TOWARDS THE UNIFICATION OF GLOBAL PRIVATE JUSTICE FOR CROSS-BORDER BUSINESS DISPUTES:

The Role of the International Chamber of Commerce in the Formalisation of Lex Mercatoria through International Commercial Arbitration

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Contents

Abstract

This essay traces the journey of the formalisation of lex mercatoria, focussing specifically on the role of the International Chamber of Commerce (ICC) in the unification of international commercial arbitration as a global private justice mechanism for cross-border business disputes. Arbitration has evolved from being a largely informal, speedy, and flexible form of alternative dispute resolution in the middle ages, to gradually becoming judicialized and institutionalised in the 20th century, and is today a worthy international substitute for national judiciaries to resolve disputes arising from international commercial contracts. This research essay attributes this harmonisation to the efforts of the ICC in establishing the International Court of Arbitration; codifying best practices of lex mercatoria through its procedural Rules of Arbitration and substantive standard contract terms: the Uniform Customs and Practice for Documentary Credits and the Incoterms; and creating precedential value through the publication of arbitral awards that are otherwise, conventionally confidential.

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Subjects and Topics

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I Introduction

"Lex mercatoria" is Latin for "law merchant". In its origin and creation, it was not established by any sovereign, but believed to have been the result of the efforts of the medieval mercatocracy to smooth over sources of friction and inconvenience presented by the then feudal law for international trade and commerce.[1] Although it is unanimously qualified as a transnational body of rules and principles devised for merchants by merchants, its existence is a vexed question that remains ardently debated even today.[2] In an attempt to integrate the divergent notions of the concept, Craig, Park and Paulsson group its definition under three headings: First, that lex mercatoria indicates an autonomous legal order, existing independently of national legal order, that is created spontaneously by parties involved in international economic relations.[3] Second, that lex mercatoria is regarded a body of rules that are sufficient to decide a dispute and operate as an alternative to an otherwise applicable law.[4] And third, that lex mercatoria complements an otherwise applicable law and is nothing more than the gradual consolidation of trade usage and settled expectations in international trade law.[5]

Over the years, specialists in international trade and comparative law have made systematic efforts to consolidate and harmonise lex mercatoria and enlist common law and civil law jurisdictions alike, in the unification of international commercial law.[6] The major promulgators suggest that "unification of law" entails the synthesis of opposing legal systems such that its outcome is the establishment of analogous principles and rules across legal cultures.[7] For example, the United Nations Commission on International Trade Law (UNCITRAL) alludes to uniformity in its 1980 Convention on Contracts for the International Sale of Goods (CISG) as that which "take[s] into account the different social, economic and legal systems … [and] contribute[s] to the removal of legal barriers in international trade and promote[s] the

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[1] See generally Adaora Okwor "Lex Mercatoria as Transnational Commercial Law: Is the Lex Mercatoria Preferentially for the 'Mercatocracy'?" in Mads Andenas and Camilla Baasch Andersen (eds) *Theory and Practice of Harmonisation* (Edward Elgar Publishing, Cheltenham, 2011) 393 at 395.

[2] See at 394–397 and Berthold Goldman and FA Mann "Introduction" in Thomas E Carbonneau (ed) *Lex Mercatoria and Arbitration: A Discussion of the New Law Merchant* (rev ed, Kluwer Law International, Boston, 1998) xix.

[3] W Laurence Craig, William W Park and Jan Paulsson *International Chamber of Commerce Arbitration* (3rd ed, Oceana Publications, ICC Publishing, United States of America, 2000) at 623.

[4] At 623.

[5] At 623.

[6] See generally Paul B Stephan "The Futility of Unification and Harmonization in International Commercial Law" (1999) 39:3 Va J Intl L 743 at 745.

[7] See Camilla Baasch Andersen "Applied Uniformity of a Uniform Commercial Law: Ensuring Functional Harmonisation of Uniform Texts Through a Global Jurisconsultorium of the CISG" in Mads Andenas and Camilla Baasch Andersen above n 1 at 31.

development of international trade".[8] Similarly, the International Institute for the Unification of Private Law (UNIDROIT) declares its purpose as being:[9]

> … to study needs and methods for modernising, harmonising and co-ordinating private and in particular commercial law as between States and groups of States and to formulate uniform law instruments, principles and rules to achieve those objectives.

But both the UNCITRAL and the UNIDROIT[10] have been criticised as sullying lex mercatoria in its creation and origin since these public bodies do not directly represent the interests of the mercatocracy.[11] They are sovereign and intergovernmental in membership and the specialist community behind their ambitious efforts at unification have been drawn from academia.[12]

By stark contrast, the International Chamber of Commerce (ICC) differs in its structural form, being composed by and from the private sector, consisting of experts on industry interest rather than academic prestige.[13] It is independent of and not accountable to national governments, with its commissions being directly linked to industrial sectors such as banking and telecommunications and coordinating with industry-specific bodies of legal experts to formulate standard contract terms for specific international commercial transactions. Touted as the "businessmen's League of Nations"[14] the ICC embodies lex mercatoria even in origin and creation. Over the last century, the ICC has grown to be the institutional representative of more than 45 million companies in over 100 countries.[15]

Moreover, this multifaceted, private international organisation has been a trailblazer for providing modern international commercial arbitration (ICA) services for the supervision of the interpretation of its standard contract terms and instruments and the resolution of cross-border business disputes. In September 2020, the ICC announced record arbitration figures in its 100-year history for 2019: 869 new cases, of which 851 were registered under the ICC Rules

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[8] *Convention on Contracts for the International Sale of Goods* UN Doc A/Conf/97/18 (10 April 1980) reprinted in 52 Fed Reg6284 (1987) (CISG), at Preamble.
[9] "History and Overview" International Institute for the Unification of Private Law (UNIDROIT) <https://www.unidroit.org/about-unidroit/overview>.
[10] See UNIDROIT Principles of International Commercial Contracts (2016) (UPICC).
[11] See generally Adaora Okwor "Lex Mercatoria as Transnational Commercial Law: Is the Lex Mercatoria Preferentially for the 'Mercatocracy'?" in Mads Andenas and Camilla Baasch Andersen above n 1 393.
[12] See Paul B Stephan above n 6 at 753–756.
[13] At 755.
[14] George Ridgeway *Merchants of Peace* (Little, Brown and Company, 1959) at 22.
[15] "Who We Are" International Chamber of Commerce <https://iccwbo.org/about-us/who-we-are/>.

of Arbitration, and 18 under its Appointing Authority Rules.[16] Its International Court of Arbitration (ICC Court) was named by Queen Mary University of London in their 2018 International Arbitration Survey as the "world's most preferred arbitral institution" by a significant 77% margin.[17] These figures not only reflect the growth of ICA as a preferred mode of cross-border commercial dispute resolution, but also signal that by its very nature of serving as a private justice mechanism for the mercatocracy, the unification of the law of ICA cannot be reduced to a mere academic endeavour. For this reason, ICC Arbitration has been majorly instrumental in bringing about relevant legislative change as well as principal multilateral arbitration treaties.[18]

This essay traces the journey of the formalisation of lex mercatoria, focussing specifically on the role of the International Chamber of Commerce (ICC) in the unification of ICA as a global private justice mechanism for cross-border business disputes. It attributes this achievement to the specific efforts of the ICC in establishing the International Court of Arbitration (ICC Court); codifying best practices of lex mercatoria through its procedural Rules of Arbitration and substantive standard contract terms: the Uniform Customs and Practice for Documentary Credits (UCP) and the International Commercial Terms (Incoterms); and creating precedential value through the publication of arbitral awards that are otherwise, conventionally confidential.

The purpose of this essay is not to provide an exhaustive overview of ICC Arbitration. It limits itself to plotting the evolutionary trajectory of ICC's contribution to the unification of ICA by formalising lex mercatoria, or in other words, by giving legitimacy and force of law to transnational customs, rules and procedures of international trade and commerce followed by the mercatocracy that are not tied to any national legal system.

To this effect, Part II charts briefly the development of ICA from being a relatively informal, flexible dispute resolution mechanism to becoming a global private justice mechanism in response to global conditions with specific focus on the factors that lead to the establishment of the ICC. Part III then provides a historical, analytical overview of specific efforts of the ICC in the formalisation of lex mercatoria while contributing to ICA: viz., the establishment of the

[16] "ICC Celebrates Case Milestone, Announces Record Figures for 2019" International Chamber of Commerce < https://iccwbo.org/media-wall/news-speeches/icc-celebrates-25000th-case-milestone-and-announces-record-figures-for-2019/>.
[17] School of International Arbitration, Queen Mary University of London *2018 International Arbitration Survey: The Evolution of International Arbitration* (White & Case, 2018) at 13.
[18] See Yves Derains and Eric A Schwartz *A Guide to the ICC Rules of Arbitration* (2nd ed, Kluwer Law International, The Netherlands, 2005) at 2–3.

ICC Court, the harmonisation of procedures in their Arbitration Rules, the unification of substantive lex mercatoria through the codification of trade customs and usages in the UCP and Incoterms, and lastly giving arbitral awards precedential value and a binding force through their publication. Part IV then charts the consequences of the judicialization and unification of ICA: the creation of a new legal order of transnational lawyers that specialise in arbitration and are not confined in their vocation to their domestic legal systems. Part V concludes.

II Development of ICA a Global Private Justice Mechanism

In the same vein as Craig, Park and Paulsson, the relevance of lex mercatoria for ICA has been succinctly explained by Professor Ole Lando:[19]

> The parties to an international contract sometimes agree not to have their dispute governed by national law. Instead they submit it to the customs and usages of international trade, to the rules of law which are common to all or most of the States engaged in international trade or to those States which are connected with the dispute. Where such common rules are not ascertainable, the arbitrator applies the rule or chooses the solution which appears to him to be the most appropriate and equitable. In doing so he considers the laws of several legal systems. This judicial process, which is partly an application of legal rules and partly a selective and creative process, is here called application of the lex mercatoria.[20]

ICA in the Middle Ages was nothing more than an autonomous and private mode of dispute resolution operated by merchants for merchants. It was largely informal, speedy, flexible, and subject to only a handful of rules and guiding principles, chiefly those of party autonomy and equal treatment of parties.[21] It witnessed gradual harmonisation and institutionalisation in the 19th and 20th centuries, but remained largely domestic in character, restricted by municipal laws and subject to the domestic courts' explicit jurisdiction and powers over arbitration proceedings.[22] While arbitral tribunals retained the prerogative to determine questions relating to the formation, interpretation of express and implied terms, and performance of commercial

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[19] Ole Lando "Lex Mercatoria in International Commercial Arbitration" (1985) 34:4 ICLQ 747 at 747.
[20] "For the terminology, see Fouchard, "L'arbitrage international en France après le décret du 12 mai 1981" (1982) 109 Journal du Droit International (Clunet) 374, 394 *et seq.*, and Goldmann, "La Lex Mercatoria dans les contrats et l'arbitrage internationaux: réalité et perspective", in The Influence of the European Communities upon Private International Law of the Member States (1981), pp.209, 211 *et seq.* (also published in [1979] Clune 475).": cited at 747.
[21] See Stavros Brekoulakis "Introduction: The Evolution and Future of International Arbitration" in Stavros Brekoulakis, Julian DM Lew and Loukas Mistelis (eds) *The Evolution and Future of International Arbitration* (Kluwer Law International, Alphen aan den Rijn, 2016) 1 at 1.
[22] See at 5.

contracts, statutory claims implicating ordre publique were considered ultra vires.[23] But since the last 40 years, scholars and jurists have noted that there has been a radical expansion in this scope.[24] In ICA, it is now accepted that tribunals have authority to determine not only commercial claims pertaining to the contracts, but also statutory claims such as anti-trust claims, tax claims, or claims arising out of securities transactions.[25]

The watershed event in this evolution was the Great War. In the aftermath of the First World War, a critical gap in the system of rules that governed trade, investment, finance, or commercial relations was felt. In an attempt to rebalance the crippling world economy, that the International Chamber of Commerce was founded in 1919.[26] It was established as a non-profit, private association by prominent members of the business communities of those nations that were then in a position to necessitate change, namely Belgium, France, Italy, the United Kingdom, and the United States of America:[27]

> The objective of its founders was to create an institution that would foster reconciliation and peace through the promotion of international commerce. But in order to achieve this goal, the ICC's founders recognised the need for gradual harmonisation of international trade practices and legislation and the development of internationally recognised commercial instruments and mechanisms, including mechanisms for the resolution of international commercial disputes.

They called themselves "the merchants of peace" and without waiting for governments to fill the gap and remove the sources of friction and inconvenience in international trade law, the founders acted on their conviction that "the private sector is best qualified to set global standards for business".[28]

In the modern world, the need for a transnational, stateless, and fluid commercial law like lex mercatoria for ICA is necessitated by globalisation, shifting of borders, and for the prevention of problems created by conflict of law rules, in the interest of harmonising trade and commerce as a mechanism for maintaining peace and harmony between States. Professor Lando, while cautioning that it is not possible to provide an exhaustive list, identifies seven elements of lex

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[23] See at 2.
[24] See generally Fan Kun "Expansion of Arbitral Subject Matter: New Topics and New Areas of Law" in Stavros Brekoulakis, above n 21 at 299.
[25] At 5.
[26] "History" International Chamber of Commerce < https://iccwbo.org/about-us/who-we-are/history/>.
[27] Yves Derains and Eric A Schwartz above n 18 at 1.
[28] "History" International Chamber of Commerce < https://iccwbo.org/about-us/who-we-are/history/>.

mercatoria in modern ICA: public international law, uniform laws, general principles of law, rules of international organisations, customs and usages, standard form contracts, and reporting of arbitral awards.[29]

It was in line with the above objectives of ICC's founders that lead to the creation of a Court of Arbitration in 1922 (renamed the International Court of Arbitration in 1989). Moreover, the ICC also contributed to three of Professor Lando's seven elements—in formulating uniform laws such as their procedural Rules of Arbitration, codifying customs and usages in Incoterms and Uniform Customs and Practice for Documentary Credits (UCP), and reporting of arbitral awards through their publication resulting in further investment of lex mercatoria.

III ICC Arbitration and the Formalisation of Lex Mercatoria

With its international headquarters in Paris, the driving force behind ICC's success comes from its membership that comprises of companies, local chambers of commerce, and individuals involved in international business activities.[30] It is the world's most networked business organisation, with direct reach to over six million businesses in more than 100 countries and an expanded network of a further 40 million companies—resulting in a total employment footprint of over one billion people.[31]

Its members are largely organised into National Committees or Groups that serve as direct links between the ICC's international headquarters and members in different countries.[32] They are responsible for organising activities that not only promote the work of the ICC and provide its services and information to its members, but also in formulating the views of the mercatocracy that they represent.[33] It is with this assistance of the National Committees and Groups, that ICC has engaged in lengthy and patient efforts over the last century by formalising lex mercatoria for ICA. It has published the Incoterms and the UCP, both of which are regarded as highly successful; and its most crucial contribution remains its ICC Arbitration service, comprising of the ICC Court and the Rules of Arbitration as administered by the Court.

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[29] Ole Lando above n 19 at 749–751.
[30] ICC Constitution, art 2(2)(a).
[31] "Global Network" International Chamber of Commerce <https://iccwbo.org/about-us/global-network/>.
[32] ICC Constitution arts 2(2)(b), 3(10).
[33] Article 3(4).

A Procedural Lex Mercatoria: Harmonising Arbitration Practices

After the ICC's establishment in 1919 in the aftermath of the First World War, peaceful resolution of international commercial disputes indispensable to achieve its objectives. Consequently, the ICC Court was founded in 1923 in Paris in order to establish an international organisation at the disposal of "financiers, manufacturers and business men of all countries" that was capable of settling cross-border commercial disputes "without recourse to formal legal procedure".[34] The Rules of Arbitration were adopted immediately preceding its establishment in 1922.[35] Contrary to what the name suggests, the ICC Court does not itself resolve disputes, rather it is an administrative body for the resolution of disputes by arbitral tribunals in accordance with the ICC Rules of Arbitration,[36] which are regarded as one of the world's leading sets of rules for ICA.[37]

1 The ICC Court

The ICC Court is an independent arbitration body of the ICC and carries out its functions in complete independence from the ICC and its organs such as the National Committees and Groups.[38] By agreeing to ICC Arbitration, the parties agree to the administration of their disputes by the Court and authorise the Court to do so in accordance with the ICC Rules.

In 2005, Yves Derains and Eric A Schwartz observed that since the ICC Court's establishment in 1922, the participants in the ICA process have today become much more diverse.[39] They note that what was once limited only to the North Atlantic and Western European countries that founded the ICC, with arbitrations taking place primarily in France and Switzerland, has today become global in membership and vocation.[40] A majority of the parties lately come from Asia, Latin America, and Central and Eastern Europe.[41] The impetus for this was the wave of legislative reform in the 1980s in respect of ICA, which has now opened up ICC Arbitration to being held in a number of "arbitration friendly" venues outside of the conventional ICA centres of Western Europe to places such as Mexico and Hong Kong.[42]

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[34] Yves Derains and Eric A Schwartz above n 18 at 1.
[35] At 1.
[36] ICC Arbitration Rules 2017 app I art 1(1).
[37] Yves Derains and Eric A Schwartz above n 18 at vii.
[38] ICC Arbitration Rules 2017, art 1(1), app I art 1(2)-(3), app II art 3.
[39] Yves Derains and Eric A Schwartz above n 18 at 3.
[40] At 3.
[41] At 3.
[42] At 3.

Nearly a 100 years later, in September 2020, the ICC Court registered its 25,000th case and continues to go strong.[43] This statistic is indicative of the ICC's reputation, experience, and results of its international expansion efforts to unify the practice of ICA as a global private justice mechanism. Despite the voluntary and optional nature of the ICC Arbitration mechanism, including its procedural Rules and substantive terms of contract such as the Incoterms and the UCP, the private organisation's success has convinced stakeholders across the globe to prefer ICC Arbitration as a dispute resolution mechanism.

2 The Rules of Arbitration

The ICC Rules have always remained a living document reflecting the contemporary trade customs and practices and evolving to circumvent sources of friction and inconvenience. As illustration, the first Rules of Arbitration and their accompanying Conciliation Rules, were published in 1922 in ICC's two working languages at that time, English and French.

They were followed by new or amended Rules in 1927, 1931, 1933, 1947, 1955, 1988, 1998, 2012, and most recently in 2017. In each case, these amendments and upgrades were issued in response to the legal developments in the field and to reflect ICC's evolving experience. For example, under the 2017 Rules, ICC has made its arbitration process even more transparent, mandating the Court to provide reasons for a wide range of important decisions, if requested by one of the parties.[44] This has been in response to the prevailing criticism of the ICC Court that its decisions were not reasoned and therefore could not be appealed against.[45]

Fusing common and civil law systems to harmonise arbitration procedures, the rules have relatively scarce procedural detail and have been drafted to be fit for use in any jurisdiction and in compliance with either legal system. For example, in Article 25, it adopts a hybrid evidentiary system that blends the civil law tradition, which takes a restrictive stance toward discovery, with the common law tradition, where judges possess the power to compel disclosure.[46]

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[43] "ICC Celebrates Case Milestone, Announces Record Figures for 2019" above n 16.
[44] ICC Arbitration Rules 2017, art 11(4).
[45] See generally Jacob Grierson and Annet Van Hooft *Arbitrating under the 2012 ICC Rules: An Introductory User's Guide* (Kluwer Law International, The Netherlands, 2012) at 48.
[46] Florian Grisel "Competition and Cooperation in International Commercial Arbitration: The Birth of a Transnational Legal Profession" (2017) 51:4 Law & Society Review 790 at 810.

The Rules further adopt a system within which the applicable procedural rules are not specified until Terms of Reference are prepared by the arbitral tribunal at the outset of the arbitration.[47] This feature is unique to ICC Arbitration. Craig, Park and Paulsson list several procedural matters that are most frequently incorporated in the terms of reference such as language(s) of the proceedings, general rules or principles for discovery of documents, discovery of documents, presentation of testimony in written form, provisions for the chairman of the tribunal to make procedural rulings alone, provision for interim awards, and empowering the tribunal to meet and hold hearings at venues other than the seat of arbitration.[48]

Consistent with the transnational nature of lex mercatoria, the Rules "provide a code that is intended to be self-sufficient in the sense that it is capable of covering all aspects of arbitrations conducted under the rules, without the need for recourse to any municipal system of law or any application to the courts of the forum".[49] The Rules provide only a general framework for arbitration, in keeping with party autonomy as paramount. To name a few, principles of lex mercatoria such as institutional freedom to regulate the conduct of arbitrators,[50] freedom to establish rules of procedure,[51] and freedom to establish applicable law,[52] have been interwoven in the Rules without reference to national law, contributing to the emergence of transnational norms.

B Substantive Lex Mercatoria: Unifying Standard Contract Terms

In addition to harmonising arbitration procedures, the ICC has also a long and successful history of formulating and updating voluntary, optional rules by which businesses are conducted and standard terms in contracts are formulated. These are specific contract terms that are based on international trade customs and practices and are frequently incorporated in international sales contracts.

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[47] ICC Arbitration Rules 2017, art 23.
[48] W Laurence Craig, William W Park and Jan above n 3 at 281.
[49] *Bank Mellat v Hellinki Techniki SA* [1984] QB 291, 304 per Kerr LJ, quoted and cited in Richard J Howarth "Lex Mercatoria: Can General Principles of Law Govern International Commercial Contracts?" (2004) 10 CanterLawRw 36.
[50] ICC Arbitration Rules 2017, arts 11 and 12.
[51] Article 19.
[52] Article 21.

1 Uniform Customs and Practice for Documentary Credits (UCP)

It was in 1933, that the ICC published the first rules for the UCP, considered one of the most successful instruments of "uniform law" for banking regulation.[53] The current revision of the UCP was in 2007, being the sixth revision of the rules since they were first promulgated.

The UCP includes definitions of terms and guidelines frequently encountered in international trade particularly in letter of credit transactions. These Rules provide a detailed description of the rights and duties of the bank issuing the letter of credit, which may be incorporated by reference. Since banks typically draft these documents, most international letters stipulate that the UCP applies. Paul B Stephan observes that national courts tend to respect these contractual terms,[54] granting them legitimacy not only in international commercial contracts but also in national legal systems. He further illustrates the triumph of the UCP with the example of New York, "an international financial centre where banks have particular influence", that has authorised by statute the entire substitution of the UCP for the statutory rules normally applicable to letters of credit.[55]

Given the technical expertise that the ICC has at its disposal by virtue of its composition and membership, its domination as a non-state actor in the field of documentary credits has been celebrated as having unparalleled "particular salience".[56]

2 International Commercial Terms (Incoterms)

The impetus for the formulation of these Rules was the different practices and legal interpretations between traders around the world which necessitated a common set of rules and guidelines.[57] As a response, the ICC published the first edition of the Incoterms rules in 1936, which back in the day, featured only six trade terms.[58] Like the Arbitration Rules and the UCP, they have also seen regular and subsequent revisions, with the latest update having been in 2020.

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[53] "History" International Chamber of Commerce < https://iccwbo.org/about-us/who-we-are/history/>.
[54] Paul B Stephan above n 6 at 781.
[55] "See NY UCC Law §5-102(4) (1998)": cited at 781.
[56] Sandeep Gopalan "Demandeur-Centricity in Transnational Commercial Law" in Mads Andenas and Camilla Baasch Andersen above n 1 at 177.
[57] "Incoterms 2020" International Chamber of Commerce <https://iccwbo.org/resources-for-business/incoterms-rules/incoterms-2020>.
[58] "History" International Chamber of Commerce <https://iccwbo.org/about-us/who-we-are/history/>.

Incoterms are the essential terms for the sale of goods and specifically provide guidance to persons who participate in the import and export of global trade on an everyday basis. The Rules feature abbreviations for customary terms and usages such as "Free on Board" (FOB), "Delivered at Place" (DAP), "Ex Works" (EXW), "Carriage and Insurance Paid To" (CIP), which not only have specific meaning for the sale of goods but also indicate when the transport obligations, costs and risks transfer between the buyer and the seller and when they remain shared.[59] To illustrate their operation: a contract provision stating that such abbreviated terms are governed by the Incoterms is considered an express agreement that the specified usage is applicable to the contract and due to the trade-usage quality of these terms, "an international arbitrator may apply the Incoterms in order to construe the contract before him even if the parties have not expressly agreed on their application".[60]

Thanks to these efforts of the ICC in producing soft law instruments such as the UCP and the Incoterms and their wide use in practice, that they have become "as important as black-letter legislation".[61] Since standard form contracts are used extensively in a wide variety of international trade and commerce relations, Richard Howarth contends that the standard form contract becomes a source of lex mercatoria given its widely acceptance in particular trading community."[62]

C Creating Precedential Value: Publication of Arbitral Awards

As seen previously, the Arbitration Rules recognise the lex mercatoria principle of party autonomy and allow the arbitrators to apply transnational law. Therefore, what logically follows is that where arbitrations have been performed under such transnational law and the arbitral award made after deciding on the basis of the transnational law, such arbitral award is a potential source of lex mercatoria.

However, given that arbitral awards are conventionally confidential, this potential goes unrealised. To address this, the ICC began to publish excerpts of awards in 1974, redacting information of the parties to preserve their anonymity, in the Journal due droit international (in

[59] Incoterms 2020.
[60] "ICC Awards No 3130": Quoted and cited in Richard J Howarth above n 49 at 36.
[61] "Communication from the European Commission to the Council and the European Parliament on European Contract Law" COM(2001)398 final, 3 <http://ec.europa.eu/consumers/cons_int/safe_shop/fair_bus_pract/cont_law/comments/2.5.2.pdf> quoted and cited in Sandeep Gopalan "Demandeur-Centricity in Transnational Commercial Law" in Mads Andenas and Camilla Baasch Andersen (eds) above n 1 at 178.
[62] Richard J Howarth above n 49 at 36.

French) and in the ICCA Yearbook Commercial Arbitration (in English) in 1976.[63] Concomitant to this development, the ICC Arbitrators have increasingly come to rely on previous awards to support their decisions,[64] thus giving them a binding force.

Today, references are found not only in cases where arbitrators were given the authority to act on principles of equity rather than law (as amiables compositeurs), or in cases governed by general principles of law instead of a specific national law, but also where a specific national law is acknowledged in principle as being applicable.[65] On these lines, Craig, Park and Paulsson in their treatise on ICC Arbitration observe:[66]

> By publishing awards rendered under its auspices, selecting especially those decisions that appear particularly independent of national law,[67] the ICC has contributed toward the development of lex mercatoria. It has become possible to discern a number of principles applied more because of their conformity to the parties' expectations than because they are compelled by specific laws.

In publishing these arbitral awards, the ICC has invested the source of lex mercatoria with greater importance over time. This in effect has contributed to the judicialization and uniformity of ICA—what was once only an informal private dispute resolution mechanism between merchants and traders, is today gradually becoming its own specialised legal order.

IV A New Legal Order: En Route Judicialization and Uniformity?

The process of ICA in its origin and creation was nothing more than a by-product of the informal and vague lex mercatoria, guided by principles of party autonomy. Today, however it has been revolutionised and is regulated by municipal laws, institutional rules, conventions, guidelines, codification of customs and best practices, and also a code of ethics.[68] Tracing the evolution of ICA over the years and the state of affairs today, Brekoulakis, Lew and Mistelis noted in 2016:[69]

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[63] W Laurence Craig, William W Park and Jan Paulsson above n 3 at 623.
[64] At 624.
[65] At 624.
[66] At 639.
[67] "The then Secretary General of the ICC Court of Arbitration wrote as follows in his introduction to the first award published in the digest of ICC awards appearing annually in the Journal de Droit International: 'Only those awards in which arbitrators have felt least constrained to apply national law have been published.' 1974 JDI at 878. The introduction to the 1983 digest confirmed this guiding principle, 1983 JDI at 889.": cited at 639.
[68] See generally Paul Friedland "Soft Law and Power" in Stavros Brekoulakis above n 21 at 341.
[69] Stavros Brekoulakis above n 21 at 7–8.

> There is hardly any aspect of the arbitration process that remains unregulated: the organisation of the proceedings is guided by the UNCITRAL Notes on the Organisation of Proceedings; the evidentiary process is guided by the International Bar Association (IBA) Guidelines on the Taking of Evidence; the conduct of the arbitrators is guided by the IBA Guidelines on Conflicts of Interest; codes of ethics are promulgated by professional and institutional bodies such as the American Arbitration Association (AAA) and the Chartered institute of Arbitrators. Even the conduct of the counsel is now guided by the IBA Guidelines on Party Representation. … The project of harmonisation can be duly attributed to the 1958 Convention on the Recognition and Enforcement of Foreign Arbitral Awards (the "New York Convention), the UNCITRAL Model Law on Arbitration (the "Model Law") and the UNCITRAL Rules of International Arbitration.

However, ICC remains the most important actor in this evolution and development of ICA, benefitting from not only having an interest-group strategy for shaping regulation, but also from having a "private ordering strategy based on recording its members' customary practices and releasing them in the form of model rules and agreements".[70]

This influx of new instruments regulating ICA has brought about radical changes to the legal profession and has created a new global legal order that is unified by the formalisation of transnational lex mercatoria and not confined in vocation to domestic legal systems. A large number of law firms today have departments that specialise in international arbitration, including lawyers that specialise in particular fields of international arbitration such as commercial, investment and maritime.

V Conclusion

In this manner, the ICC has contributed substantively to the formalisation of the lex mercatoria through ICA. Its tireless efforts since the institution of the ICC Court in 1923 till the latest update of the Incoterms in 2020 has contributed to a unification of a global private justice mechanism with its own transnational legal order. These efforts have taken the originally informal, vague and inconcrete lex mercatoria to becoming an elaborate transborder rule of law that makes it possible to not only standardise international commercial contracts by codifying trade customs and rules, but also allows disputes arising from such contracts to be settled privately with harmonised procedures of ICA.

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[70] John Braithwaite and Peter Drahos *Global Business Regulation* (2000) at 27–28: as quoted and cited at 8.

The 100-year history of ICC Arbitration embodies HC Gutteridge's prophetic words in 1949:[71]

> Unification can only be achieved by lengthy and patient efforts' which will ultimately convince those in all countries, who are in a position to sponsor and carry through changes in the law, that it is a matter of urgent necessity to take steps in order to remove sources of inconvenience and friction in the international sphere. Unification cannot be achieved by a stroke of the pen, nor can it be carried out within the four walls of law libraries, practitioner's offices or professional studies. The ground must be very carefully surveyed, and the interests concerned must be won over before any action is undertaken.

[71] HC Cutteridge *Comparative Law* (2nd ed, CUP, Cambridge) 157.

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