

Lex Mercatoria, International Arbitration and Independent Guarantees

What is the relationship among the new *lex mercatoria*, international commercial arbitration, and independent contract guarantees?. Under the title “*Lex Mercatoria, International Arbitration and Independent Guarantees: Transnational Law and How Nation States Lost the Monopoly of Legitimate Enforcement*”, a recently published essay by Cristian Gimenez Corte analyses how these elements interact; whether their interaction may have led to the establishment of a new, truly autonomous, transnational legal system; and, if it does, whether and how the transnational legal system is related to, and impacts on, national legal systems. Accordingly, the essay does not seek to provide an in-depth analysis of the nature of each of these legal institutions separately; it rather studies the relations among them, and the outcome of these relations.

Let's start with the relationship between the new *lex mercatoria* and international commercial arbitration. An international contract may be governed solely on the basis of the transnational *lex mercatoria*, without reference to any national law. However, if a dispute arises, one of the parties may bring a claim before a national court, and then national law will necessarily come into play. The parties to an international contract may still, nonetheless, circumvent the jurisdiction of national courts, which are the constitutional organs of the state with the power to adjudicate legal disputes, and refer their dispute to arbitration. This interplay between the substantive *lex mercatoria* and international commercial arbitration as a dispute settlement mechanism has been seen as establishing an ‘autonomous’ legal system, independent from national legal systems.

Yet, if the arbitral award is not executed voluntarily, the winning party will have to request the assistance of a national court, and of national law, to *enforce* the arbitral award. Thus, at the end of the day, the transnational legal system would not be entirely autonomous; it would depend upon national law, because at the moment of truth, legitimate enforcement remains a monopoly of the governments of nation states.

At this point, independent contract guarantees enter into play. Parties to an international contract may choose the new *lex mercatoria* as the substantive law of the contract; they may also incorporate an arbitration clause; and, finally, they may agree on an independent contract guarantee as a warrant for the execution of the award. In accordance with the terms and conditions of the independent contract guarantee, the guarantor will pay the winner of the arbitration upon demand, accompanied by the award. Hence, the arbitral award will be enforced without the intervention of any national court.

As seen, the *classical* theory of the *lex mercatoria* as an autonomous system of law finds its own limits at the enforcement stage. The incorporation of independent contract guarantees, however, allows that limit to be exceeded by providing the *lex mercatoria* with its own means of enforcement, thus establishing a truly autonomous and transnational system of law.

In this scenario, the transnational legal system is composed of substantive transnational customary law, which is implemented by private arbitrators, who may even enforce their own decisions without support from national courts. Hence, there is no participation or control by the constitutional organs of national states over the production, adjudication, or even enforcement of transnational law. This situation should necessarily lead to the question of the formal validity and the legitimacy of transnational law—that is, how and on whose behalf this ‘law’ is invoked and applied.

As said, these arguments are developed in depth in an article published in the *Transnational Legal Theory* journal, which further examines whether and how national law ‘validates’ transnational law, by analysing the interplay and linkages between them. As a conclusion, the study briefly addresses the issue of the legitimacy of the transnational legal system.

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