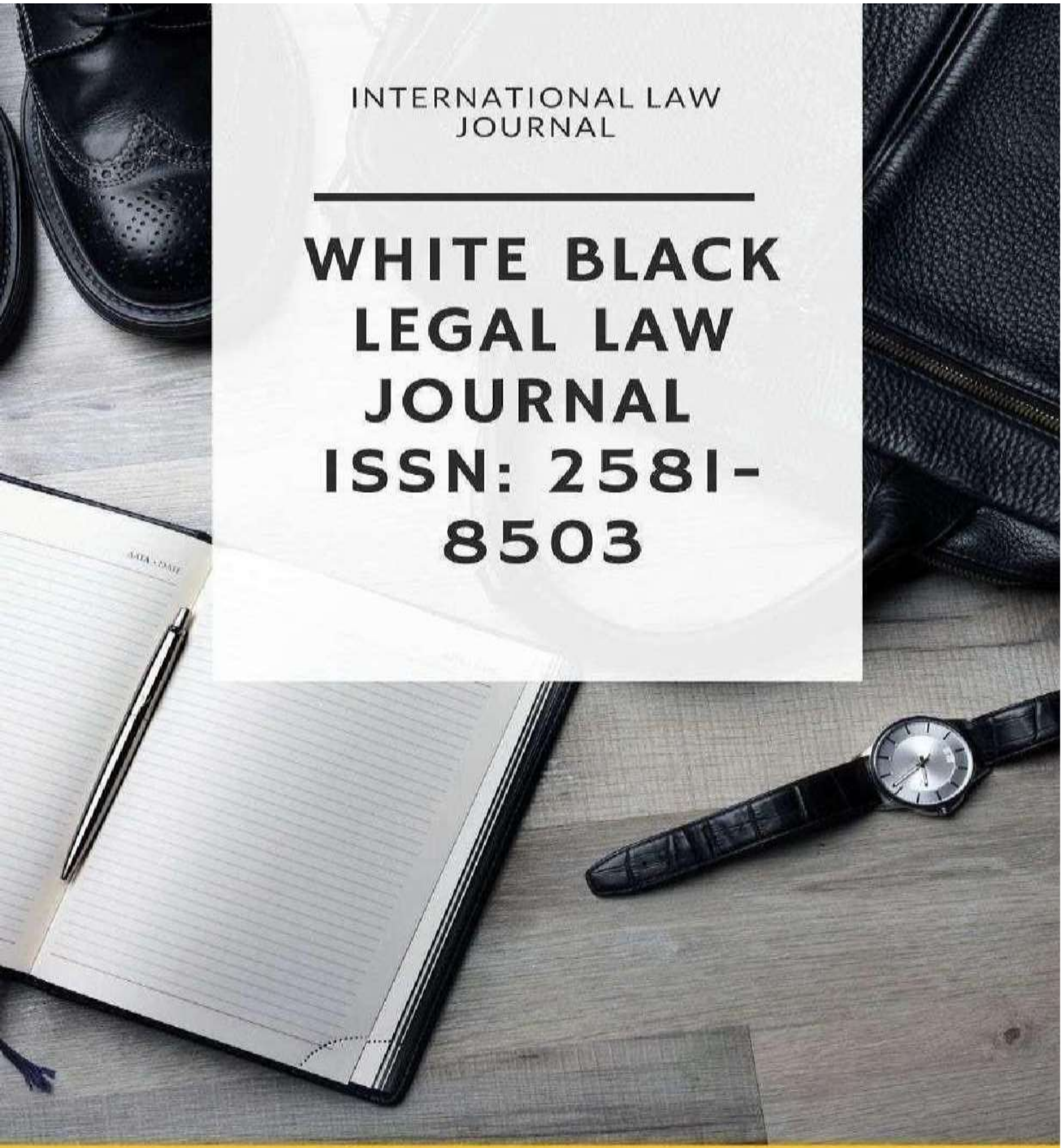

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WHITE BLACK LEGAL is an open access, peer-reviewed and refereed journal providededicated to express views on topical legal issues, thereby generating a cross current of ideas on emerging matters. This platform shall also ignite the initiative and desire of young law students to contribute in the field of law. The erudite response of legal luminaries shall be solicited to enable readers to explore challenges that lie before law makers, lawyers and the society at large, in the event of the ever changing social, economic and technological scenario.

With this thought, we hereby present to you

LEX MERCATORIA AND PARTY AUTONOMY: CONVERGENCE AND CONFLICT IN INTERNATIONAL TRADE LAW

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Abstract

This research dives into the intricate relationship between lex mercatoria and party autonomy within the realm of modern international commercial law. It looks at how these two essential principles both support and challenge one another in cross-border trade disputes. Lex mercatoria, which is essentially a global set of commercial customs and practices that merchants have developed over the years, works hand in hand with the principle of party autonomy. This principle allows contracting parties the freedom to select the applicable law and the methods for resolving disputes.

The study explores how lex mercatoria can serve as both a facilitator and a potential limitation on party autonomy. On one side, it offers parties a neutral and specialized legal framework that goes beyond national borders, providing the flexibility and commercial insight that traditional state laws might not offer. This synergy is particularly noticeable in international arbitration, where parties often refer to trade usages and commercial customs to enhance their chosen governing law, leading to a more unified approach to resolving disputes.

In conclusion, the effective resolution of conflicts between lex mercatoria and party autonomy calls for a balanced strategy that respects both the commercial wisdom found in merchant practices and the core principle of contractual freedom. Achieving this balance is best done through precise contractual drafting, thoughtful arbitral decision-making, and the ongoing evolution of harmonized international commercial law principles that take into account both merchant customs and the intentions of the parties involved.

Keywords: lex mercatoria, party autonomy, international commercial law, arbitration, transnational law, commercial customs, contractual freedom, conflict of laws

Introduction

International commercial arbitration has emerged as one of the most effective and successful ways to settle disputes in the realm of international trade. A big part of its appeal lies in its flexible procedural approach. This flexibility stems from the concept of party autonomy. Essentially, arbitration is a mutually agreed-upon method of resolving disputes between two parties involved in a contract. The core idea here is that the effectiveness of arbitration is rooted in the contractual agreement that the parties make to pursue this alternative dispute resolution method. The key focus here is the doctrine of party autonomy, particularly regarding the arbitration process and the selection of governing law. The pressing question is how this doctrine of party autonomy influences the evolution of lex mercatoria.

The principle of party autonomy began to take shape in the nineteenth century. At its core, party autonomy revolves around the choice of law within a contract. However, in the context of international commercial arbitration, this principle takes on a broader significance. In simpler terms, the parties involved in the arbitration agreement have the freedom not just to select the applicable laws but also to shape the arbitration process itself.

By entering into an arbitration agreement, the parties effectively give up their right to pursue legal action in court, thereby excluding the jurisdiction of the courts. This agreement serves as a fundamental resource for arbitration, acting as a guiding framework for both the parties and the arbitral tribunal throughout the arbitration process. Moreover, the arbitration agreement stands as the strongest testament to party autonomy, as it allows the parties to independently choose the governing law and manage the arbitration proceedings. However, it’s important to recognize that the principle of party autonomy isn’t an absolute rule in international commercial arbitration. In some circumstances, it may be subject to some restrictions.[1]

Arbitration serves as an alternative way to settle disputes, rooted in the idea of party autonomy. To truly grasp the concept of arbitration, it's essential to delve into this principle. This research paper will explore the role and scope of party autonomy in detail. To start, we'll look at party autonomy within the realm of international commercial arbitration. After that, we'll examine how arbitration agreements reflect this autonomy, along with the relevant laws, the makeup of the arbitral tribunal, various aspects of the arbitration process, and the involvement of national

1 Andrew Tweeddale and Keren Tweeddale, Arbitration of Commercial Disputes (Oxford University Press 2007) 256.

courts. One of the great things about International Commercial Arbitration is its flexibility, allowing parties to shape the proceedings to fit their needs. It's also known for being a quicker, more cost-effective, and simpler way to resolve disputes. However, the actual benefits can vary depending on the specifics of the case, including its duration, costs, and complexity. For arbitration to take place, both parties must agree to resolve their disputes through this method, typically by including an arbitration clause in their business contract or through a submission clause. Since parties have a say in how the arbitration process unfolds, the established rules provide them with some freedom. However, these rights are limited to procedural matters and cannot interfere with other contractual areas or alternative dispute resolution methods. Certain principles must be upheld alongside the party autonomy principle, such as the neutrality of the procedure, the principle of good faith, and the requirement for an odd number of arbitrators. This sets the stage for a clearer understanding of what party autonomy truly entails.

Party autonomy is a term that can be understood in two main ways: it can refer to the freedom to enter into contracts or the freedom of the parties to choose the governing law for a contract. Some argue that this distinction depends on whether we're talking about an international or domestic context; domestically, it's about the freedom of contract, while internationally, it's about the parties' ability to select the laws that will govern their agreement. However, in the realm of international arbitration, both aspects are crucial.

When we talk about party autonomy in terms of contractual freedom, we're looking at the parties' right to enter into a contract and define its content—the rights and obligations that will exist between them. This is particularly important for arbitration because it allows parties to create arbitration agreements. Such an agreement gives an arbitral tribunal the authority to resolve a dispute, effectively taking that power away from the courts. Since courts have limited ability to interfere in the arbitration process, this opens the door for various legal practices to emerge within the framework of arbitration, which can influence the evolution of commercial law and lex mercatoria. On the flip side, party autonomy regarding the choice of law is a conflict of laws principle that permits the parties to agree on which law will govern their contract. The rights and obligations arising from their dispute will then be interpreted according to the chosen law. In arbitration, parties enjoy greater flexibility in selecting the applicable laws and rules compared to national courts. This freedom in choosing the law can result in different legal frameworks being applied and varied outcomes in commercial disputes, compared to similar cases handled in national courts. The choice of law in arbitration can therefore lead to different laws being applied and different solutions being reached in commercial disputes than in similar proceedings in national courts, making arbitration a substantially important contributor to the development of lex mercatoria.[2]

Party Autonomy in International Commercial Arbitration

Autonomy can be understood as the ability of an individual to choose from genuine alternatives and to make decisions based on reasons that resonate with them. This concept implies that parties have the freedom to shape their contractual relationships in a way that suits them best. Essentially, party autonomy refers to how individuals arrange their legal relationships according to their preferences. It embodies the idea of "complete independence." In this context, party autonomy signifies the control that parties have over the arbitration process. While they can significantly influence how the arbitration is organized, the actual conduct of the proceedings is the responsibility of the arbitrators. The level of control available to the parties hinges on whether they opt for Institutional arbitration or ad-hoc arbitration. In Institutional arbitration, the procedural framework is already set up by the institution, and the parties simply express their intentions in the arbitration or submission agreement. On the other hand, in Ad hoc arbitration, the parties themselves create the procedural framework that governs the arbitration. This is evidenced by the "arbitration or submission agreement," which outlines the procedures to be followed in international arbitration.

All contemporary arbitration laws acknowledge the principle of party autonomy, allowing parties the freedom to choose the substantive law that applies to their disputes. This is a widely accepted notion. Article 28(3) of the UNCITRAL Model Law grants parties the liberty to empower the arbitral tribunal to act as amiable compositeur and make decisions ex aequo et bono. This provision has been incorporated into Section 28(2) of the Arbitration and Conciliation Act, 1996. To align with the Model Law, Section 46(1)(b) of the English Arbitration Act 1996 states that the arbitral tribunal shall resolve the dispute 'if the parties agree, by such considerations as are agreed by them or determined by the tribunal.'
In the ICC case 8385[3], the arbitral tribunal concluded that it should apply "the law that best aligns with the needs of the international commercial community, that doesn't conflict with the reasonable expectations of the parties, that ensures uniformity of outcomes, and that offers

2 Rodriguez, Arbitration's influence on the development of lex mercatoria, University of Oslo, 2014, p 4
3 US Company vs Belgium Company, 124 Clunet 1061 (1997)

a sensible resolution to the issue."

A fundamental principle in international commercial arbitration is party autonomy. The authors Redfern and Hunter describe it like this:

"Party autonomy is the guiding principle in determining the procedure to be followed in an international commercial arbitration. It is a principle that has been embraced not only in national laws but also by international arbitral institutions and organizations. The legislative history of the Model Law indicates that this principle was adopted without any opposition."[4]

These days, arbitration has become a favored method for resolving international commercial disputes. Its popularity largely stems from the principle of party autonomy, which brings both flexibility and confidentiality to the process[5]. Flexibility is one of the key benefits of arbitration. Parties involved in an international commercial contract often prefer not to resolve their disputes through litigation, as the court that is familiar to one party may be foreign to another. Moreover, they typically want to avoid the hassle of procedural formalities. As a result, they opt for arbitration as a private means of dispute resolution, allowing them to tailor the entire arbitration process to their specific needs and preferences. This includes setting a schedule for hearings and selecting an arbitrator with the relevant expertise to address the unique aspects of their dispute.

Confidentiality is a significant perk of arbitration. Typically, the parties involved are international companies with substantial budgets, which often means they have valuable trade secrets to protect. When these companies enter into an international commercial contract, it usually includes an arbitration clause to handle any future disputes. The primary purpose of this clause is to safeguard those trade secrets, as arbitration proceedings are kept confidential, unlike court cases. Additionally, the parties can include specific provisions to further enhance this confidentiality[6]. It's important to remember that all of this stems from the principle of party autonomy. The key distinction between litigation and arbitration lies in the fact that arbitration is a private method of resolving disputes, driven by the parties' preferences. This means that, according to party autonomy, the parties have the freedom to select the applicable laws and shape the arbitration process based on the specifics of their dispute. Essentially, they can control every aspect of the arbitration.

4 Redfern and Hunter, with Blackaby and Partasides, Law and Practice of International Commercial Arbitration, 4th Edition, 2004 at p 315

5 Alan Redfern and Martin Hunter, Redfern and Hunter on International Arbitration,(student edition, Oxford University Press, 2009) para 2.176.

6 *Ibid*

Arbitration is grounded in the principle of freedom of contract, allowing parties to bypass court jurisdiction and opt for arbitration as their dispute resolution method through an arbitration agreement[7]. This freedom also empowers them to plan every detail of the arbitration process. Given these points, it's clear that party autonomy reflects the essence of freedom of contract and stands as a "key principle" of arbitration[8]. The principle of party autonomy enables the parties to choose the applicable law for both the substance and the arbitration process, including the appointment of arbitrators, scheduling, and the choice of location and language for the arbitration. This principle ensures that the arbitration unfolds according to the parties' wishes. However, it's worth noting that this autonomy isn't always absolute; it can be limited by mandatory legal rules or public policy considerations in the relevant jurisdiction.

The idea of party autonomy is widely accepted around the globe. This concept has also been acknowledged in various international conventions. For example, the UNCITRAL Model Law states, "The arbitral tribunal shall decide the dispute by such rules of law as are chosen by the parties as applicable to the substance of the dispute."[9] This principle is echoed in the New York Convention as well. It mentions that the recognition and enforcement of an award can be denied if "the composition of the arbitral authority or the arbitral procedure was not by the agreement of the parties." Additionally, the Rules of the International Chamber of Commerce (ICC) touch on party autonomy too, stating that "the parties shall be free to agree upon the rules of law to be applied by the Arbitral Tribunal to the merits of the dispute."[10]

When it comes to English Law, the principle of party autonomy is clearly outlined in the English Arbitration Act 1996. The key article on this topic asserts that "the parties should be free to agree how their disputes are resolved, subject only to such safeguards as are necessary in the public interest." This statement covers various aspects, including the makeup of the arbitral tribunal and the arbitration process itself. Moreover, there are other instances of party autonomy reflected in the English Arbitration Act 1996, which will be examined in the relevant sections of this work.

Since the Home Insurance case, one of the most important judicial decisions in England has likely been Channel Tunnel Group v Balfour Beatty Ltd. The House of Lords decided to pause

7 Thomas E. Carbonneau, "The Exercise of Contract Freedom in Making of Arbitration Agreements" (2003) vol. 36 Vanderbilt Journal of Transnational Law 1189, 1189-1196.

8 The Bay Hotel and Resort Limited v Cavalier Construction Co. Ltd. [2001] UKPC 34, 16July 2001, PC

9 UNCITRAL Model Law on International Commercial Arbitration 1985 with amendments as adopted in 2006(hereinafter "Model Law"), art 28

10 1958 - Convention on the Recognition and Enforcement of Foreign Arbitral Awards - the "New York" Convention (hereinafter "New York Convention") art V (1(d)).

court proceedings because the contract called for expert references and subsequent arbitration, which was meant to be governed by the shared principles of English and French contract law. If there were no common principles, it would then be guided by general principles of international trade law as recognized by both national and international tribunals. Interestingly, throughout the case, no one seemed to raise any concerns about the effectiveness of this choice of law clause.

The lex mercatoria of our time has largely come from arbitration clauses found in or added to international commercial contracts. These clauses are often broad enough to allow arbitrators to apply criteria that go beyond the laws of any specific country when resolving disputes[11]. Typically, these disputes arise between a contractor, concessionaire, or lender from a developed capitalist society and developing nations or their agencies, often related to the exploitation of natural resources or development loans. The idea of lex mercatoria is significantly influenced by the fear that local laws might change, whether through nationalization or other means, putting the overseas party at a disadvantage. It's common for international development banks to include lex mercatoria conditions in their standard lending terms. However, as the Channel Tunnel Group case illustrates, in international commercial transactions between parties with similar standing and bargaining power, this concept also holds a certain appeal.

As global commerce continues to expand, it seems almost unavoidable that the lex mercatoria will thrive even more. However, it has faced, and likely still faces, some strong opposition. One notable critic was the late Francis Mann. Today, the most prominent living critic is probably Lord Mustill, who has stepped back from his role as a Law Lord and returned to being a key figure among professional arbitrators. In his 1987 contribution to the Liber Amicorum for Lord Wilberforce, titled "The New Lex Mercatoria, The First Twenty-Five Years," Sir Michael Mustill made it clear that he didn't fully support the doctrine he was discussing. His piece is a thorough and well-reasoned critique of the lex, pointing out issues like vagueness and a lack of clear origins.[12] He even listed twenty propositions that he believed represented "a tolerably complete account of the rules that are said to make up the lex mercatoria in its current form." He described this as "a relatively modest haul for twenty-five years of international arbitration." When his paper was reissued a year later, he felt it was important to clarify that he wasn't claiming the twenty propositions would hold up in every situation, "at least if the lex is

11 Sandeep Gopalan, The Creation of International Commercial Law: Sovereignty Felled? 5 SAN DIEGO INT'L L . J . 267, 322 (2004).

12 Keith Highet 'The Enigma of the Lex Mercatoria" (1989) 63 Tulane L Rev 613,616.

understood in its ‘macro’ sense." Interestingly, some advocates of the lex mercatoria, rather than viewing the list as modest, have pointed to it, compiled by such a respected author, as strong evidence of its success[13]. Unsurprisingly, the leading English textbook, Mustill and Boyd's "The Law and Practice of Commercial Arbitration," approaches the topic in a way that's quite similar to his paper. Meanwhile, Professor Roy Goode took a less critical, though not exactly enthusiastic, stance in an article he published in 1997.

With a scholar's knack for dissecting rules, it's no wonder he views the variety of approaches in arbitration as potentially diluting the cohesive power of international commercial law. He believes that arbitral awards shouldn't be seen as tools for advancing international legal principles. Ultimately, what really counts, he argues, is that the arbitral tribunal arrives at a conclusion that a reasonable person would deem fair in that specific situation. This principle is central to the rulings of any court, regardless of the legal system; the effectiveness of legal systems hinges on their ability to deliver just outcomes in individual cases. Professor Goode cautiously suggests that perhaps the increasing reliance on international trade practices, rather than national laws, isn't such a bad thing after all. Despite facing criticism and the instinctive hesitations of many lawyers encountering this concept for the first time, support for lex mercatoria and broader general principles seems to be steadily gaining traction among scholars and professionals engaged in arbitration. The discussion kicks off with a paper by Stewart Boyd QC, published in 1990, titled "Arbitrators Not to Be Bound by the Law" Clauses[14]. The second co-author, Mustill and Boyd, appears to hold a different perspective, as he sees "no potential harm to the administration of justice in England or to the integrity and clarity of English commercial law that would arise from interpreting such clauses—specifically, equity and good conscience clauses, which he considers to fall under the same umbrella as lex mercatoria—in their fullest sense." Following this, in the same journal, is "Lex Mercatoria: An Arbitrator's View" by Professor Andreas F. Lowenfeld from New York University School of Law[15].

He wraps up his thoughts, drawing from a wealth of practical experience, by stating that most arbitrators don’t primarily aim for compromise. "International arbitrators strive to achieve fair outcomes within a legal framework, which, by its very nature, extends beyond the borders of

13 John Head "Evolution of the Governing Law for Loan Agreements of the World Bank and other Multi-lateral Development Banks" (1996) 90 American Journal of International Law 214.

14 "Usage and its Reception in Transnational Commercial Law" (1997) 46 ICLQ 1, 35-6.

15 "Arbitrators not to be bound by the Law Clauses" (1990) 6 Arbitration International 122, 130.

any single state. This encapsulates the vision, promise, and utility of lex mercatoria."
A significant contribution from a member of the New York bar is David W. Rivkin's 1993 article on the Enforceability of Arbitral Awards Based on Lex Mercatoria[16]. This piece provides numerous real-world examples of arbitrations conducted under this or similar principles across various jurisdictions. He references authorities that lead him to believe that U.S. courts are likely to honor the parties' decision to use a non-national standard to govern the merits of their disputes.

Jérôme Huet offers a valuable synthesis in his 1995 work, The Unidroit Principles for International Commercial Contracts: A New Lex Mercatoria. The following year, an insightful article on international development loans was published in the United States. Additionally, the 1997 compilation honoring Roy Goode features several enlightening contributions, including Professor Ole Lando's Eight Principles of European Contract Law, which comes from one of the leading advocates of the lex, and Professor M.J. Bonell's lengthy title piece that essentially compares various contract law principles. Notably, Bonell's paper includes a compelling example of a recent arbitration involving an English company and an Iranian government agency, where the agreed governing law was simply "principles of natural justice." The arbitral tribunal ruled, by a two-to-one majority (with a distinguished English Queen's Counsel dissenting), that these principles were broad enough to imply a duty to bring and pursue a claim without unreasonable delay, although in this case, no breach of that duty was found.

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