

GLOBAL CONTEXT OF LEGAL NORMS RELATING TO COMMERCIAL LAW

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INTRODUCTION

Background

Commercial law deals with rights, relations and conduct of people involved in trade, sales and commerce. Commercial law covers all trading segments like merchant shipping, all forms of insurance, bills of exchange and partnerships. Commercial law has slowly been accepted leading to the adoption of a new merchant law known as *lex mercatoria*. International business partners sometimes submit to be governed by international trade (Dalhuisen, 2012a). When this happens, the rules that are common to all or most of the parties engaged in the international trade dispute apply. When there are no common laws that are applicable to the trading parties, the arbitrator decides based on the most appropriate rule. *Lex mercatoria* is a judicial process which encompasses the application of legal rules in a selective and creative way. *Lex mercatoria* is mostly applicable in international trade disputes. Since it does not depend on treaty or statutory law, and permits the formation of an informal law in the marketplace it is dynamic (Dalhuisen, 2012b). However in cases where there are no common laws among the disputing parties, the arbitrator turns to domestic law which then becomes the default rule. This has majorly been necessitated by the lack of legal regime in *lex mercatoria*.

Problem statement

In international trade disputes, the disputing parties are governed *lex mercatoria* if they chose it in their dealings. However the law also depends on common national laws in the arbitration of a dispute. *Lex mercatoria* came as a result of the need for an international law that deals with international disputes. National or international laws do not deal adequately with international commercial disputes. This is because international commercial disputes involve parties from different countries from different national legal backgrounds (Dalhuisen, 2012c). The

inadequacy of national and international law to dealing with commercial disputes led to the adoption of lex mercatoria; a disputes arbitration law that is characterised by a mixture of both national and international laws. Lex mercatoria is applicable to international commercial contracts which include state contracts. This research study looks at the global context of legal norms relating to commercial law.

Research questions

The research questions formulated for the research study on the global context of legal norms relating to commercial law are;

1. How does the growth of international economic law and institutions led to the navigation of globalization necessitating general principles of international commercial contracts?
2. Why has lex mercatoria been popular in the arbitration of international commercial disputes?
3. Do arbitrators in international dispute borrow from common national and international law in commercial dispute arbitration?

Research objectives

The objectives on the research study on global context of legal norms relating to commercial law are;

1. Find out the theories of lex mercatoria and how they apply to commercial law.
2. Establish if the arbitration in commercial disputes are satisfactorily settled using lex mercatoria.
3. Examine the benefits of using lex mercatoria as compared to using national or international law.

Significance of research study

The research study on global context of legal norms relating to commercial law will add to the pool of knowledge on commercial law and commercial law disputes. It will be able to provide information to international businesses which will be handy in international business contracts. The information provided on the research study on global context of legal norms relating to commercial law will be beneficial to students, scholars, lecturers, authors and the general public.

Scope of study

The research study on global context of legal norms relating to commercial law looks into the global context of legal norms relating to commercial law. The introduction chapter lays the foundation by giving an insight into the rest of the study, while the literature review chapter compares and contrasts literature related to lex mercatoria. The literature review also covers the three theories of lex mercatoria.

LITERATURE REVIEW

Lex mercatoria is useful in commercial dispute resolution. It however only uses a law that is common to all or most of the disputing party. Parties in a lex mercatoria contract chose the terms and conditions that govern their commercial contract. Lex mercatoria has been used an autonomous alternative to national and international commercial laws. The theories of lex mercatoria are; Drahozal's signaling theory of lex mercatoria, an agency theory of lex mercatoria and the production cost theory of lex mercatoria.

Drahozal's signaling theory of lex mercatoria

Drahozal studied the continued use of lex mercatoria by practitioners and stated their continued interest and use by practitioners is catalyzed by the need for international arbitration services. Individuals who want to be appointed as arbitrators must show their competence to their prospective clients (Drahozal and Naimark, 2005). The expertise could be done through the publishing of their rulings as arbitrators in international arbitration issues. In this way they could signal their prospective clients of their arbitration abilities. If arbiters demonstrate their legal internationalism they get better ratings from the market and prospective clients. According to Drahozal's signaling theory of lex mercatoria, arbiters should participate publicly in debates on lex mercatoria in order to convince the prospective customers and the market of their knowledge on lex mercatoria. However, a good arbitrator should have a good understanding of the major differences between legal traditions and the rules availed for decision making in a commercial dispute. Critics of lex mercatoria state that it is vague, complex and difficult to determine; a factor that make it difficult to see its benefits to the disputing parties (Lando, 1985). There have been arguments for and against lex mercatoria; with its proponents advocating for its inclusion in

national laws while critics state the complexity of its determination as an obstacle in dispute resolution.

An agency theory of lex mercatoria

Despite its ambiguity, lex mercatoria has been appealing to many international arbitrators. Lex mercatoria has been used even in disputes that parties did not subscribe to its application. This is because arbitrators in such cases are powered to use rules they deem fit if there are no governing rules chosen by the disputing parties (Tom, 2010). Despite the fact that arbitrators can consult national laws in instances where there is no common law among the countries of the disputing parties, in some instances, arbitrators have used non national rules in awarding dispute cases. This also happens in cases where the contracting parties have not chosen a governing law. ICC has been central to the application of lex mercatoria. Most of the disputes decided on lex mercatoria in the last 50 years have been based on the ICC auspices. The choice by some arbitrators to use non national rule is supported by the 1985 INCITRAL Model law on international arbitration which allows arbitrators to use a law that is most applicable in the determination of a particular trade dispute (Alec, 2011). However some arbitration institutions have adopted the use of non national rules even in instances where the disputing parties have not stated their stand on the laws to be applied in their dispute. To this end the shortcoming of lex mercatoria like its ambiguity and complexity comes to the fore (John et al, 2009). Lex mercatoria has an increased discretionary which work in the favor of some litigant and a disadvantage to others. International arbitrators act as agents of the parties that appoint them to represent them in international commercial disputes (Berger, 2010).

A production cost theory of lex mercatoria

Lex mercatoria has been promoted due to the fact that it is less costly. This is because the arbitrator does not have to use either of the national laws of the parties involved in a commercial dispute. If both or some laws of the countries' of the disputing entities had to be used, then the cost and time implications would be enormous (Cuniberti, 2013). Besides, national laws change over time and this will affect the decision of arbitrators in resolving such commercial disputes. The advantage of lex mercatoria lies in its ability to come up with a solution that is neutral and that does not favor any party in the dispute and at the same time save time and money which would have been spent in interpreting national laws of the involved parties.

Link to legal systems

Lex mercatoria is a combination of national and international law. It therefore borrows from both laws. In instances where common laws are chosen to govern a business contract because of their commonality, then lex mercatoria is used in international commerce disputes. The laws used in the arbitration of international trade disputes, are therefore linked to legal systems. The commonly used type of law in the English law because it is consistent and has examples which arbitrators can borrow from. The use of English or Spanish law in the arbitration of a dispute shows how the legal norms relate to commercial law.

Conclusion

Lex mercatoria has been popular but it has also been blamed for being discretionary and only favoring some parties to a dispute while putting other to a disadvantage. Despite its drawbacks it has been hailed for saving arbiters and the parties involved the much valued time and money in dispute resolution.

References

Alec, S. S., 2011. Arbitration and Judicialization. Onati socio-legal series, pp. 144-256.

Berger, K. P., 2010. The creeping codification of the new lex mercatoria. Available at: books.google.com/books?isbn=9041131795 [Accessed 22 May 2013]

Cuniberti, G., 2013. Three theories of lex mercatoria. Available at: <http://blogs.sciences-po.fr/pilagg/files/2013/03/Cuniberti-Three-theories-on-lex-mercatoria.pdf> [Accessed 21 May 2013]

Dalhuisen, J., 2012a. The modern lex mercatoria and international arbitration. Available at: <http://opiniojuris.org/2012/04/05/the-modern-lex-mercatoria-and-international-arbitration/> [Accessed, 21 May 2013]

Dalhuisen, J., 2012b. The source of the modern transnational lex mercatoria. Available at: <http://opiniojuris.org/2012/04/02/the-sources-of-the-modern-transnational-lex-mercatoria/> [Accessed 21 May 2013]

Dalhuisen, J., 2012c. Modern lex mercatoria and its dynamism. Available at: <http://opiniojuris.org/2012/04/03/the-modern-lex-mercatoria-and-its-dynamism/> [Accessed 21 May 2013]

Drahozal, C. R. and Naimark, W. N., 2005. Towards a science of international arbitration. Available at: books.google.com/books?isbn=9041123229 [Accessed 21 May 2013]

John, A., Henry, H. and Reinier K., (2009). Agency Problems and Legal Strategies and Enforcement, in *The anatomy of corporate law: a comparative and functional approach*. Oxford: Oxford University Press.

Lando, E., 1985. The lex mercatoria in international commercial arbitration. *The international and corperative law quarterly* 34, pp.747-800.

Tom, G., 2010. The Arbitrator as Agent: Why Deferential Review is not Always Pro-Arbitration, *77 Chicago Law Review* pp. 1013