes, independent of the domestic or national laws of any particular country. In essence, the contractual nature of arbitration is emphasized over its territorial aspect, and it is argued that international arbitrations are not necessarily constrained by national laws, except where public policy requires such limitations (Mohebi, 1999).

The theory of denationalization argues that if a universal law governing arbitration can be relied upon that does not conflict with the laws of the seat of arbitration, the arbitration process would become simpler and more efficient. Neither the arbitrators nor the parties to international contracts would need to dissect different parts of a single arbitration process and make each subject to the law of a specific country. Consequently, the denationalization theory seeks to detach international arbitration from the law of the country where the arbitration takes place (the seat of arbitration), whether in procedural or substantive matters, thereby simplifying the entire arbitration process for the parties and arbitrators and reducing its complexity. The rationale for this modern approach is largely based on the principle of party autonomy and the private nature of arbitration as a dispute resolution method (Sedighi & Naeimi, 2016).

Reviewing certain arbitration awards that have invoked Lex Mercatoria reveals a tendency among arbitrators to denationalize arbitration, leading to the application of transnational law rather than national law. For instance, when the parties granted the arbitrator the authority to act as an amiable compositeur, in ICC Award No. 3267, dated 1979, the tribunal stated that the arbitrator "has the power to decide the dispute based on general principles of law without being constrained by the technicalities of any specific legal system." The arbitrator's reference to general legal principles essentially pointed to the principles and rules of Lex Mercatoria.

In another case decided by the ICC Arbitration Court in 1979, the tribunal chose Lex Mercatoria to address the challenge of determining the governing law of the contract. The arbitrator explained that "faced with the difficulty of selecting a national law that is convincingly applicable, the tribunal decided, given the international nature of the agreement, that it was appropriate to set aside any reference to specific legislation ... and apply international Lex Mercatoria" (Carbonneau, 1987).

Thus, the language used by arbitrators in various awards suggests a trend toward the denationalization of arbitration in international contracts. This trend is justified given the transnational nature of arbitration in international trade, where arbitrators deal with international trade customs rather than national practices and procedures. It is noteworthy that scholars in the field of economic law have also emphasized the need for denationalized laws tailored to the conditions of international markets. Prominent legal theorists have even argued that transnational economic groups, which represent a "non-territorial legal system," exercise their "denationalized powers" (Lindahl, 2013), grounding denationalization in the principles of a free economy where both parties to a contract have the freedom to decide which laws should govern the arbitration process.

4. Situations for Applying Lex Mercatoria Despite the Choice of National Law

Many countries, based on the principle of party autonomy, which gained special recognition in private international law through the French philosopher and jurist Charles Dumoulin, prioritize the parties' choice of governing law for contractual obligations. Given the significance of the governing law on the parties' obligations, individuals in international trade contracts, which may be subject to multiple laws, generally prefer to specify a national law as the governing law to avoid concerns about the application of the law of a third country or the other party's national law in case of a dispute. In such cases, an important question arises: Do arbitrators in international commercial contracts still lean toward applying Lex Mercatoria even when the parties have expressly chosen the national law of a specific country as the governing law? We will analyze arbitration awards and the reasoning that has sometimes led arbitrators to apply Lex Mercatoria, even when a specific national law has been chosen.

4.1. Lex Mercatoria as a Complement to National Laws

According to the principle of party autonomy, arbitrators are not permitted to disregard the chosen governing law if the parties have explicitly selected a specific law for their contract. Nevertheless, international commercial arbitration practice has shown that arbitrators, in numerous instances, have chosen to apply Lex Mercatoria principles and rules as a complement to national law, even when a specific national law was designated by the parties.

In ICC Arbitration Case No. 11295, the claimant, a Swiss company, initiated arbitration proceedings, alleging that the Polish company, as the respondent, had violated the exclusive rights granted to the claimant. In this case, the sole arbitrator was first required to determine whether the claimant had the right to initiate proceedings for a violation of rights transferred to a subsidiary and whether that subsidiary could join the arbitration. In assessing the legal effects of the claimant's transfer of rights to its subsidiary—particularly whether the transfer included both rights and obligations or merely rights—the arbitrator examined the chosen law, which was Polish law. After reviewing Polish law, the arbitrator found no specific rule suitable for resolving the issue. Consequently, the arbitrator noted that Polish law did not provide a definitive solution to the substantive legal question. The arbitrator then applied the Polish rule of contract interpretation, which mandates that contracts be interpreted based on the parties' intent and the contract's purpose rather than relying solely on literal wording. Citing this interpretive rule, the arbitrator stated, "In international arbitration, when the applicable national laws do not provide a specific solution for a legal issue, the tribunal may apply international rules as a complementary tool."

However, the arbitrator noted that even international legal instruments, such as the UNIDROIT Principles, did not specifically address the issue. The arbitrator concluded that the solution could only be derived by referencing general legal principles, understood through a convergence of Polish general laws and the UNIDROIT Principles. These principles included freedom of contract, the interpretation of contracts according to the parties' common intent, the nature and purpose of the contract, good faith, fair dealing, and reasonableness (Elcin, 2012).

In ICC Arbitration Case No. 9753, the dispute involved a contract between a British company and a state entity in the Czech Republic related to financing for the development of a site in the Czech Republic. The arbitrator decided to apply Czech law, which had been chosen by the parties. According to Section 264(1) of the Czech Commercial Code, customary commercial practices relevant to the specific business activity should be considered in determining contractual rights and obligations unless they conflict with the contract's terms or the law. As there was no specific custom in this case, the arbitrator referred to the UNIDROIT Principles, emphasizing general commercial principles such as the obligation to perform in good faith. The arbitrator stated, "Fair commercial conduct is one of the fundamental principles of Czech commercial law."

In ICC Arbitration Case No. 9651, the contract's governing law clause designated Swiss law as the applicable law. The arbitration tribunal convened in Zurich, Germany, needed to interpret the choice-of-law clause, specifically to determine whether the parties' chosen national law covered issues related to fraud or fraudulent behavior in contract formation. The respondent argued that the reference to Swiss law in the governing law clause was limited to the contract, while matters involving false or fraudulent representations during negotiations should be resolved under Indian law, as the negotiations took place in India. The respondent, an Indian company, needed various licenses for such contracts, and some foreign party representations were transferred to the Indian government. The respondent also argued that principles of fairness, equality, and good conscience should be applied, and the UNIDROIT Principles were a useful guide for internationally accepted standards of justice and equity. The tribunal determined, based on Article 116(2) of the Swiss Private International Law Act, that the law governing the interpretation of the choice-of-law clause was Swiss law, as chosen by the parties. However, in interpreting the choice-of-law clause, the tribunal explicitly referred to Articles 1-7, 4-1, and 2-4 of the UNIDROIT Principles to highlight the convergence between the interpretative rules under Swiss law and the designated legal provisions. The tribunal believed that, from the perspective of a reasonable merchant, the chosen law should also influence matters related to contract formation (Elcin, 2012).

4.2. Internationalizing Arbitration Awards

Another reason for arbitrators' preference to apply Lex Mercatoria, even when a specific national law has been chosen, is to lend greater legitimacy to the awards. When international arbitrators refer to both the national law of a specific country and international principles and rules, their awards are perceived as more legitimate, even from the viewpoint of the losing party. This is because referencing internationally accepted commercial principles, recognized by most international legal systems, gives the award a more international character, dispelling any notion that the decision was solely based on the national rules of a single country and overlooked the international context of the contract. Consequently, it has been emphasized that one consistent feature of most arbitration awards is the arbitrators' effort to demonstrate that domestic laws and applicable principles provide similar solutions (Douglas, 2014).
It should be noted that some norms commonly considered part of Lex Mercatoria are specifically designed for certain types of transactions. For example, standard contracts developed by commercial institutions are tailored to specific industries or transaction types, creating trust that, in those contexts, transnational commercial principles and rules better achieve the parties' objectives compared to the default rules of national law. Naturally, in industries with well-developed customs and practices, there is greater confidence in these general legal principles.
Lex Mercatoria also includes many general norms, such as international treaties and general legal principles, that are more appropriately aligned with the conditions of international trade than national laws (Cuniberti, 2013). It has also been argued that domestic laws are inherently inadequate for resolving issues in international contracts. This argument highlights two features of the contemporary economy: First, the transnational nature of the economy, which appears incompatible with the national character of legal systems, and second, the economy's constant flux, which demands flexible laws adaptable to changes, contrasting with the rigidity of national laws (Berger, 2001). Thus, a spontaneous transnational system like Lex Mercatoria is considered essential for sustaining commercial activities beyond national borders, given the multifaceted nature of modern commerce and the broad acceptance of its principles and rules within both national legal systems and the international commercial community (Shen, 2008).
Furthermore, one of the features of the international commercial law system is its inclination toward autonomy, defined as "providing regulations in a manner as independent as possible from solutions provided by various national legal systems." The autonomous nature of Lex Mercatoria, combined with the independent role of arbitrators, has led arbitrators to resort to international Lex Mercatoria rather than national laws when resolving disputes between merchants.

5. Conclusion

International trade contracts require rules and regulations that transcend the territorial boundaries of individual countries and have evolved based on the shared needs of merchants engaged in international commerce. Therefore, national laws, being developed and refined within national borders, are generally not suitable for managing disputes in international trade. With this perspective in mind, and considering the numerous reasons discussed in this study, arbitrators prefer to apply international Lex Mercatoria instead of or as a complement to the national laws governing a contract when resolving disputes in international commercial contracts. The analysis of the parties' implicit intentions also suggests that, in the absence of an agreed-upon governing law, the parties either could not agree on a specific national law or did not wish for their disputes to be governed by national laws. Hence, imposing any national law on their contractual relationships would contradict the parties' implied intentions. Additionally, in some cases, the national law chosen by the parties may not provide a clear ruling on the specific dispute, or the parties may have had economic reasons for not negotiating the governing law. In such instances, arbitrators, recognizing the transnational nature of disputes in international commerce, are inclined to apply Lex Mercatoria rather than national laws to manage disputes arising from international commercial contracts.

Authors' Contributions

Authors contributed equally to this article.

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In order to correct and improve the academic writing of our paper, we have used the language model ChatGPT.

Transparency Statement

Data are available for research purposes upon reasonable request to the corresponding author.

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References

Baddack, F. (2005). *Lex Mercatoria: Scope and Application of the Law Merchant in Arbitration* Faculty of Law, University of the Western Cape.

Berger, K. P. (2001). The New Law Merchant and the Global Market Place- A 21st Century View of Transnational Commercial Law. In *The Practice of Transnational Law* (pp. 19-22).

Bonell, M. J. (2000). The Unidroit Principles and Transnational Law. *Uniform Law Review*, *5*(2), 199-218. https://doi.org/10.1093/ulr/5.2.199

Bonell, M. J. (2009). *An International Restatement of Contract Law The UNIDROIT Principles of International Commercial Contracts*. Transnational Pub Inc. https://doi.org/10.1163/ej.9789004177161.i-692.47

Carbonneau, T. E. (1987). Transnational Law-Making: Assessing the Impact of the Vienna Convention and the Viability of Arbitral Adjudication. *Journal of International Dispute Resolution*, *1*, 51-80. https://ssrn.com/abstract=2763744

Cuniberti, G. (2013). Three Theories of Lex Mercatoria. *Columbia Journal of Transnational Law*, *52*(1), 369-434. https://ssrn.com/abstract=2244349

Douglas, C. (2014). *Homeland Security, Its Law and Its State; A Design of Power for the 21st Century*. Taylor & Francis.

Elcin, M. (2012). *Lex Mercatoria in International Arbitration Theory and Practice* European University Institute, Florence.

Goldman, B., & Fouchard, P. (2000). *Foucahrd Gaillard Goldman on International Commercial Arbitration*. Kluwer Law International.

Karimi, M., Kashani, J., Mohibi, M., & Nasiran, D. (2022). Lex Mercatoria: An Efficient Law for Merchants. *Business Research Quarterly*, *26*(103), 233-263.

Lindahl, H. (2013). *Fault Lines of Globalization; Legal Order and the Politics of A-Legality*. OUP Oxford. https://doi.org/10.1093/acprof:oso/9780199601684.001.0001

Lynch, K. L. (2003). *The Forces of Economic Globalization: Challenges to the Regime of International Commercial Arbitration*. Kluwer Law International.

Mohebi, M. (1999). *The International Law Character of the Iran-United States Claims Tribunal*. Martinus Nijhoff Publishers. https://doi.org/10.1163/9789004635241

Moses, M. L. (2012). *The Principles and Practice of International Commercial Arbitration*. Cambridge University Press. https://doi.org/10.1017/CBO9780511920073

Noussia, K. (2010). *Confidentiality in International Commercial Arbitration; A Comparative Analysis of the Position Under English, US, German and French Law*. Springer.

Piiparinen, T., & Klabbers, J. (2013). *Normative Pluralism and International Law Exploring Global Governance*. Cambridge University Press.

Sedighi, B., & Naeimi, S. M. (2016). Legal Effects of Seat in International Commercial Arbitration. *Quarterly Journal of International Relations Research*, *6*(3), 263-294.

Shariat Bagheri, M. R. (2012). The Sovereignty of Will over Private International Contracts. *Judicial Legal Perspectives*, *17*(58), 97-140.

Shen, W. (2008). *Beyond the New York Convention* London School of Economics and Political Science.

Shiravi, A. (2016). *International Commercial Arbitration*. Organization for Research and Composition of University Humanities Books (SAMT).

Zumbansen, P. (2020). *The Many Lives of Transnational Law; Critical Engagements with Jessup's Bold Proposal*. Cambridge University Press. https://doi.org/10.1017/9781108780582

Zumbansen, P. (2021). *The Oxford Handbook of Transnational Law*. Oxford University Press. https://doi.org/10.1093/oxfordhb/9780197547410.001.0001