ISSLP
Interdisciplinary Studies in Society, Law and Politics

OPEN PEER REVIEW

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

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Received: 2024-10-03 **Revised:** 2024-12-05 **Accepted:** 2024-12-31 **Published:** 2025-04-01

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1. Round 1

1.1. Reviewer 1

Reviewer:

In the introduction, the statement: "However, a question that has perhaps received less attention is whether, in the absence of a clause selecting the applicable law for the contract, arbitrators are permitted to apply the principles of Lex Mercatoria" requires additional support from prior studies or case law. The assertion should be reinforced with specific scholarly references or arbitration decisions.

The paragraph starting with "Over past decades, various authors have provided different definitions of Lex Mercatoria" (Concept of Lex Mercatoria section) should better distinguish between traditional and modern interpretations of Lex Mercatoria. Citing additional legal scholars beyond Goldman and Mustill would strengthen the argument.

The paragraph starting with "The most fundamental principle in contract law is the principle of autonomy of will" (Non-Selection of the Governing Law and the Application of Lex Mercatoria section) should discuss counterarguments, particularly the critique that unrestricted autonomy may lead to legal uncertainty.

The claim that "Lex Mercatoria also includes many general norms, such as international treaties and general legal principles" (Internationalizing Arbitration Awards section) needs clarification. International treaties are binding legal instruments, whereas Lex Mercatoria is typically regarded as soft law. This distinction should be addressed.

The discussion of ICC Arbitration Case No. 11295 should specify whether the arbitrator's reliance on Lex Mercatoria was challenged or upheld by a national court. This would add a valuable legal perspective on the enforceability of such decisions.

The argument that "many countries, based on the principle of party autonomy, prioritize the parties' choice of governing law" (Situations for Applying Lex Mercatoria Despite the Choice of National Law section) could be strengthened by referencing specific legal systems that have explicitly restricted arbitrators from deviating from the chosen law.

Authors revised the manuscript and uploaded the document.

1.2. Reviewer 2

Reviewer:

The reference to Karimi et al. (2022) in "Karimi et al., 2022, p. 259" should be expanded to clarify the specific contribution of this work. What particular aspect of Lex Mercatoria does this study emphasize? A brief summary of their perspective would provide better context.

The sentence: "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" (Concept of Lex Mercatoria section) should specify how adaptability is demonstrated in practice. A real-world example would be beneficial.

In "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" (Non-Selection of the Governing Law and the Application of Lex Mercatoria section), more recent arbitration cases should be cited to substantiate this claim. Many contemporary arbitral decisions follow national conflict-of-law rules instead.

The discussion of ICC case number 7375 and award number 8261 should include a deeper analysis of why the tribunals preferred Lex Mercatoria over traditional conflict-of-law approaches. Did the tribunals explicitly justify their reasoning in the awards?

In "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" (The Transnational Nature of Lex Mercatoria Principles and Rules section), the article should address criticisms regarding the lack of codification in Lex Mercatoria and its potential inconsistency in arbitral awards.

The reference to Zumbansen (2021, p. 448) should include a more detailed explanation of their perspective. What specific arguments does Zumbansen present regarding arbitrators' reliance on Lex Mercatoria?

The sentence: "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" (Arbitrators' Tendency Toward the Denationalization of Contracts in International Trade section) requires additional references to legal sources discussing the denationalization of arbitration.

Authors revised the manuscript and uploaded the document.

2. Revised

Editor’s decision: Accepted.
Editor in Chief’s decision: Accepted.